

In Re S.W. (minor), J.K. v. V.W.

[1990]

2 I.R. 437

In the matter of S.W., an infant, J.K Applicant v. V.W. and The Protestant Adoption Society,
Respondents, and An Bord Uchtala and O.R and C.R., Notice Parties

[S.C. No. 324 of 1989]

[H.Ct. No. 108 of 1990]

Supreme Court 1st December 1989

High Court

9th February 1990

Infant - Guardianship - Custody - Natural parents unmarried - Child placed for adoption by mother - Applicant father obtained order for guardianship and custody in Circuit Court - Adoptive parents in better socio-economic position than applicant's family - Child would be reared in applicant's parents' home if he got custody - Evidence of bonds of attachment between child and adoptive parents - Possibility of mother applying for custody if applicant succeeded - Right of natural father to apply for guardianship - Whether application in reality a joint application for guardianship and custody - Test to be applied - Whether natural father who was a fit person had a right to guardianship defeasible by reasons involving welfare of child, such reasons alone not to deny his rights - Whether section gave natural father a mere right to apply for guardianship with welfare of infant being first consideration and wishes of natural father to be disregarded unless differences in quality of welfare between two competing homes unimportant - Whether section equated natural father's position at law with that of father married to mother - Whether blood link, guardianship and society of natural father are factors relevant to welfare of child - Whether rights which accrue from relationship of natural father to child vary with circumstances - Psychological theory of attachment - Whether legal test would be applied in light of psychological evidence - Whether differences in upbringing between competing homes springing from socio-economic causes a factor - Adoption Act, 1952 (No.25), s. 14 - Guardianship of Infants Act, 1964 (No. 7), ss. 2, 3, 6, 6A, sub-s. 4 and 10, sub-ss. 1 and 2 - Status of Children Act, 1987 (No. 26), ss. 9, 11 and 12. Practice - Case stated - Test to be applied in guardianship application by natural father - High Court the final court of appeal in guardianship cases - Case stated to Supreme Court on test to be applied - Time lapse of 6 months before resumption of case in High Court - Function of Supreme Court in case stated on question of law - Whether Supreme Court must accept facts and inferences as found in High Court - Whether High Court test correct - Other principles to be applied - Whether additional evidence could be called when matter returned to High Court - Whether evidence could be adduced on matters affected by lapse of time - Whether High Court could make determination of fact rendered necessary by further evidence - Courts of Justice Act, 1936 (No. 48), s. 38, sub-s. 3. Constitution - Constitutional rights - Natural rights identified by Constitution - Whether natural father has such rights to the guardianship of child - Whether taking differences between competing homes springing from socio-economic factors into consideration in breach of Constitution - Guardianship of Infants Act, 1964 (No. 7), s. 6A - Constitution of Ireland, 1937, Article

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40, s. 1. Statute - Interpretation - Words and phrases - Provision that welfare of child to be the "first and paramount consideration" - Test to be applied - Guardianship of Infants Act, 1964 (No. 7), ss. 2, 3, 6, and 6A, sub-s. 4 - Status of Children Act, 1987 (No. 26), ss. 9, 11 and 12.

Section 6A of the Guardianship of Infants Act, 1964, (inserted by s. 12 of the Status of Children Act, 1987) provides: "Where the father and mother of an infant have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant".

Section 3 of the Act of 1964 provides: "Where in any proceedings before any court the custody, guardianship or upbringing of an infant . . . is in question the court, in deciding the question, shall regard the welfare of the infant as the first and paramount consideration".

Section 2 of the Act of 1964 (as amended by s. 9 of the Act of 1987) provides inter alia that "'welfare' in relation to an infant, comprises the religious and moral, intellectual, physical and social welfare of the infant".

By virtue of s. 10, sub-s. 2 of the Act of 1964, subject to the terms of that order a person appointed a guardian of the person of an infant shall as against every person not being jointly with him a guardian of the person be entitled to the custody of the infant.

Section 11 of the Status of Children Act, 1987, substitutes the following sub-section for s. 6 sub-s. 4 of the Act of 1964:â€”

"Where the mother of an infant has not married the infant's father, she, while living, shall alone be the guardian of the infant unless there is in force an order under section 6A (inserted by the Act of 1987) of this Act or a guardian is otherwise appointed in accordance with this Act".

By virtue of s. 14 of the Adoption Act, 1952, an adoption order shall not be made without the consent of every person being the child's mother or guardian or having charge of or control over the child, unless the Board dispenses with such consent.

The applicant was the natural father of the child and lived with his parents, his sister and her child.

The first respondent, who was the natural mother of the child, had met the applicant in 1986. She lived with the applicant's family for a time in 1987 and they lived together as man and wife in other accommodation until they split up in February, 1988.

They decided to have a baby about Christmas, 1987, and the first respondent became pregnant. They got engaged in the middle of February, 1988, but the first respondent broke the engagement at the end of February and returned to her parents. The applicant's efforts to contact her were blocked by her parents. The baby was born in September, 1988. The child was handed over for adoption by the first respondent and was placed for adoption on the 17th November, 1988. When the applicant was informed of this he instituted proceedings in the Circuit Court seeking guardianship and custody of the child.

The child had been placed for adoption with a married couple (the second and third notice parties) whose social and financial circumstances and religion were similar to those of the first respondent and her family, who were members of the Church of Ireland. The applicant and his family were Roman Catholics.

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The applicant was supported by his entire family in his wish for custody and proposed to bring up the child in his parents' home being cared for during the day by his sister and his mother.

The first respondent and the second and third notice parties had appealed to the High Court against the decision of the Circuit Court granting the applicant guardianship and custody (but granting a stay pending appeal). The High Court (Barron J.) reached the following conclusions"

(1) The applicant wished bona fide to have custody of the child and felt the existence of an emotional bond.

(2) If the child was given into his custody it would be well looked after.

(3) If the second and third notice parties retained custody it would be equally well looked after.

(4) If the child remained with the second and third notice parties it would obtain the benefit of a higher standard of living and would be likely to remain in school longer than if it passed into the applicant's custody.

(5) There would be short term trauma for a few days to the child if custody passed and as an adult this might make the child less capable of dealing with any serious stress.

(6) Taking the child's welfare as the sole consideration these factors required her to remain with the second and third notice parties.

Barron J. stated his view of the interpretation of s. 6A of the Act of 1964 and the correct test to be applied as:-

"1. Whether the natural father is a fit person to be appointed guardian and, if so,

2. Whether there are circumstances involving the welfare of the child which require that notwithstanding that he is a fit person he should not be so appointed."

The High Court (Barron J.) held that the applicant satisfied the first condition and that unless the welfare of the child was to be regarded as the sole consideration, he satisfied the second condition.

Barron J. expanded this test by stating that "having regard to the purposes of the Status of Children Act, 1987, the rights of the father should not be denied by considerations of the welfare of the child alone, but only where "and they do not exist in the present case " there are good reasons for so doing."

The questions of law for the determination of the Supreme Court which were stated by the High Court (Barron J.) were:-

(i) Whether his construction of s. 6A of the Act of 1964 was correct, and

(ii) If not, what was the proper construction of the section and what other, if any, principles should have been applied or considered whether in relation to guardianship or custody which derive either from law or the provisions of the Constitution?

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Held by the Supreme Court (Finaly C.J., Walsh, Griffin, and Hederman JJ.; McCarthy J. dissenting), in answering the case stated, 1, that in a case stated on a question of law by the High Court for the determination of the Supreme Court where the High Court was the ultimate court of appeal, the function of the Supreme Court was to accept the facts as found and the inferences raised from them to answer the questions of law submitted.

2. That the combined effects of the statutory provisions in this case were such that the application before the High Court was a joint application for guardianship and custody.
3. That s. 6A of the Act of 1964 gave a natural father the right to apply to be appointed guardian but it neither gave him the right to be guardian nor equated his position at law with regard to the infant with the position of a father married to the mother who is and must remain a guardian.
4. That the court must regard the welfare of the infant as the first and paramount consideration.
5. That the natural father did not have a constitutional right or a natural right identified by the Constitution to guardianship of the child and s. 6A of the Act of 1964 did not declare or acknowledge that right although the blood link between the father and the child and the possibility for the infant to have the benefit of the guardianship and society of its father were one of many factors relevant to its welfare which might be viewed by the court.
6. That the extent and character of the rights which accrued from the relationship of the natural father to an infant varied depending on the circumstances.
7. That, as guardianship was linked to custody in the present case, regard should not be had to the wishes of the applicant to be involved in the guardianship and society of the child unless the court had first concluded that the quality of the welfare which would probably be achieved for the infant by its custody with the second and third notice parties as compared to that which would probably be achieved with its father, was not to an important extent better.

Per McCarthy J. (dissenting): Although the High Court found that taking the welfare of the infant as the sole consideration would require the child to remain in the custody of the second and third notice parties and although s. 6A of the Act of 1964 only gave a right to apply for an order of guardianship (which in these circumstances would amount to custody) the purpose of the Act of 1987 was to promote the father into the position of having rights and the test in the case stated was correct provided the trial judge made the welfare of the infant the paramount consideration.

The State (Nicolaou) v. An Bord Uchtáil [1966] I.R. 567 and G. v. An Bord Uchtáil [1980] I.R. 32 considered.

Per McCarthy J. (dissenting): The High Court's construction of s. 6A of the Act of 1964 did not presuppose a right to guardianship in the father and if it did it was a qualified right which did not arise until he made a successful application under s. 6A of the Act of 1964 which should succeed unless he was not a fit person or there were circumstances and good reasons involving the welfare of the infant which required otherwise.

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Per McCarthy J. (dissenting): Where the child was the fruit of a loving relationship between a man and a woman who wished to have a child, then the father was entitled to an order under s. 6A of the Act of 1964 unless he was not a fit person or there were circumstances involving the welfare of the child which required that he should not be appointed.

Per McCarthy J. (dissenting): The second leg of the test set out in the High Court did not depart from the principle that the welfare of the child was the first and paramount consideration, but the expansion of the view to state that the rights of the father should not be denied by a consideration of the welfare of the child alone except where there were good reasons for so doing was not correct because if the first and paramount consideration was the welfare of the child, then considerations of the welfare of the child alone might deny what are called the rights of the father.

Per McCarthy J. (dissenting): Where the welfare of the child would be adequately secured with the father, as has been found in this case, the fact that there might be added benefits if the child remained in the custody of the prospective adopters did not outweigh the combination of the rights of the father and the benefit to the child of maintaining a blood link and the court would be entitled to grant the order to the applicant.

The appeal was reconsidered by the High Court on the basis of the appropriate test as enunciated by the Supreme Court and it was

Held by Barron J., in refusing the relief sought, 1, that while liberty to call additional evidence had been refused after the matter came back to the High Court insofar as it might have led to a rehearing of the appeal, liberty had been granted to recall witnesses to deal with any matter that might have arisen since the hearing or which might have been affected by the time lapse of 6 months since the hearing.

2. That the matter would have to be reconsidered on the basis of the appropriate test as enunciated by the Supreme Court but the High Court would have to make such determination of fact as had been rendered necessary by the further evidence adduced.

3. That differences in the upbringing the child would receive in the two competing homes sprang solely from socio-economic causes and should not be taken into consideration especially where one of the claimants was a natural parent as to do so would be in breach of the constitutional obligation to hold all citizens as human persons equal before the law.

4. That the psychological theory of attachment propounded to the courts over many years without evidence to the contrary would be accepted and the legal test would be applied in the light of dangers to the psychological health of the child which the expert witness foresaw would be the result of the change in custody.

5. That the question to be determined before the applicant could be appointed guardian was whether he should also be granted custody since his appointment as guardian would allow him to bar the adoption process and before determining the question of custody the court must be satisfied that if no adoption process was in being, the applicant would have succeeded.

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6. That the applicant would have been appointed guardian if this was solely an application for guardianship; it was his wish and intention at the date of the conception of the child that she should be party to a stable relationship.

7. That, applying the test laid down by the Supreme Court, the existence of the blood link should be considered only where the wishes of the father are also to be considered but if this was wrong it was not material to the present case as the expert witness placed no importance on it.

8. That the welfare of the child must be considered first and if this could be met by both claimants, the quality of the welfare which would probably be achieved in each case, but at all times bearing in mind that the natural father had no more than the right to apply to be appointed guardian.

9. That the welfare of the child would be met by her growing up in either household but the difference in the quality of the welfare lay in (i) the dangers inherent in breaking the bonds of attachment with the second and third notice parties, (ii) the possibility of the first respondent applying for custody herself if the applicant succeeded, and (iii) the fact that she would become a member of a family recognized by the Constitution if the adoption procedures were completed.

10. That the differences were of such importance that the quality of the welfare likely to be achieved with the second and third notice parties was to an important extent better than that likely to be achieved with the applicant and for that reason his wishes would not be taken into account .

Cases mentioned in this report:-

K.C. v. An Bord Uchtala [1985] I.L.R.M. 302.

R.C. and P.C. v. An Bord Uchtala (Unreported, High Court, O'Hanlon J., 8th February, 1985).

In re K.D., A Minor [1988] A.C. 806; [1988] 2 W.L.R. 398; [1988] 1 All E.R. 577.

In re Frost Infants [1947] I.R. 3; (1945) 82 I.L.T.R. 24.

G. v. An Bord Uchtala [1980] I.R. 32; [1978] I.L.T.R. 25.

J. v. C. [1970] A.C. 668; [1969] 2 W.L.R. 540; [1969] 1 All E.R. 788.

Johnson v. Ireland [1987] 9 E.H.R.R. 203.

E.K v. M.K. (Unreported, Supreme Court, 31st July, 1974).

In re M. [1946] I.R. 334; (1946) 80 I.L.T.R. 130.

MacD. v. MacD. (1979) 114 I.L.T.R. 60.

McF. v. G. and G. [1983] I.L.R.M. 228.

T.O'G v. A.G. [1985] I.L.R.M. 61.

The State (D.P.P.) v. Walsh [1981] I.R. 412.

The State (Nicolaou) v. An Bord Uchtala [1966] I.R. 567; (1966) 102 I.L.T.R. 1.

P.W. v. A.W. (Unreported, High Court, Ellis J., 21st April, 1980).

Case stated.

By application to the Circuit Court dated the 16th December, 1988, the applicant sought to be appointed a guardian of the child, S.W., pursuant to s. 6A of the Guardianship of Infants Act, 1964, as inserted by s. 12 of the Status of Children Act, 1987, and custody pursuant to s. 11 of the Act of 1964. On the 29th May, 1989, the Circuit Court (His Honour Judge Spain) made an order appointing the applicant guardian of the infant and granting him sole care and custody. A stay was granted pending appeal and the applicant's application for interim access to the infant in the event of an appeal was refused.

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The first respondent and the second and third notice parties appealed to the High Court by notices dated the 30th May, 1989, and the 2nd June, 1989. The matter was heard by the High Court (Barron J.) on the 18th, 19th, 20th, 25th, 26th, 27th, 28th and 31st July, 1989. At the conclusion of the hearing an application was made by the first respondent and the second and third notice parties for the court to state a case for the opinion of the Supreme Court pursuant to s. 38, sub-s. 3 of the Courts of Justice Act, 1936. The High Court (Barron J.) stated a case on the 7th September, 1989, as to the proper test to be applied in deciding whether to grant guardianship of an infant to a natural father under s. 6A of the Guardianship of Infants Act, 1964, as inserted by the Status of Children Act, 1987.

The facts and relevant statutory provisions have been summarised in the headnote and are set out in the judgments, *infra*. The case stated is set out fully in the judgment of Barron J. *infra*.

The case was heard by the Supreme Court on the 4th and 5th October, 1989.

Susan Denham S.C. and Gerard Durcan for the second and third notice parties referred to *G. v. An Bord Uchtala*; *K.C. v. An Bord Uchtala*; *E.K. v. M.K.*; *In re Frost Infants*; *In re K.D., A Minor*; *MacD. v. MacD.*; *J. v. C.*; *In re M. and P. W. v. A. W.*

Frank Clarke S.C. and Catherine McGuinness S.C. for the first respondent referred to *McF. v. G. and G.*

James O'Reilly S.C. (with him Nastaise Leddy) for the first notice party.

Mary Robinson S.C. (with her Dervla Browne) for the applicant referred to *The State (Nicolaou) v. An Bord Uchtala*; *Johnson v. Ireland*; *The State (D.P.P.) v. Walsh*; *G. v. An Bord Uchtala*; *R.C. and P.C. v. An Bord Uchtala* and *T.O'G. v. A.G.*

Susan Denham S.C. in reply referred to *Johnson v. Ireland*; *MacD.v.MacD.* and *In re K.D., A Minor*.

Frank Clarke S.C. in reply.

Cur. adv. vult.

Finlay C.J.

1st December 1989

This is a case stated by Barron J. pursuant to s. 38, sub-s. 3 of the Courts of Justice Act, 1936, submitting to this Court certain questions of law which the learned judge is satisfied are necessary for the determination by him of an appeal brought to the High Court from the Circuit Court concerning certain applications under the Guardianship of Infants Act, 1964, as amended by the Status of Children Act, 1987.

The facts proved or admitted before the learned trial judge necessary for the determination of the issues of law involved are as follows. The applicant is the natural father of the infant and the first respondent is the natural mother. The parties were not married to each other, and each of them is unmarried, the father being approximately twenty-five years of age and the mother twenty-one years of age. The parents commenced a relationship in the spring of 1986 and that continued until the month of February, 1988, when they parted company and have not been in significant contact with each other since then. For something over a year of that period the parties lived together. The first respondent became pregnant in

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early 1988 and it was a planned pregnancy, the parties at that time wishing to have a child. In the month of February, 1988, the first respondent returned to her own home and the parties have not since that time resided together nor had any contact with each other.

The child was born in the late autumn of 1988 and almost immediately the first respondent consented to have it placed for adoption. It was then placed for adoption with her consent and put into the custody of prospective adoptive parents who are the second and third notice parties in the action. The first respondent does not intend to keep the child and has not made any proposal so to do, but expresses the wish that it is in the interests of the child that the child should be adopted.

As soon as possible after he became aware that the first respondent had consented to the placing of the child in adoption the applicant instituted these proceedings in the Circuit Court, claiming firstly an order pursuant to s. 6A, sub-s. 1 of the Guardianship of Infants Act, 1964, as inserted by s. 12 of the Status of Children Act, 1987, appointing him to be a guardian of the infant and claiming, secondly, custody of the infant. The notice parties eventually joined in the application consisted of the mother of the child, the adoption society which had arranged the adoption, the prospective adoptive parents and An Bord Uchtáil. The application was heard in the Circuit Court and the decision of that court was to grant the applicant an order appointing him to be a guardian of the infant and to direct that the custody of the child should be given to him. Against that order the first respondent and the second and third notice parties appealed to the High Court.

In the case stated by him to this Court, Barron J. cited in considerable detail and with great care the facts which were established before him, and this has been of great assistance to the Court. He made certain findings of fact and expresses certain conclusions arising from those findings. As a result of that he raises two questions of law for the determination of this Court.

The function of this Court in those circumstances is neither to inquire into the findings of fact made by the learned High Court judge which are peculiarly his function in a matter in which the High Court is the ultimate court of appeal nor, in my view, to query the inferences raised by him from those facts but, accepting both the facts as found and the inferences raised from them, is to answer the questions of law which are submitted.

The statutory provisions

Section 12 of the Status of Children Act, 1987, amended the Guardianship of Infants Act, 1964, by the insertion after s. 6 of section 6A. Section 6A, sub-s. 1 provides as follows:-

"Where the father and mother of an infant have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant."

Section 3 of the Act of 1964 provides that "Where in any proceedings before any court the custody, guardianship or upbringing of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."

Section 2 of the Act provides inter alia that "'welfare', in relation to an infant, comprises the religious and moral, intellectual, physical and social welfare of the infant".

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By virtue of s. 10, sub-s. 1 of the Act of 1964 every guardian appointed by the court shall be a guardian of the person and of the estate of the infant unless the court by its order otherwise provides.

By virtue of s. 10, sub-s. 2, subject to the terms of that order a person appointed as guardian of the person of an infant shall as against every person not being jointly with him a guardian of the person be entitled to the custody of the infant.

By virtue of s. 11 of the Status of Children Act, 1987, the following sub-section is substituted for s. 6, sub-s. 4 of the Act of 1964:-

"Where the mother of an infant has not married the infant's father, she, while living, shall alone be the guardian of the infant unless there is in force an order under section 6A (inserted by the Act of 1987) of this Act or a guardian is otherwise appointed in accordance with this Act."

By virtue of s. 14 of the Adoption Act, 1952, an adoption order shall not be made without the consent of every person being the child's mother or guardian or having charge of or control over the child, unless the Board dispenses with such consent. The power of the Board to dispense with such consent is confined to cases where the Board is satisfied that the parent, guardian or person in charge so concerned is incapable by reason of mental infirmity of giving consent or cannot be found.

In the facts of the present case the combined effect of these statutory provisions is:-

(1) If the applicant succeeds in obtaining an order appointing him as a guardian of the infant pursuant to s. 6A of the Act of 1964, as inserted, the infant cannot be made the subject matter of an adoption order unless he consents.

(2) If the applicant obtains an order under s. 6A which is unconditional, in the absence of a claim by the first respondent for custody herself of the infant which has not been made, the applicant is entitled to custody of the infant.

The learned trial judge was, therefore, in my view, correct in the course of the case stated in identifying the applications before him as being a joint application for guardianship and custody.

Findings of fact and conclusions

In the course of the case stated the learned trial judge has carefully set out the evidence which he heard of the circumstances and background of the applicant and the nature, circumstances and background of the household into which he proposes to bring the infant child, if granted custody, and the other persons who would be involved with him in the upbringing of the child. He also sets out the circumstances and background of the second and third notice parties, the home in which the child is presently residing in their custody and the background against which it would be brought up in that home. He indicates the evidence given by the first respondent of her preference in the interests of the child for it to be adopted. Having set out these matters in detail he then states the following conclusions which are relevant to the questions of law raised, and these are:-

1. The applicant wishes bona fide to have custody of his child and feels the existence of an emotional bond.

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2. If the child is given into the custody of the applicant it would be well looked after.
3. If the second and third notice parties retain custody the child will be equally well looked after.
4. If the child remains with the second and third notice parties it will obtain the benefit of a higher standard of living and is likely to remain at school longer than if it passes into the custody of the applicant.
5. In addition there will be a short term trauma for some few days if custody passes and as an adult this may make the child less capable of dealing with any serious stress in its life.
6. Taking the welfare of the child as the sole consideration these factors require her to remain in her present surroundings.

Having dealt with the submissions made on behalf of the parties as to the legal consequences of these conclusions the learned trial judge stated his view of the interpretation of s. 6A of the Act of 1964 as follows:-

"The test, therefore, is

1. Whether the natural father is a fit person to be appointed guardian and, if so,
2. Whether there are circumstances involving the welfare of the child which require that, notwithstanding he is a fit person, he should not be so appointed."

Subsequently in the case stated the learned trial judge expands this test, which he states to be in his view the appropriate test, in the following paragraph:-

"In my opinion, having regard to the purposes of the Status of Children Act, 1987, the rights of the father should not be denied by considerations of the welfare of the child alone, but only where "and they do not exist in the present case " there are good reasons for so doing."

The questions

Having stated these findings of fact and conclusions the following questions of law for the determination of the Supreme Court were stated by the learned trial judge:-

"(i) Am I correct in my opinion as to the manner in which s. 6A of the Guardianship of Infants Act, 1964, as inserted by s. 12 of the Status of Children Act, 1987, should be construed?

(ii) If not, what is the proper construction of that section and what are the other, if any, principles I should have applied or considered whether in relation to guardianship or custody which derive either from the law or from the provisions of the Constitution?"

Conclusions

I am satisfied that the opinion expressed by the learned trial judge in the case stated as to the manner in which s. 6A of the Act of 1964 should be construed is in law not correct. Section 6A gives a right to the natural father to apply to be appointed guardian. It does not give him a right to be guardian, and it does

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not equate his position vis-à-vis the infant as a matter of law with the position of a father who is married to the mother of the infant. In the latter instance the father is the guardian of the infant and must remain so, although certain of the powers and rights of a guardian may, in the interests of the welfare of the infant, be taken from him.

The right to apply to be appointed guardian of the infant under s. 6A of the Act of 1964 (as inserted by the Act of 1987) is a right to apply pursuant to a statute which specifically provides that the court in deciding upon such application shall regard the welfare of the infant as the first and paramount consideration.

To construe s. 6A of the Act of 1964 as has been done in the case stated as giving to the father a right to guardianship which cannot be denied unless (a) he is not a fit person, or (b) there are circumstances or good reasons involving the welfare of the child which require that he should not be appointed is incorrect, in my view, for two reasons. It presumes a right to guardianship, whereas s. 6A creates merely a right to apply for guardianship.

A right to guardianship defeasible by circumstances or reasons "involving the welfare of the child" could not possibly be equated with regarding the welfare of the child as the first and paramount consideration in the exercise by the court of its discretion as to whether or not to appoint the father guardian. The construction apparently placed by the learned trial judge in the case stated upon s. 6A to a large extent would appear to spring from the submission made on behalf of the applicant on this appeal that he has got a constitutional right, or a natural right identified by the Constitution, to the guardianship of the child, and that the Act of 1987 by inserting s. 6A into the Act of 1964 is thereby declaring or acknowledging that right.

I am satisfied that this submission is not correct and that although there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right to guardianship in the father of the child exists. This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married.

The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstances of each individual case.

The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as the result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed.

Having reached these conclusions, I would answer the first question raised by the learned trial judge in the negative, stating that the construction placed by him on s. 6A of the Act of 1964, as indicated by the tests outlined by him in the case stated is not correct.

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It accordingly becomes necessary to answer the second question raised, namely, to try and set out what the correct construction of the section is and the principles or considerations which are appropriate to the exercise of the discretion created by it.

I am satisfied that the correct construction of s. 6A is that it gives to the natural father a right to apply to the court to be appointed as guardian, as distinct from even a defeasible right to be guardian.

The discretion vested in the court on the making of such an application must be exercised regarding the welfare of the infant as the first and paramount consideration.

The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by and the society of its father is one of many factors which may be viewed by the court as relevant to its welfare.

In a case such as the present case where the application for appointment as a guardian is linked to the application for a present order of custody, regard should not be had to the objective of satisfying the wishes and desires of the father to be involved in the guardianship of and to enjoy the society of his child unless the court has first concluded that the quality of welfare which would probably be achieved for the infant by its present custody, which is with the prospective adoptive parents, as compared with the quality of welfare which would probably be achieved by custody with the father, is not to an important extent better.

Walsh J.

I agree.

Griffin J.

I agree.

Hederman J.

I agree.

McCarthy J.

These being proceedings before a court where the custody, guardianship or upbringing of an infant is in question, the welfare of the infant must be regarded as the first and paramount consideration. (Guardianship of Infants Act, 1964, s. 3). As identified by the Chief Justice and by Barron J., the combined effect of the several relevant statutory provisions is that if the application succeeds then the adoption proceedings must fail and, there being no claim by the mother for custody, the custody must be given to the father. Whatever the legal niceties may be, the effect of the granting of an order under s. 6A would be, in the circumstances of this case, to make the father both guardian and custodian.

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The welfare of the infant being identified as the first consideration presupposes a second consideration; the welfare is not the sole consideration.

Barron J. concluded that the child would be well looked after either in the custody of the applicant or in that of the second and third notice parties, but that remaining with the second and third notice parties the child would obtain the benefit of a higher standard of living and was likely to remain at school longer than if in the custody of the applicant. In addition there will be a short-term trauma for some few days if custody passes from the adopters to the applicant and as an adult this may make the child less capable of dealing with any serious stress in life. The final conclusion was that taking welfare as the sole consideration, the latter factors of standard of living, school and the effects of a short-term trauma require the child to remain in the custody of the second and third notice parties. In expressing these conclusions, as I have sought to summarize, the learned trial judge appears satisfied that in the custody of either the applicant or the second and third notice parties the child will be well looked after and raises the issue as to whether or not what may be termed a father's rights or interests may be weighed in the balance so as to offset whatever additional benefits a higher standard of living and a lengthier period at school may confer upon the child in the custody of the second and third notice parties. At first sight it would seem to the advantage of the infant to enjoy the company of the applicant, the more particularly so when not enjoying that of the first respondent; the applicant has his own right to happiness and fulfilment. Has the father such a right in respect of the child save such as may be given to him by law by an order under section 6A? Section 6A does not give the right but rather the right to apply for an order of guardianship which in the circumstances would amount to an order for custody. In that sense, it rather begs the question to point to what is a prospective right under the section 6A. In *The State (Nicolaou) v. An Bord Uchala* [1966] I.R. 567 this Court held at p.643:-

"It has not been shown to the satisfaction of this Court that the father of an illegitimate child has any natural right, as distinct from legal rights to either the custody or society of that child and the Court has not been satisfied that any such right has even been recognised as part of the natural law. If an illegitimate child has a natural right to look to his father for support that would impose a duty on the father but it would not of itself confer any right upon the father. The appellant has therefore failed to establish that any personal right he may have guaranteed to him by Article 40, section 3, of the Constitution has been in any way violated by the Adoption Act of 1952."

In *G. v. An Bord Uchtala* [1980] I.R. 32 at p. 97, Kenny J. appeared to question the claim of the mother of an illegitimate child to have a constitutional right to its custody.

The wording of the judgment in *The State (Nicolaou) v. An Bord Uchtala* [1966] I.R. 567 seems to leave it open to establishing, I know not how, that the father of an illegitimate child has a natural right to either custody or society of the child. The contrast to the unappealing details set out at p. 641 with the last of those details may be augmented here. Quite apart from the case of the long-term stable relationship between man and woman who, for legal or other reasons, may be unable to marry there may be compared a situation such as here where the father wants to care for the child but the mother feels the child's welfare would be more secure away from her and with the adoptive parents. An extreme of the latter situation is where a mother, out of spite, seeks to have a child adopted. Has the father no say, once it is established that the adoptive home is, presently at least, a more desirable one? Happiness is not a monopoly of the better off.

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Is the fact of there being a prospective adoption to be taken into account at all? If it is, then a spiteful mother could wilfully defeat any father's claim by setting an adoption in motion.

I tend to share the view that the purpose of the Act was, so to speak, to promote the father into the position of having rights; I find it difficult to accept that a loving father, who with the mother wanted to have a child, has no natural right to the society of the child. It is inevitable and, indeed desirable, that if the child is adopted, the father will never see his child again.

The questions raised

As long as the trial judge bears in mind that the paramount consideration is the welfare of the infant, I see no objection to the test that he applied. The first question is appropriate, relating, as it does, to the application by the father as a person himself. There are factors to which the trial judge does not make reference in the case stated but which no doubt would be present to his mind – the blood link with the applicant and the constitutional family of the second and third notice parties. I do not subscribe to the view that the construction by the learned trial judge of s. 6A presupposes a right to guardianship in the father; if it does, it is a qualified right – an inchoate right which does not arise unless and until he makes a successful application under s. 6A, but such application should succeed unless he is not a fit person or there are circumstances or good reasons involving the welfare of the child which require that he should not be appointed.

If the father of a child the offspring of a casual encounter were to exercise the right to apply under section 6A he would be met with impressive arguments based upon whether or not he was a fit person or that there were circumstances or good reasons involving the welfare of the child that required that he should not be appointed. Where, however, the child is the fruit of a loving relationship between a man and woman who wished to have a child, then it seems to me that the father, absent such reasons as I have identified, is entitled to an order under section 6A. If there are circumstances or reasons involving the welfare of the child which require that the father should not be appointed guardian, then the court is not regarding the welfare of the child as the first and paramount consideration.

Barron J. stated the test under section 6A as:-

- "1. Whether the natural father is a fit person to be appointed guardian and, if so,
2. Whether there are circumstances involving the welfare of the child which require that, notwithstanding he is a fit person, he should not be so appointed."

I do not consider that the second leg of the test departs from the first and paramount consideration but rather expresses it in a different way. Later, the learned trial judge said:-

"In my opinion, having regard to the purposes of the Status of Children Act, 1987, the rights of the father should not be denied by considerations of the welfare of the child alone, but only where – and they do not exist in the present case--there are good reasons for so doing."

It is in that expansion of his view that I would disagree with the learned trial judge. It is no more than stating the obvious to say that, if the first and paramount consideration is the welfare of the child, then considerations of the welfare of the child alone may deny what are called the rights of the father. Where,

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however, the welfare of the child is adequately secured, as has been found to be the case here, then, in my judgment, the fact that there may be added benefits as stated if the child remains in the custody of the prospective adopters, does not outweigh the combination of the rights of the father and the benefit to the child of maintaining the blood link or, more pertinently, the learned trial judge, who is the sole judge of the primary and secondary facts, is entitled so to hold. In my view, on these facts, it is open to the learned trial judge to grant the order sought under section 6A.

The case was re-listed in the High Court (Barron J.) for submissions on the 7th December, 1989, which were heard on the 7th and 8th December, 1989. The court read the order of the Supreme Court dated the 1st December, 1989. An application by the second and third notice parties to call additional evidence was refused insofar as it might have led to the re-hearing of the appeal. This decision was later affirmed on appeal by the second and third notice parties to the Supreme Court. The High Court gave the parties liberty to recall any witness to deal with any matter which might have arisen since the 31st July, 1989. The case was mentioned on the 15th December, 1989, and on the 11th January, 1990, and there was a further hearing of the case on the 23rd and 24th January, 1990.

Mary Robinson S.C. (with her Dervla Browne) for the applicant.

Catherine McGuinness S.C. for the first respondent.

James O'Reilly S.C. (with him Nastaide Leddy) for the first notice party.

Susan Denham S.C. and Gerard Durcan for the second and third notice parties.

Cur. adv. vult.

Barron J.

9th February 1990

These proceedings come before this court by way of an appeal from an order of the Circuit Court made on the 29th May, 1989. The appeal was fully heard by me over several days at the end of July, 1989. Following the conclusion of the hearing an application was made by the natural mother and the prospective adopters for me to state a case for the opinion of the Supreme Court. I acceded to that request and the case stated was as follows:-

"This case is stated by me at the request of counsel for the first respondent and the second and third notice parties pursuant to s. 38, sub-s. 3 of the Courts of Justice Act, 1936. The questions of law on which I agreed to state a case are set out in para. D hereof:-

(A) This is an application by the applicant to be appointed a guardian of the infant named in the title hereof under s. 6A of the Guardianship of Infants Act, 1964, as inserted by s. 12 of the Status of Children Act, 1987, and for custody pursuant to s. 11, sub-s. 4 of the Act of 1964 as inserted by s. 13 of the Act of 1987.

(B) The facts proved or admitted before me are as follows:-

(i) The applicant is aged twenty five years. He lives at his parents' home in Dublin with his father and his mother. He has an older brother at home who is employed and who mainly lives at his place of employment. He has two younger brothers at home, both unmarried, one of whom is doing an AnCO

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course. They are aged nineteen and seventeen years respectively. His sister aged twenty nine and her son aged seven born to a father to whom she was not married, also live in this home.

(ii) The applicant's father was a member of the defence forces for a period of twenty five years. He was in the equitation branch. After leaving the defence forces, where he remained as a private throughout his service, he became a groundsman at a local institution. The applicant's father was, however, involved in a serious road accident and received injuries to his legs and arms. He is now left as a cripple in the sense that he has plates in his legs and has problems walking. He received a substantial sum of money as compensation, part of which was used to buy and furnish the present family home. The applicant's mother works in the catering department in Beaumont Hospital. Her duties in the main involve serving meals to patients. The applicant's sister, M., is not employed and she looks after the household. The family are Roman Catholics.

(iii) The applicant had a primary education and three years in vocational education college. He left the V.E.C. at about the age of sixteen having passed the Group Certificate. He had jobs from time to time for a period of two years and then got a permanent job as a machine operator. He is regarded by his employers as a very good worker. He has a knowledge of very many machines, is trustworthy and is never late for work. He does whatever he is told and although he was somewhat flighty when he started he is no longer so.

(iv) The applicant has three convictions for taking or being carried in a car without consent for which he received prison sentences. On the 5th October, 1983, he was sentenced to three months imprisonment; on the 10th October, 1983, he was sentenced to six months imprisonment and on the 9th January, 1985, he was sentenced to nine months imprisonment. He also had convictions in relation to the possession of drugs. On the 4th July, 1983, he was given the Probation Act and for a similar offence on the 29th August, 1986, he was fined Â£25. He also received the benefit of the Probation act on the 10th December, 1981, in respect of the larceny of a bicycle wheel. After each of two periods of imprisonment, he was re-employed by his employers.

(v) The first respondent is aged 21 years. She lives with her parents. She has a brother who is two years older than herself and who lives on his own. Her father was a production manager in a substantial factory and was made redundant on that factory failing financially. Since then, he has been self-employed. He owns a shop which he runs with the help of his wife and daughter. The family are members of the Church of Ireland. The first respondent herself went to primary school and secondary school and left at the end of the fifth year. Although she did her Intermediate Certificate, she never did her Leaving Certificate.

(vi) The first respondent came to Dublin for a year's course in child-minding and was put up in a hostel run by nuns. She met the applicant at a party in March, 1986, and they fell in love. The first respondent was then attending a course in child-minding. When the course ended about June of that year, she spent her time between her home and the applicant's home where she was made welcome and was put up for weekends. During that period, intercourse commenced between the two parties.

(vii) In November, 1986, the first respondent got accommodation with a female friend of the natural father in a flat in S. street, which was not an ideal place for her and totally contrary to her up-bringing. She did not like it. However she stayed there until the end of February, 1987. At that stage, she had a job in B. and she moved in permanently with the applicant's family until the end of July, 1987, when the job

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ended. She went home for a fortnight. She returned to Dublin and found accommodation with an unmarried couple who were friends of the applicant. This was in a rough area. This couple was a friend of the same age as the applicant and a woman S.G. with whom his friend was then living, who was a few years older and who had an unsuccessful marriage which left her with two children aged seven and five. The applicant came to live there about two to four weeks later. They continued living there as man and wife until they split up at the end of February, 1988.

(viii) During this period in their relationship, the first respondent felt that the applicant resorted too much to the society of his men friends, but the applicant was unaware of this source of discontent.

(ix) The applicant and first respondent decided sometime about Christmas, 1987, that they would have a baby. The first respondent became pregnant and was aware of her condition by the end of January or certainly by early February. They then decided to get engaged which they did on St. Valentine's Day. The pregnancy was confirmed medically on the 22nd February, 1988. The first respondent went home to tell her parents. However, when she was there, she found that she could not tell them and she came back to Dublin.

(x) The first respondent's parents knew she was in Dublin and where she was living. They had invited the applicant for a week-end in the Summer of 1986 and they knew of his criminal record. They were not keen on him and there was also the religious difference, but their daughter was deeply in love and her attitude was that she was happy and couldn't they leave her be. The first respondent also brought S.G. to see her parents for a week-end. Her father had also met Mrs. K. the mother of the applicant and had not been impressed.

(xi) When the first respondent found that she could not tell her parents that she was pregnant, she made up her mind that she wanted to stay with the applicant but that there was not much point staying with him in Dublin because he had his friends there and she did not. She thought that the solution would be to go to England where they could start afresh with no ties. She only had to state that proposition to herself to realize that it was unsuitable. From that point, she drifted into the only possible solution which was to break with the applicant and she did break with him. On Sunday, the 28th February, 1988, she told him that she was breaking with him and asked him to go home, which he did. On the 29th February, 1988, she gave him a letter explaining her situation which stated that he would always be able to see the baby. The applicant thought that she was staying in Dublin but on the Wednesday she went home. He tried to contact her by telephone and he wrote to her but his efforts were deliberately blocked by her parents. There was no further communication or meeting prior to the birth of the child.

(xii) The applicant knew roughly when the child was going to be born and he went to the first respondent's home town on the 1st October, 1988, with S.G. The baby had been born on the 29th September, 1988, in a private nursing home. S.G. went to see the first respondent and she was warmly received but the first respondent did not want to see the applicant. He saw the baby but not the mother. The first respondent became very agitated since she did not wish to see him. The local Protestant minister was visiting her and just after that her own mother turned up. There was an emotional scene and the first respondent asked S.G. to go and she and the applicant left.

(xiii) Mrs. K. and S.G. came down at the beginning of November to see the baby and went to where the shop of the first respondent's father was at that stage. They saw Mr. and Mrs. W., the parents of the first

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respondent there but not the first respondent who in fact heard the entire conversation from a room in the back of the shop. On that occasion the K. family was trying to make contact but was being fended off and was led to believe that the child was going to be kept. In fact, from about six months on in her pregnancy, the first respondent had explored the possibilities of adoption. Certainly, by the date of this visit, she had already handed over the child preparatory to it being placed for adoption. On the 17th November, 1988, the child was placed for adoption. On the 22nd November, 1988, the first respondent wrote to the applicant telling him of the placing. His immediate reaction was to go to a solicitor and that resulted in these proceedings.

(xiv) The child has been placed for adoption with the second and third notice parties who have no children, though it is medically possible that they may have children and they have not given up hope of having children whether or not the proposed adoption takes place. The husband was educated to Leaving Certificate standard which he passed. His wife left school after passing Intermediate Certificate. He works for his father. She worked with the local Health Board as a clerk/typist until the child was placed with them. She does not intend to return to work if the child stays with them. They have their own home and are members of the Church of Ireland. Their social and financial circumstances are similar to those of the first respondent and her family.

(xv) The applicant wishes bona fide to have custody of his child. He feels the existence of an emotional bond. He is supported by his entire family. If he obtains custody, the child will be brought up in his parents' home. There is more than adequate accommodation for those who presently live there as well as for the child. She will be cared for during the day mainly by M.K. She will be assisted by Mrs. K. The applicant will fulfil a father's role. If the child is given into his custody it will be well looked after.

(xvi) The first respondent wishes the adoption procedures to continue. If the adopters retain custody, the child will be equally well looked after. There will be differences. The social and financial positions of the applicant and the second and third notice parties are different. If the child remains with the second and third notice parties, she will obtain the benefit of a higher standard of living and is likely to remain at school longer than if she passes into the custody of her father. In addition, there will be a short term trauma for some few days if custody passes and as an adult this may make the child less capable of dealing with any serious stress in her life. Taking the welfare of the child as the sole consideration these factors require her to remain in her present surroundings.

(C)(i) On behalf of the applicant it has been submitted that the purposes of the Status of Children Act, 1987, is to equalise the rights of children born out of wedlock with the rights of those born within it; that the intention is to create a legal nexus between father and child and that the father should be appointed guardian in all cases when he applies unless there is some factor involving him in his relation with his child which would militate against it's welfare. It is also submitted that the right sought by the natural father is one recognized by the Convention on Human Rights and that if the meaning of s. 6A can give rise to more than one interpretation it should be construed in accordance with the provisions of the convention. It is accepted that the court should, when considering either the issue of guardianship or custody, have regard to the welfare of the child as the first and paramount consideration. But this should not be the sole consideration. It is submitted that the test should be analogous to that enunciated in *K.C. v. An Bord Uchtala* [1985] I.L.R.M. 302 and that less compelling circumstances might defeat the natural father since his rights are legal as opposed to being constitutional as in that case.

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(ii) On behalf of both the first respondent and the second and third notice parties, it has been submitted that the issue as to guardianship should not be considered independently of the issue of custody and that unless some benefit would accrue to the child it should remain in its present custody and accordingly since the applicant would refuse to consent to adoption he should not be appointed guardian unless the court also intended to grant him custody. Substantially, both of these parties submitted that the welfare of the child required her to remain where she was. They also submitted that the rights of the mother being constitutional were superior to those of the father and so the wishes of the mother should be accepted in priority to those of the father.

(iii) I am of the opinion that in considering the applications both for custody and guardianship I must have regard to circumstances as they presently exist and that in considering the welfare of the child I must take into account the fact that she has been placed for adoption. Each application must be taken as part of a global application and not as a separate and distinct one. The test therefore is:-

(1) whether the natural father is a fit person to be appointed guardian, and, if so:

(2) whether there are circumstances involving the welfare of the child which require that, notwithstanding he is a fit person, he should not be so appointed.

In the present case, I am of opinion that he satisfies the first condition and that unless the welfare of the child is to be regarded as the sole consideration, he satisfies the second condition. In arriving at this opinion, I have applied the principle expressed in the judgment of Walsh J. in *G. v. An Bord Uchtala* [1980] I.R. 32 at p. 76 referred to in the judgment of Finlay C.J. in *K.C. v. An Bord Uchtala* [1985] I.L.R.M. 302 at p. 318, as follows:-

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

In my opinion, having regard to the purposes of the Status of Children Act, 1987, the rights of the father should not be denied by considerations of the welfare of the child alone, but only where "and they do not exist in the present case-- there are good reasons for so doing.

(D) The questions of law for the determination of the Supreme Court are:-

(i) Am I correct in my opinion as to the manner in which s. 6A of the Guardianship of Infants Act, 1964, as inserted by s. 12 of the Status of Children Act, 1987, should be construed?

(ii) If not, what is the proper construction of that section and what other, if any, principles should I have applied or considered whether in relation to the guardianship or custody which derive either from law or from the provisions of the Constitution?"

In answering the questions raised by the case stated the judgment of Finlay C.J. with which the majority of the Court agreed answered the first question "no" and set out the test to be applied as follows: "and they do not exist in the present case-- there are good reasons for so doing.

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"I am satisfied that the correct construction of s. 6A is that it gives to the natural father a right to apply to the court to be appointed as guardian, as distinct from even a defeasible right to be guardian.

The discretion vested in the court on the making of such an application must be exercised regarding the welfare of the infant as the first and paramount consideration.

The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by and the society of its father is one of many factors which may be viewed by the court as relevant to its welfare.

In a case such as the present case where the application for appointment as a guardian is linked to the application for a present order of custody, regard should not be had to the objective of satisfying the wishes and desires of the father to be involved in the guardianship of and to enjoy the society of his child unless the court has first concluded that the quality of welfare which would probably be achieved for the infant by its present custody, which is with the prospective adoptive parents, as compared with the quality of welfare which would probably be achieved by custody with the father, is not to an important extent better."

As a result it is clear that I reached my decision on the facts as found by me upon a wrong principle of law. It is therefore necessary for me to reconsider the matter upon the basis of the appropriate test as enunciated by the Supreme Court. I must however make such determination of fact as may be necessary upon the further evidence which has been adduced.

When the matter came back to me, an application was made to call additional evidence. I refused this application insofar as it might have led to a re-hearing of the appeal. However, since six months had elapsed since that hearing I gave liberty to the several parties to recall any witness to deal with any matter which might have arisen since the hearing before me or which might have been affected by the lapse of time.

Four witnesses were recalled. Doctor Byrne, a consultant child psychiatrist gave his opinion of the effect on the psychological health of the child if it was now to be moved from the home of the second and third notice parties to that of the applicant. His evidence did not differ substantially from that which he had given in July. He stressed the short-term trauma involved and was of opinion that this would be of at least three weeks' duration and could continue for appreciably longer rather than up to two weeks had the child been transferred in July.

His opinion of the longer term effect remained the same. The child would be more vulnerable to stress in later years and less able to cope with it. She might have difficulty in forming trust relationships and this difficulty would be aggravated if M.K., who would be the mother figure if she was given into the custody of the applicant, left home to get married. He also affirmed his concern with the effect on the child psychologically in the event of the applicant being given custody of the likely conflict between the first respondent and the father's family.

Doctor Byrne's evidence was based upon the theory of attachment. The child forms attachment to its parents between the ages of six months and twelve months. On average this takes place at eight months. As it grows older this attachment strengthens. By about the age of three the child begins to be able to stand on its own feet and the effect of breaking this bonding with its parents gradually lessens.

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In the present case the child in the past six months has begun to develop its personality and at the same time its attachment to its presumed parents has strengthened. On this basis he is satisfied that the short-term effects of any changeover would be much more serious than he had previously indicated.

Unfortunately Doctor Byrne was unable to instance any case histories in support of his opinion. His evidence was that there are very many variables which can affect what actually occurs. Here a child has been seen to attach easily. So it is more likely that she will attach to her new parent figures more quickly than he anticipates. Again the only study of which he is aware of the effects of a changeover of a child of this age showed surprisingly to the researcher that the child progressed very well.

These attachments are formed also with the extended family and the short-term trauma involves the effect of the loss of these attachments also.

This theory of attachment is one which the courts have had propounded to them for at least the last ten years with little contrary evidence and has in general been accepted. I accept the theory and indeed in the absence of any evidence to the contrary would be wrong not to do so.

In July I took the view that the short-term effects of a move would not have been as serious as suggested by Doctor Byrne. I still take that view though obviously with the passage of time and the consequent strengthening of the relevant attachments the K. household will take longer to overcome the predicted period of trauma.

I heard evidence also from the second and third notice parties and the social worker who made the pre-placement assessment of this couple. The former confirmed the stronger attachment which had occurred since July. The latter was strongly against any move but the force of her evidence was limited by the fact that her experience of moving children from one home to another related to older children where there were problems affecting the welfare of such children.

I have heard no evidence to cause me to alter my view as to the differences in the upbringing of a child between the two competing homes. These differences spring solely from socio-economic causes and in my view should not be taken into consideration, certainly where one of the claimants is a natural parent. To do otherwise would be to favour the affluent as against the less well-off which does not accord with the constitutional obligation to hold all citizens as human persons equal before the law.

Accordingly in the present case what I must consider is how to apply the legal test in the light of the dangers to the psychological health of the infant which Doctor Byrne foresees would be the result of a change of custody.

This case is not merely an application for the appointment of a natural father as guardian of his child. This is because if he were so appointed he could effectively bar the adoption process by refusing his consent to it. Accordingly the question to be determined before the applicant can be appointed guardian is whether he should also be granted custody.

Before considering this latter question, it follows that the court must be satisfied that if no adoption process was in being, the applicant would have succeeded in his application. If he would not have done so then no question of his obtaining custody could have arisen. It may be that he might still have been granted access but in an adoption situation again this would not have been a question to arise.

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If I were dealing solely with an application for guardianship I would have appointed the applicant to be a guardian. At p. 447 of his judgment on the case stated Finlay C.J. said:-

"The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed depending on the circumstances of each individual case.

The range of variation would, I am satisfied extend from the situation of the father of a child conceived as the result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family when the rights would be very extensive indeed."

Although the applicant was never in the situation contemplated at the end of that passage, nevertheless it was his wish and his intention at the date of conception of the child that she should be a party to such a stable relationship, though one based upon marriage to the mother. In my view, it would have been proper in those circumstances to have acceded to his application.

I now pass to whether I may make such order since I may not do so unless I also grant him custody.

In applying the test laid down by the Supreme Court there are three pertinent factors:â€”

- (1) The applicant has no legal right to be appointed guardian; he has a right only to apply to be so appointed;
- (2) The welfare of the child must be regarded as the first and paramount consideration; and
- (3) The wishes of the applicant should be disregarded unless the quality of welfare which would probably be achieved for the infant by its present custody which is with the second and third notice parties as compared with the quality of welfare which would probably be achieved by custody with the applicant is not to an important extent better.

It seems to me that the existence of the blood link is to be considered only where the wishes of the father are also to be considered. However if I am wrong in that it is not material since Doctor Byrne in his evidence in July placed no importance upon such link at that stage and a fortiori now since the child is older again.

It seems to me that what I must do is consider first the welfare of the child and then, if this can be met by both claimants, the quality of the welfare which will probably be achieved in each case, but at all times bearing in mind that the natural father has no more than the right to apply to be appointed guardian.

It is implicit in my findings of fact that the welfare of the infant will be met by her growing up in either household. If it would not have been, then I would have been wrong to have determined that there was no good reason why the child should not be given into the custody of the applicant.

What I must do is to consider the quality of the welfare likely to be achieved in her present custody as opposed to the quality of welfare likely to be achieved if the child is to be moved. The difference lies in the bonds of attachment which already exist and the dangers inherent in breaking those bonds. Doctor

In Re S.W. (minor), J.K. v. V.W.

Byrne has no doubt that there is no comparison and that it would be greatly preferable for the child to remain where she is.

He bases this opinion upon his view that there will be a short-term trauma during which he would expect the child to be distraught. He accepts however that it is something about which she will have no conscious memory. Nevertheless she will have a sub-conscious memory of it. It will affect her attachments in later life and will render her less able to cope with stresses in personal relationships. If, having been given into the applicant's custody M.K. or indeed the applicant were to marry there would be a further loss, the effect of which would aggravate this longer term trauma.

When I dealt with this matter in July the strength of the attachments was much less. However, I was of the opinion that the natural father had a legal right to guardianship in the particular circumstances of this case. That being so the factors which Doctor Byrne has highlighted seemed to me to be matters which ought not to have deprived this natural father from being united with his daughter. For the same reason I paid little attention to the possible difficulties arising from future conflict between the first respondent and the applicant's family. Where however the natural father does not have that legal right then my view was based upon an incorrect premise. Accordingly I must reconsider it in the light of the legal principle that he has no such right. It means that he has not got the favourable position which I thought. In considering the quality of the welfare which would probably be achieved if custody were now given to the applicant I must have regard to all the fears expressed by Doctor Byrne including the stated intention of the first respondent to seek custody for herself in those circumstances. I cannot say how a court would treat any such application. It may fail entirely. It may succeed, or it may succeed to the extent of gaining an order for access in favour of the first respondent.

The result, it seems to me, is this. If the child remains where she is, she will, if the adoption procedures are completed, become a member of a family recognised by the Constitution and freed from the danger of psychological trauma. On the other hand if she is moved she will not be a member of such a family and in the short and long term her future is likely to be very different. The security of knowing herself to be a member of a loving and caring family would be lost. If moved, she will I am sure be a member of a loving and caring unit equivalent to a family in her eyes. Nevertheless the security will be lost and there will be insecurity arising from the several factors which have been enumerated.

In my view these differences and the danger to her psychological health are of such an importance that I cannot hold that the quality of welfare likely to be achieved with the second and third notice parties would not be to an important extent better than that likely to be achieved by custody with the applicant. That being so, his wish and desire to be involved in the guardianship of and to enjoy the society of his child is not a factor which I am to take into account. In these circumstances, the welfare of the infant requires her to remain in her present custody. Accordingly the application for relief must be refused.

W.O'R. v. E.H.

[1996] 2 IR 248

W O'R, Applicant, v EH, Respondent; The Adoption Board, Notice Party [SC No 71 of 1995]

Supreme Court

[1996] 2 IR 248

HEARING-DATES: 15 16 May 23 July 1996

23 July 1996

Children -- Guardianship -- Adoption -- Access -- Natural parents unmarried -- Application to adopt children by natural mother and her husband -- Application for guardianship by natural father -- Right of natural father to apply for guardianship -- Whether court entitled to take pending adoption into account in determining -- Rights of natural father to child -- Constitution of Ireland, 1937, Article 40, s 1, Articles 41, 42 -- Adoption Act, 1952 (No 25), s 14, sub-s 1, s 16, sub-s 4 -- Guardianship of Infants Act, 1964 (No 7), s 3, s 6, sub s 4, s 6A, sub-s 1, s 11, sub-s 4 -- Status of Children Act, 1987 (No 26), ss 1, 12, 13.

Constitution -- Infant -- Natural parents unmarried -- Whether natural father enjoys rights under Constitution with respect to child -- Whether natural father enjoys right under Constitution to guardianship of child -- Natural parents unmarried -- Whether concept of de facto family ties afforded recognition under the Constitution -- Constitution of Ireland, 1937, Article 40, s 1, Articles 41, 42.

Section 3 of the Guardianship of Infants Act, 1964, provides, inter alia, that "(where) in any proceedings ... the custody, guardianship or upbringing of an infant ... is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration". By s 6, sub-s 4, as inserted by s 11 of the Status of Children Act, 1987:-

"Where the mother of an infant has not married the infant's father, she, while living shall alone be the guardian of the infant unless there is in force an order under section 6A (inserted by the Act of 1987) of this Act or a guardian has otherwise been appointed in accordance with this Act."

By s 6A, sub-s 1, as inserted by s 12 of the Status of Children Act, 1987:-

"Where the father and mother of an infant have not married each other, the court may, on the application of the father appoint him to be a guardian of the infant."

By s 11, sub-s 4, as inserted by s 13 of the Act of 1987, states that "(in)the case of an infant whose father and mother have not married each other, the right to make an application under this section ... [for directions concerning the welfare of an infant including custody and the right of access to the infant of his father or mother] ... shall extend to the father who is not a guardian of the infant . . ."

By s 14, sub-s 1 of the Adoption Act, 1952, an adoption order "shall not be made without the consent of every person being the child's mother or guardian . . ."

By s 16, sub-s 4 of the Act of 1952, where the Adoption Board has notice of proceedings "in regard to the custody of a child in respect of whom an application is before the Board, the Board shall make no order in the matter until the proceedings have been disposed of."

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By s 24 Act, upon the making of an adoption order, the child "shall be considered . . . as the child of the . . . adopters born to . . . them in lawful wedlock" and "the mother or guardian shall lose all parental rights and be freed from all parental duties with regard to the child". The applicant father and the respondent mother were in a relationship from 1981 until 1992 during which two children were born to them. Their first child was unplanned but the second was planned and the parties, who lived together for the final six years of their relationship had considered marriage. In June, 1993, the mother married JH and applied with him to the notice party to adopt the children. In November, 1993, the father applied to the District Court, pursuant to s 6A of the Guardianship of Infants Act, 1964, to be appointed guardian of the children. This application was refused, but he was granted liberal access to the children. It was the father's intention, if appointed guardian of the children, to oppose the application to adopt made by the mother and her husband, though he was not opposed to the children remaining in their custody. The notice party indicated that it would not make an adoption order until the District Court access order in favour of the father was vacated, although the mother and her husband wished the father to have continued access to the children.

The father appealed the refusal of guardianship to the Circuit Court which submitted a consultative case stated for the determination of the Supreme Court. The questions of law were:-

- (1) On hearing an application by a natural father to be appointed guardian under s 6A of the Guardianship of Infants Act, 1964, is it proper for the court to take into account a specific pending application for adoption of the children of the natural parents by the natural mother's husband when deciding whether or not to appoint the natural father as a guardian to his children, in particular in circumstances where the natural father is not seeking to change the custodial status of the children?
- (2) If the answer to No 1 is in the affirmative, is it proper for the court to take into account the natural father's intention to oppose the adoption application?
- (3) If the answer to No 1 is in the affirmative, is it proper for the court to have regard to this specific adoption application pending?
- (4) What are the character and extent of the rights of interest or concern of the natural father (referred to by the Supreme Court in the decision of *JK v VW* [1990] 2 IR 437) and when do same arise in the context of a guardianship application and are such matters within the sole discretion of the trial judge?
- (5) Is the concept of de facto family ties referred to in the European Court of Human Rights decision of *Keegan v Ireland* (1994) 18 EHRR 342 afforded recognition under the Constitution and what rights, if any, accrue to the father in the instant case arising from same?
- (6) Is a natural father's right to apply for guardianship and/or access or an order for access already made extinguished on the making of an adoption order?
- (7) If the answer to No 6 is in the negative, does the Adoption Board have the right to direct that an access order already made be vacated before making an adoption order?

The father contended that a natural father had constitutional rights with respect to his child in circumstances where he was not married to the mother of the child.

Held by the Supreme Court (Hamilton CJ, O'Flaherty, Denham, Barrington and Murphy JJ) in answering the case stated, 1, that s 6A of the Act of 1964 gives to a natural father the right to apply to be appointed guardian of an infant; it does not give him a right to guardianship, nor does it equate the position of a natural father with that of a father who is married to the mother of a child.

JK v VW [1990] 2 IR 437 followed.

2. That in deciding an application made pursuant to s 6A of the Act of 1964, a court must regard the welfare of the infant as the first and paramount consideration; it is not the only consideration to be taken into account.

JK v VW [1990] 2 IR 437 and G v An Bord Uchtala [1980] IR 32 followed.

3. That on hearing an application by a natural father to be appointed guardian under s 6A of the Act of 1964, it is proper for the court to take into account a specific pending application for adoption of the children, in deciding whether or not to appoint the natural father as guardian of the children; further it is proper for the court to take into account the natural father's intention to oppose the adoption application.

4. Per Hamilton CJ, O'Flaherty, Denham and Murphy JJ; Barrington J dissenting) That the extent and character of the rights of the father of a child not married to the mother accrue not from any constitutional right vested in the natural father to be appointed guardian but from the relationship of a father to a child.

JK v VW [1990] 2 IR 437 followed. The State (Nicolaou) v An Bord Uchtala [1966] IR 567 discussed.

5. That with regard to the rights of interest or concern of a natural father in the context of an application by him to be appointed guardian, the basic issue on such an application is the welfare of the children. The blood link, of itself, is of small weight and would not be a determining factor. But where a child is born as a result of a stable and established relationship and is nurtured at the commencement of its life by a father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, the rights of the natural father would be extensive.

JK v VW [1990] 2 IR 437 followed.

6. That the concept of de facto family ties is not afforded recognition under the Constitution. The existence of de facto families is recognised, as is the fact that a natural father who lived in such a family might have extensive rights by reason of his membership of it.

Keegan v Ireland (1994) 18 EHRR 342 considered.

7. That an adopted person is, from the date of the adoption, to be regarded as the child of the adopters; accordingly, upon the making of an adoption order, a natural father's right to apply for guardianship is extinguished as is any order for access already made.

Per Denham J: That the instant proceedings were in the form of a consultative case stated concerning the law as it presently applies to a natural father and his rights with respect to his child in circumstances where he is not married to the mother of the child; accordingly, the question of whether there was any deprivation of any constitutional right of the father did not arise.

Per Barrington J dissenting: That the relationship between natural parents and their child could be compared with that existing between married parents and their children under Article 42 of the Constitution, but the group did not form a unit, group or institution within the meaning of Article 41. A natural father has a duty to support his child and, should he observe this duty, has, so far as practicable, rights relating to the child which derive from Article 40, s 3 of the Constitution.

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In re M, an infant [1946] IR 334 considered; The State (Nicolaou) v An Bord Uchtala [1966] IR 567 and G v An Bord Uchtala [1980] IR 32 not followed.

Per Murphy J: That natural rights may be invoked only in so far as they are expressly or implicitly recognised by the Constitution; comprised in the common law or equity; or expressly conferred by an Act of the Oireachtas or other positive human law made under or taken over by, and not inconsistent with, the Constitution.

CASES-REF-TO:

East Donegal Co-Operative v Attorney General [1970] IR 317; (1970) 104 ILTR 81.
G v An Bord Uchtala [1980] IR 32; (1978) 113 ILTR 25.
Hope v Hope (1854) 4 De GM & G 328.
In re Fynn (1848) 2 De G & Sm 457.
In re M, an infant [1946] IR 334; (1946) 80 ILTR 130.
In re O'Hara [1900] 2 IR 232; (1900) 34 ILTR 17.
J v C [1970] AC 668; [1969] 2 WLR 540; [1969] 1 All ER 788.
Keegan v Ireland (1994) 18 EHRR 342.
JK v VW [1990] 2 IR 437; [1990] ILRM 121.
McGee v Attorney General [1974] IR 284; (1973) 109 ILTR 29.
Ryan v Attorney General [1965] IR 294.
The State (Nicolaou) v An Bord Uchtala [1966] IR 567; (1966) 102 ILTR 1.

INTRODUCTION:

Case stated.

The facts and the case stated have been summarised in the headnote and are set out in the judgment of Hamilton CJ, *infra*.

On the 3 November, 1993, the applicant applied to the District Court to be appointed guardian of his children VH and WH, pursuant to s 6A of the Guardianship of Infants Act, 1964, as inserted by s 12 of the Status of Children Act, 1987, which application was refused.

The applicant appealed to the Circuit Court and, pursuant to the provisions of s 16 of the Courts of Justice Act, 1947, His Honour Judge Patrick Moran submitted a consultative case stated to the Supreme Court.

The case was heard by the Supreme Court (Hamilton CJ, O'Flaherty, Denham, Barrington and Murphy JJ) on the 15 and 16 May, 1996.

John Rogers SC (with him Marjorie Farrelly) for the applicant: The crux of this matter is the relationship between adoptions and guardianship. The applicant has had a relationship with his children and now seeks guardianship; the respondent and her husband seek to adopt the children. Can an adoption order be made in these circumstances? The rights of a natural father are extensive and, I would submit, so extensive as to entitle him to custody. These rights include an entitlement to object to the making of an adoption order and, *prima facie*, a natural father ought to be appointed guardian unless there are compelling reasons to the contrary.

The decision in The State (Nicolaou) v An Bord Uchtala denied rights under Article 40, s 1 of the Constitution to a natural father; the Court ought to look again at that decision. The contest in this case was not possible in 1966 and I submit that the applicant is entitled to proceed in the Circuit Court with rights equal to those of the respondent. In this respect I would refer the Court to JK v VW.

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The position is that if the applicant is not appointed a guardian then he need not be consulted about anything. I say that he has a prima facie right to be appointed guardian.

Inge Clissman SC (with her Anna O'Connor) for the respondent: Section 24 of the Adoption Act, 1952, states that upon an adoption order being made the child shall be considered the child of the adopters and the natural mother and the guardian shall be freed of all parental rights and duties. Therefore, if the applicant is not a guardian he will not lose his rights because the section refers only to the mother and the guardian of the child. There is no reference to the natural father of the child in the section.

The applicant has no rights under the Constitution; his only rights are statutory. These are rights which arise for the welfare and protection of his children in circumstances where he has a good relationship with those children.

I invite the Court to support the principle laid down in JK v VW that a natural father's rights are confined to his statutory right to apply pursuant to s 6, sub-s 4 of the Guardianship of Infants Act, 1964.

Nastaise Leddy for the notice party: The notice party ought not to become involved in custody proceedings.

The decision in Keegan v Ireland criticised the relationship between guardianship and adoption but offered no criticism of the decision of Finlay CJ in JK v VW.

John Rogers SC in reply.

COUNSEL:

John Rogers SC (with him Marjorie Faunell) for the applicant; Inge Clissman (with her Anne O'Connor) for the respondent; Nastaise Leddy for the notice party.

Solicitors for the applicant: North Quay Law Centre, Cork; Solicitors for the respondent: South Mall Law Centre, Cork; Solicitor for the notice party: The Chief State Solicitor.

JUDGMENT-READ:

Cur adv vult, 23 July 1996.

PANEL: Hamilton CJ, O'Flaherty, Denham, Barrington, Murphy JJ

JUDGMENTS:

HAMILTON CJ: This is a consultative case stated and signed by His Honour Judge Patrick Moran pursuant to the provisions of s 16 of the Courts of Justice Act, 1947, submitting to this Court certain questions of law which the learned Judge is satisfied are necessary for the determination by him of an appeal brought to the Circuit Court against the order of Judge John P Clifford of the District Court, District Court Area of Cork City, District No 19 made on the 3 November, 1993, refusing the applicant guardianship of his children, VH and WH, pursuant to s 6A of the Guardianship of Infants Act, 1964. The facts proved or admitted before the learned trial judge as necessary for the determination of the issues of law involved are set forth in the case stated and are as follows:-

"(1) The applicant (hereinafter referred to as the natural father) and the respondent (hereinafter referred to as the natural mother) were involved in a relationship together from 1981 until June 1992.

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- (2) Two children were born to the parties during the course of their relationship, namely, a daughter V, who was born on the 31 May, 1982, and a son W, who was born on the 2 July, 1991.
- (3) The parties resided together as a family for the last six years of their relationship.
- (4) V was not a planned pregnancy. W was a planned pregnancy and the parties planned to stay together at that time.
- (5) During the course of their relationship, the parties considered marriage.
- (6) The parties separated permanently 11 months after the birth of W in or around the month of April, 1992.
- (7) The respondent married JH on the 25 June, 1993.
- (8) The respondent and JH applied to the Adoption Board for the adoption of V and W in or around the month of July, 1993.
- (9) The natural father applied to the District Court to be appointed guardian of V and W on the 3 November, 1993, under s 6A of the Guardianship of Infants Act, 1964, as inserted by s 12 of the Status of Children Act, 1987 which said application was refused. The applicant was granted liberal access to W and V under s 11 of the Guardianship of Infants Act, 1964, as amended.
- (10) The respondent and JH wished the natural father to have continued access to his children, further to the District Court Order.
- (11) The natural father has exercised access to his children since the time of his separation from the respondent, EH.
- (12) The Adoption Board indicated that it will not make an adoption order in favour of the respondent and JH until the access order made in the District Court is vacated.
- (13) The natural father intends to oppose the making of an adoption order should he be appointed guardian but does not intend to oppose the children's present custodial status.
- (14) Section 24(b) of the Adoption Act, 1952 provides that the mother or the guardian of a child under an adoption order being made shall lose all parental rights and be free from all parental duties with respect to the child."

The learned Circuit Court Judge has submitted for the determination of the Supreme Court the following questions:-

1. On hearing an application by a natural father to be appointed guardian under s 6A of the Guardianship of Infants Act, 1964, is it proper for the court to take into account a specific pending application for adoption of the children of the natural parents by the natural mother's husband when deciding whether or not to appoint the natural father as a guardian to his children, in particular in circumstances where the natural father is not seeking to change the custodial status of the children?
2. If the answer to No 1 is in the affirmative, is it proper for the court to take into account the natural father's intention to oppose the adoption application?

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3. If the answer to No 1 is in the affirmative, is it proper for the court to have regard to this specific adoption application pending?
4. What are the character and extent of the rights of interest or concern of the natural father (referred to by the Supreme Court in the decision of JK v VW [1990] 2 IR 437) and when do same arise in the context of a guardianship application and are such matters within the sole of discretion of the trial judge?
5. Is the concept of de facto family ties as referred to in the European Court of Human Rights decision of Keegan v Ireland (1994) 18 EHRR 342 afforded recognition under the Constitution and what rights, if any, accrue to the applicant arising from same?
6. Is a natural father's right to apply for guardianship, and/or access or an order for access already made, extinguished on the making of an adoption order?
7. If the answer to No 6 is in the negative, does the Adoption Board have the right to direct that an access order already made be vacated before making an adoption order?

As the case stated, and the questions raised thereby for determination by this Court, arose out of proceedings before the Circuit Court on the hearing of an appeal from the District Court, where the natural father sought an order, pursuant to the provisions of s 6A of the Guardianship of Infants Act, 1964, as inserted by s 12 of the Status of Children Act, 1987, it is desirable to set forth the statutory provisions relevant to the determination of such application.

Section 2 of the Guardianship of Infants Act, 1964 defines a "father" as including a male adopter under an adoption order but does not include the natural father of an illegitimate infant.

Section 3 of the said Act provides that:-

"Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."

Section 6, sub-s 1 of the said Act provides that:-

"The father and mother of an infant shall be guardians of the infant jointly."

Section 6, sub-s 4 of the said Act provided that:-

"The mother of an illegitimate infant shall be guardian of the infant."

The aforesaid sub-section was amended by s 11 of the Status of Children Act, 1987, by the substitution therefor of:-

"(4) Where the mother of an infant has not married the infant's father, she, while living, shall alone be the guardian of the infant unless there is in force an order under section 6A (inserted by the Act of 1987), of this Act or a guardian has otherwise been appointed in accordance with this Act."

By virtue of the provisions of s 12 of the Status of Children Act, 1987, s 6 of the Act of 1964 was further amended by the insertion after s 6 of the following section --

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"6A -- (1) Where the father and mother of an infant have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant.

(2) Without prejudice to the provisions of sections 5 (3) (inserted by the Courts Act, 1981), 8(4) and 12 of this Act, the appointment by the court under this section of the father of an infant as his guardian shall not affect the prior appointment of any person as a guardian of the infant under section 8 (1) of this Act unless the court otherwise directs."

Section 8, sub-s 1 of the Act of 1964 provides that:-

"Where an infant has no guardian, the court, on the application of any person or persons, may appoint the applicant or applicants or any of them to be the guardian or guardians of the infant."

Section 11 of the Guardianship of Infants Act, 1964, provides that:-

"(1) Any person being a guardian of an infant may apply to the court for its direction on any question affecting the welfare of the infant and the court may make such order as it thinks proper.

(2) The court may by an order under this section --

(a) give such directions as it thinks proper regarding the custody of the infant and the right of access to the infant of his father or mother;

(b) order the father or mother to pay towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the father or mother, the court considers reasonable.

(3) An order under this section may be made on the application of either parent notwithstanding that the parents are then residing together but an order made under subsection (2) shall not be enforceable and no liability thereunder shall accrue while they reside together, and the order shall cease to have effect if for a period of three months after it is made they continue to reside together.

(4) In the case of an illegitimate infant the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the natural father of the infant and for this purpose references in this section to the father or parent of an infant shall be construed as including him; but no order shall, on such application, be made under paragraph (b) of subsection (2)."

Section 11, sub-s 4 of the Act of 1964 was amended by s 13 of the Status of Children Act, 1987, by the substitution therefor of the following:-

"(4) In the case of an infant whose father and mother have not married each other, the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the father who is not a guardian of the infant, and for this purpose references in this section to the father or parent of an infant shall be construed as including him."

Statutory rights of the natural father

Prior to the enactment of the Status of Children Act, 1987, the natural father of an illegitimate infant was not a guardian of the infant though the mother was, by virtue of the provisions of s 6, sub-s 4 of the Act of 1964, recognised as the guardian of the infant, and in that capacity enjoyed the rights of a guardian as set forth in the Act of 1964.

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The only right which the natural father had in regard to the infant was to make an application pursuant to the provisions of s 11, sub-s 4 of the Act of 1964 regarding the custody of the infant and the right of access thereto, and for the purposes of s 11 of the Act of 1964 references to the father or parent of an infant were to be construed as including the natural father. All other rights in respect of the infant were vested in the mother as guardian of the infant and the natural father had no right to apply to be appointed guardian of the infant or to be so appointed.

The natural father's rights were extended by the provisions of ss 12 and 13 of the Status of Children Act, 1987, and the natural mother's sole right to guardianship was restricted by s 11 of the Status of Children Act, 1987.

The natural father's rights under the Act of 1964 as amended consist of:-

- (1) the right to apply to the court to be appointed guardian of the infant, and
- (2) independently of such right, the right to apply to the court pursuant to s 11 of the Act of 1964 regarding the custody of the infant and the right of access thereto.

The court, in the consideration of applications made by the natural father in the exercise of such rights, must, as in all proceedings before the court where the custody, guardianship or upbringing of an infant is in question, regard the welfare of the infant as the first and paramount consideration.

Because of the particular circumstances of this case, as outlined in the case stated, and in particular the application of the natural mother of the infants and her husband for an adoption order in respect of the infants, it is necessary to refer to a number of the provisions of the Adoption Acts, 1952 to 1991.

Section 14 of the Adoption Act, 1952, provides that:-

"(1) An adoption order shall not be made without the consent of every person being the child's mother or guardian or having charge of or control over the child, unless the [Adoption] Board dispenses with any such consent in accordance with this section.

(2) The Board may dispense with the consent of any person if the Board is satisfied that that person is incapable by reason of mental infirmity of giving consent or cannot be found."

The power of the notice party to dispense with such consent is confined to cases where the notice party is satisfied that the parent, guardian or person in charge so concerned is incapable by reason of mental infirmity of giving consent or cannot be found. The effect of an adoption order, if made, is dealt with in s 24 of the Adoption Act, 1952, which provides that:-

"Upon an adoption order being made --

- (a) the child shall be considered with regard to the rights and duties of parents and children in relation to each other as the child of the adopter or adopters born to him, her or them in lawful wedlock;
- (b) the mother or guardian shall lose all parental rights and be freed from all parental duties with regard to the child."

Section 3, sub-s 2 (a) of the Status of Children Act, 1987, provides that:-

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"An adopted person shall ... be deemed from the date of the adoption to be the child of the adopter or adopters and not the child of any other person or persons." Section 16 of the Adoption Act, 1952, provides that:-

"(4) Where the Board has notice of proceedings pending in any court of justice in regard to the custody of a child in respect of whom an application is before the Board, the Board shall make no order in the matter until the proceedings have been disposed of."

In the facts of the present case, the combined effect of these statutory provisions is:-

(1) If the applicant succeeds in obtaining an order appointing him as a guardian of the infants pursuant to s 6A of the Act of 1964, as inserted, the infants cannot be made the subject matter of an adoption order unless he consents.

(2) If the applicant fails to obtain such order and an adoption order is made in regard to the infants, he loses all parental rights and is freed from all parental duties with respect to the children.

(3) The notice party is not entitled to make any order until the proceedings have been disposed of.

The circumstances in this case are rather unusual. It appears from the findings set forth in the case stated that the natural father, the applicant herein, and the respondent had enjoyed a relationship between 1981 and June, 1992; that during this period two children were born, namely a daughter V who was born on the 31 May, 1982, and a son, W who was born on the 2 July, 1991; that the parties resided together as a family for six years prior to April, 1992; that they separated in or about the month of April, 1992; that the respondent married JH on the 25 June, 1993; that it is she and her husband who have applied for the adoption of the two children; that the applicant enjoys a reasonable relationship with the respondent and her husband, who do not seek to deprive him of access to the children and he, on his part, does not seek custody of the children; that pursuant to an application made to the District Court on the 3 November, 1993, he was granted liberal access to the children and has continued to exercise his right in that regard, which right the respondent and her husband wish to have continued.

There is no suggestion that this exercise by him of his right of access to the children was not of benefit to the children.

The real purpose of the applicant's application for guardianship is to prevent any alteration in the existing arrangements because he wishes to maintain his ties and relationships with his infant children.

It is submitted by Mr Rogers on behalf of the applicant that having regard to the particular circumstances of this case that he has a right to be appointed guardian, being a fit person to be appointed guardian, and that there are no circumstances involving the welfare of the children which require that he should not be so appointed.

The effect and interpretation of s 6A of the Act of 1964 on a natural father's rights in this regard was considered by this Court in the case of JK v VW [1990] 2 IR 437.

In this case, the learned trial judge, Barron J stated his view of the interpretation of s 6A as follows:-

"The test, therefore, is

1. Whether the natural father is a fit person to be appointed guardian and, if so,

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2. Whether there are circumstances involving the welfare of the child which require that, notwithstanding he is a fit person, he should not be so appointed."

He had further stated that:-

"In my opinion, having regard to the purposes of the Status of Children Act, 1987, the rights of the father should not be denied by considerations of the welfare of the child alone, but only where -- and they do not exist in the present case -- there are good reasons for so doing."

The learned trial judge then submitted the following questions of law for the determination of the Supreme Court:-

"(i) Am I correct in my opinion as to the manner in which s 6A of the Guardianship of Infants Act, 1964, as inserted by s 12 of the Status of Children Act, 1987, should be construed?

(ii) If not, what is the proper construction of that section and what are the other, if any, principles I should have applied or considered whether in relation to guardianship or custody which derive either from the law or from the provisions of the Constitution?"

In delivering his judgment, with which Walsh, Griffin and Hederman JJ agreed, Finlay CJ stated at pp 446 and 447 of the report that:-

"I am satisfied that the opinion expressed by the learned trial judge in the case stated as to the manner in which s 6A of the Act of 1964 should be construed is in law not correct. Section 6A gives a right to the natural father to apply to be appointed guardian. It does not give him a right to be guardian, and it does not equate his position vis-a-vis the infant as a matter of law with the position of a father who is married to the mother of the infant. In the latter instance the father is the guardian of the infant and must remain so, although certain of the powers and rights of a guardian may, in the interests of the welfare of the infant, be taken from him.

The right to apply to be appointed guardian of the infant under s 6A of the Act of 1964 (as inserted by the Act of 1987) is a right to apply pursuant to a statute which specifically provides that the court in deciding upon such application shall regard the welfare of the infant as the first and paramount consideration.

To construe s 6A of the Act of 1964 as has been done in the case stated as giving to the father a right to guardianship which cannot be denied unless (a) he is not a fit person, or (b) there are circumstances or good reasons involving the welfare of the child which require that he should not be appointed is incorrect, in my view, for two reasons. It presumes a right to guardianship, whereas s 6A creates merely a right to apply for guardianship.

A right to guardianship defeasible by circumstances or reasons "involving the welfare of the child "could not possibly be equated with regarding the welfare of the child as the first and paramount consideration in the exercise by the court of its discretion as to whether or not to appoint the father guardian. The construction apparently placed by the learned trial judge in the case stated upon s 6A to a large extent would appear to spring from the submission made on behalf of the applicant on this appeal that he has got a constitutional right, or a natural right identified by the Constitution, to the guardianship of the child, and that the Act of 1987 by inserting s 6A into the Act of 1964 is thereby declaring or acknowledging that right. I am satisfied that this submission is not correct and that although there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right to guardianship in the father of the child exists. This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as may make it

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desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married.

The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstances of each individual case.

The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as the result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed.

Having reached these conclusions, I would answer the first question raised by the learned trial judge in the negative, stating that the construction placed by him on s 6A of the Act of 1964, as indicated by the tests outlined by him in the case stated is not correct.

It accordingly becomes necessary to answer the second question raised, namely, to try and set out what the correct construction of the section is and the principles or considerations which are appropriate to the exercise of the discretion created by it. I am satisfied that the correct construction of s 6A is that it gives to the natural father a right to apply to the court to be appointed as guardian, as distinct from even a defeasible right to be guardian.

The discretion vested in the court on the making of such an application must be exercised regarding the welfare of the infant as the first and paramount consideration. The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by and the society of its father is one of many factors which may be viewed by the court as relevant to its welfare.

In a case such as the present case where the application for appointment as a guardian is linked to the application for a present order of custody, regard should not be had to the objective of satisfying the wishes and desires of the father to be involved in the guardianship of and to enjoy the society of his child unless the court has first concluded that the quality of welfare which would probably be achieved for the infant by its present custody, which is with the prospective adoptive parents, as compared with the quality of welfare which would probably be achieved by custody with the father, is not to an important extent better."

From a consideration of this judgment, it appears that the following principles were established thereby:-

(1) While the provisions of s 6A of the Act of 1964 give a right to a natural father to apply to be appointed guardian of an infant, it does not give him either a right to be appointed guardian, or a right to guardianship defeasible by circumstances or reasons involving the welfare of the child. It does not equate his position vis-a-vis the child with a father who is married to the mother of the child.

(2) The court in deciding upon such application must regard the welfare of the infant as the first and paramount consideration.

(3) While no constitutional right to guardianship of the child exists in the natural father, there may be considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of its father even though its father and mother are not married and this is one of the factors which may be viewed by the court as relevant to its welfare.

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(4) The extent and character of the rights of the father of a child to whose mother he is not married accrue not from any constitutional right vested in the natural father to be appointed guardian but from the relationship of a father to a child.

(5) In the situation where a child or children are born as a result of a stable and established relationship and nurtured at the commencement of their life by their father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, the rights of the natural father would be very extensive indeed.

In spite of the decision of this Court in *JK v VW* [1990] 2 IR 437 and the principles enunciated therein, Mr Rogers, on behalf of the applicant, contends and submits that:-

(1) The nature and extent of the rights which accrue to the applicant as a natural father in his individual circumstances include a prima facie right at this stage to the guardianship of his children and that this right may be only defeated if it is established that he is not a fit and proper person to be appointed or that the welfare of the children require that he be not appointed.

(2) In the consideration of his application to be appointed guardian to the said children, the court must also take into account his rights as a member of a de facto family and his personal rights as natural father.

(3) That this Court should consider the manner in which the common realities pertaining to the relationship between a natural father and his children have altered since the 1960s when the Supreme Court pronounced on the natural father's position in *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567.

In the course of delivering the judgment of the Court in that case Walsh J stated at pp 642 and 643:-

"It was also submitted on behalf of the appellant that the provisions of the Adoption Act, 1952, violate the guarantees contained in Article 40, s 3, sub-s 1 of the Constitution. That section reads:- 'The State guarantees in its laws to respect, and, so far as practicable, by its laws to defend and vindicate the personal rights of the citizen.' The Constitution does not set out in whole what are the rights of the citizen which are encompassed in this guarantee and, while some of them are indicated in sub-s 2 of s 3, it was pointed out in the judgment of this Court in *Ryan v The Attorney General* [1965] IR 294 that the personal rights guaranteed are not exhausted by those enumerated in sub-section 2. It is, however, abundantly clear that the rights referred to in s 3 of Article 40 are those which may be called the natural personal rights and the very words of sub-s 1, by the reference therein to 'laws,' exclude such rights as are dependent only upon law. Sub-section 3 cannot therefore in any sense be read as a constitutional guarantee of personal rights which were simply the creation of the law and in existence on the date of coming into operation of the Constitution. For the reasons already indicated earlier in this judgment, in so far as a father has rights in respect of his natural child which were the creation of law, judge-made or legislative, they were of their nature susceptible to legislative change and if the Adoption Act, 1952, has effected such change it does not infringe the guarantee contained in s 3 of Article 40. It has not been shown to the satisfaction of this Court that the father of an illegitimate child has any natural right, as distinct from legal rights, to either the custody or society of that child and the Court has not been satisfied that any such right has ever been recognised as part of the natural law. If an illegitimate child has a natural right to look to his father for support that would impose a duty on the father but it would not of itself confer any right upon the father. The appellant has therefore failed to establish that any personal right he may have guaranteed to him by Article 40, s 3 of the Constitution has been in any way violated by the Adoption Act of 1952."

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Mr Rogers submitted that the applicant has rights in regard to the children arising from the nature of the relationship which he had enjoyed with them and the respondent, a relationship which he described as in the nature of a de facto family.

A de facto family, or any rights arising therefrom, is not recognised by the Constitution or by any of the enactments of the Oireachtas dealing with the custody of children.

(4) The Court should review the statutory changes which have been effected so as to alter the position and status of natural fathers and children born outside of marriage since the enactment of the Guardianship of Infants Act, 1964;

(5) The Court should review the effect of Ireland's ratification of the European Convention on Human Rights and in particular the policy now adopted by the notice party arising out of decisions of the European Court of Human Rights on the State's failure to vindicate the right to family life of a natural father.

The statutory changes which have been affected since the enactment of the Act of 1964, were set forth and considered by this Court in the case of *JK v VW* [1990] 2 IR 437 and regard was had to the effect of such statutory changes in the decision of the Court and the majority of the Court held that neither the provisions of such enactments nor the Constitution gave to the natural father the right to be appointed guardian of the infants in this case.

In view of the decision of this Court in *JK v VW* [1990] 2 IR 437 I do not consider it necessary for the purpose of answering the questions posed in the case stated, which is the function of this Court, to refer to or purport to deal in any way with the decision of this Court in the case of *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567 other than to state that the view of the Court that it had not been established that the father of an illegitimate child has any natural right, as distinct from legal rights to either the custody of that child would appear to be reinforced by the statement made by Finlay CJ in the course of his judgment in *JK v VW* where he stated that 'no constitutional right to guardianship in the father exists'.

It is important to emphasise that the applicant has no right per se to be appointed guardian of the children. He has the right to apply to the Court to be appointed guardian, the right to have such application considered and adjudicated upon by the Court in the context of and subject to the requirement that the welfare of the children be the first and paramount consideration in the determination of such application. The Oireachtas, in granting to a natural father the right to apply to the Court for an order appointing him guardian of the infants, obviously envisaged circumstances in which the Court would grant such application, if the welfare of the infants so required.

In the course of his judgment in *G v An Bord Uchtala* [1980] IR 32, Walsh J, dealing with the provisions of s 3 of the Act of 1964 stated at p 76:-

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

In this case, the natural father has no constitutional right to be appointed guardian of his infant children. Such rights as he has in this regard are granted by statute viz, the right to apply to be appointed guardian and in the consideration of such application, the welfare of the children is to be the superior consideration.

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Mr Rogers, on behalf of the applicant, submitted that the rights and concerns referred to by Finlay CJ in the course of his judgment in *JK v VW* [1990] 2 IR 437 as arising from the blood link between the father and the child and described as varying greatly depending on the circumstances of each individual case were constitutional rights and that in the situation where the children were, as appears to be the situation in this case, born as a result of a stable and established relationship and nurtured at the commencement of their lives by their father and mother in a situation bearing nearly all the characteristics of a constitutionally protected family, the rights would be very extensive indeed.

I do not accept Mr Rogers' submission that the rights and concerns referred to in the said judgment constituted constitutional rights in the natural father. They are matters to be taken into account in determining the welfare of the children when the natural father avails of his statutory right to apply to the court for guardianship or custody of the children or access thereto.

The responsibility for determining what is required by the welfare of the children is a matter for the learned trial judge.

In this case, the learned Circuit Court Judge had, prior to stating the case, made no finding with regard to the question whether the welfare of the children would best be served by the continuance of the existing arrangements whereby the children were in the custody of the respondent, the applicant had access to them and they had the benefit of the society and protection of both parents, or by the making of an adoption order which would alter such arrangements.

It is understandable that he did not do so but it is difficult, if not impossible, to determine the rights of a natural father, which are subordinate to the requirements of the welfare of the children, in regard to his application to be appointed their guardian in the absence of such a finding.

The application by the applicant for appointment as guardian of the children in this case is not linked to an application for custody of the children, as was the situation in *JK v VW* [1990] 2 IR 437, and to that extent differs therefrom. He has no wish or intention to seek to alter the present custodial arrangements with regard to the children, who are with the respondent, but wishes to enjoy the right to access to the said children which would be affected by the making of an adoption order. He wishes to be appointed guardian of the children because if he were so appointed, an adoption order could not be made without his consent.

Before considering his wishes in this regard, the Court must first consider whether the welfare of the children would be to an important extent better if an adoption order were made in respect of them than by a continuance of the existing arrangement.

In the consideration of this matter, the learned trial judge is entitled to take account of all of the relevant circumstances pertaining to the welfare of the children.

He is entitled to take into account the circumstances which have existed since the date of birth of the children, the fact that they were born as a result of a stable relationship that existed between the applicant and the respondent, the fact that the children in their early years enjoyed the benefit of such relationship, the fact that despite the separation and the respondent's subsequent marriage, the applicant has enjoyed with her consent and by order of the District Court access to the children, the relationship which the applicant has with the children, the benefits which have accrued to the children therefrom and the effect that the termination of such relationship would have on them and on their welfare. The welfare of the children may require that they continue to enjoy the society and protection of the applicant which they have enjoyed since their birth or may require that their welfare would be better served by the making of the adoption order sought by the respondent and her husband.

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In either event the question of adoption is a crucial factor in determining this issue and the learned trial judge is not only entitled but obliged to have regard thereto.

The Court will answer the questions submitted to the Court for determination as follows:-

Question No 1

On hearing an application by a natural father to be appointed guardian under s 6A of the Guardianship of Infants Act, 1964, is it proper for the Court to take into account a specific pending application for adoption of the children of the natural parents by the natural mother's husband when deciding whether or not to appoint the natural father as a guardian of the children, in particular, in circumstances where the natural father is not seeking to change the custodial status of the children?

Answer: Yes.

The Courts first and paramount consideration is the welfare of the child (ss 2 and 3 of the Guardianship of Infants Act, 1964). All factors relevant to the child's welfare should be before the Court for consideration. In an application by a natural father to be appointed guardian under s 6A of the Guardianship of Infants Act, 1964, it is proper for the Court to take into account the factor of a specific pending application for adoption of the children of the natural parents by the natural mother's husband when deciding whether or not to appoint the natural father as guardian to his children. The fact that the natural father was not seeking at that time to change the custodial status of the children is a matter for the trial judge to consider in all the circumstances of the case. The trial judge must, however, make his own decision based on his own independent assessment of the whole case as presented to him and should not regard his decision as merely a means of predetermining the outcome of the adoption proceedings.

Question No 2

If the answer to question No 1 is in the affirmative, is it proper for the court to take into account the natural father's intention to oppose the adoption application?

Answer: Yes.

It is proper for the court to take into account the natural father's intention to oppose the adoption. That is a factor relevant to the welfare of the children. The trial judge must, however, make his own decision based on his own independent assessment of the whole case as presented to him and should not regard his decision as merely a means of predetermining the outcome of the adoption proceedings in favour of any party.

Question No 3

If the answer to question 1 is in the affirmative, is it proper for the court to have regard to this specific adoption application pending?

Answer: Yes.

The issue is the welfare of the particular children, not children in a general sense, and thus the specific circumstances of the pending adoption proceedings are relevant to the welfare of the children.

Question No 4

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What are the character and extent of the rights of interest or concern of a natural father (referred to by the Supreme Court in the decision in JK v VW [1990] 2 IR 437) and when do same arise in the context of a guardianship application and are such matters within the sole discretion of the trial judge?

Answer:

The rights of interest or concern in the context of the guardianship application arise on the making of the application. However, the basic issue for the trial judge is the welfare of the children. In so determining, consideration must be given to all relevant factors. The blood link between the natural father and the children will be one of the many factors for the judge to consider, and the weight it will be given will depend on the circumstances as a whole. Thus, the link, if it is only a blood link in the absence of other factors beneficial to the children, and in the presence of factors negative to the children's welfare, is of small weight and would not be a determining factor. But where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a de facto family as opposed to a constitutional family, then the natural father, on application to the Court under s 6A of the Guardianship of Infants Act, 1964, has extensive rights of interest and concern. However, they are subordinate to the paramount concern of the court which is the welfare of the children.

Question No 5

Is the concept of de facto family ties as referred to in the European Court of Human Rights decision of Keegan v Ireland (1994) 18 EHRR 342 afforded recognition under the Constitution and what rights, if any, accrued to the applicant arising from same?

Answer:

The decision of the European Court is not part of the domestic law of Ireland. The family referred to in Articles 41 and 42 of the Constitution is the family based on marriage. The concept of a "de facto" family is unknown to the Irish Constitution. The Irish Supreme Court, however, in its decision in JK v VW [1990] 2 IR 437 recognised the existence of "de facto families" and also the fact that a natural father who lived in such a family might have extensive rights of interest and concern of the kind referred to in the reply to the previous question.

Question No 6

Is a natural father's right to apply for guardianship and/or access, or an order for access already made, extinguished on the making of an adoption order?

Answer: Yes.

It is clear from s 24 of the Adoption Act, 1952, and from the Status of Children Act, 1987, that an adopted person is from the date of the adoption to be regarded as the child of the adopters and not the child of anyone else. A natural consequence of such a law is that the right to apply is extinguished on the making of the adoption order.

Question No 7

If the answer to question No 6 is in the negative, does the Adoption Board have the right to direct that an access order already made be vacated before making an adoption order?

Answer:

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The answer to question No 6 being in the affirmative, this question does not arise to be considered.

O'Flaherty J: I agree with the judgment delivered by Hamilton CJ.

Denham J: The consultative case stated has been set out in full in the judgment of the Chief Justice. The function of the Supreme Court is to accept the facts and to answer the questions of law submitted.

This is not a case where there is an application to have a statute declared invalid under the Constitution. The action is neither in the appropriate form, nor is the Attorney General joined. Rather, it is a consultation on the law as it now exists.

The rights of interest or concern of a natural father were referred to in *JK v VW* [1990] 2 IR 437 by Finlay CJ at p 447:-

" . . . although there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right to guardianship in the father of the child exists. This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married.

The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstances of each individual case.

The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as a result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed."

It is unnecessary to analyse the rights and interests in general of a natural father. The question raised in this case relates to the guardianship application. Therefore, any reference to other rights or interests that might exist would be extraneous.

Counsel referred to *Keegan v Ireland* (1994) 18 EHRR 342. The concept of de facto family ties as referred to in *Keegan v Ireland* are not afforded explicit recognition under the Constitution. The basic difference between that case and *JK v VW* [1990] 2 IR 437 arises from the wording of the Constitution which founds a family on marriage whereas Article 8 of the European Convention on Human Rights does not so define a family.

The jurisprudence of the Irish courts has been that the constitutional family is the family based on marriage. While the Constitution does not define "the family", the wording of Article 41 is clear. The construction placed on it by the courts may be epitomised by the words of Walsh J in *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567 where he stated at p 643 that it was:-

" . . . quite clear . . . that the family referred to in [Article 41] is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the law for the time being in force in the State . . ."

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The effect of the Constitution grounding the family for the purposes of Article 41 on marriage was to exclude natural fathers from that institution.

The kernel issue, in this case, is the welfare of the children. That is the paramount consideration for the Court. The rights of interest and concern of the applicant are directly in proportion to the circumstances that exist in the case between the applicant and the children. The greater the beneficial contact for the children there has been, the more important it is to the welfare of the children and so the higher the rights of interest and concern of the applicant. Thus, variable degrees of interest and concern of the father arise on the making of the guardianship application.

The natural father's right to apply for guardianship is currently stated in s 6A of the Guardianship of Infants Act, 1964. The rights of interest or concern of the natural father arise on the initiation of the application process. It is essential that the law protects his right to apply within appropriate time so that all his rights may be exercised.

There is no issue in this case of delay in the procedure. There has been no prejudice to the applicant. He has not been barred de jure or de facto from developing his bond with the children. The parties agree that access shall continue for the children to the applicant. Thus, there is no question that he is not getting a hearing of the issues at the appropriate time.

The basic issue for the trial judge is the welfare of the children. In so determining, consideration must be given to all relevant factors. The blood link will be one of many factors for the judge to consider, and the weight it will be given will depend on the circumstances as a whole. Thus, the link, if it is only of blood with the absence of other factors beneficial to the children, or in the presence of factors negative to the children's welfare, is of small weight and would not be a determining factor. But, where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a de facto family as opposed to a constitutional family, then the natural father on application to the court under s 6A of the Guardianship of Infants Act, 1964, has extensive rights of interest or concern. However, they are subordinate to the paramount concern of the court which is the welfare of the child.

Conclusion

The issues in this case are determined by the trial judge with the welfare of the child as the paramount consideration. A natural father's rights arising on application to court on foot of constitutional procedures are proportionate to the circumstances of the case. It is assumed that the procedures provided by statute will be conducted in accordance with the principles of constitutional justice: *East Donegal Co-Operative v Attorney General* [1970] IR 317.

It is not for this Court to legislate, that is a matter for the Oireachtas. In so doing, it is open to that body to consider the European Convention on Human Rights and cases arising thereunder insofar as they are not inconsistent with the Constitution. In the circumstances of this case, there is no issue of any deprivation of any constitutional right of the applicant.

It is clear that procedures must provide adequate protection for the welfare of the child. This includes an appropriate process to enable a natural father to make application for guardianship at a time within which the scales concerning the child's welfare have not been tilted inevitably in another's favour. There is no such issue in this case.

In light of the above, I agree with the answers given by the Chief Justice to the questions posed by the Circuit Court Judge.

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Barrington J: The applicant is the father, and the respondent the mother, of two children born out of wedlock. The elder child is a girl and is now aged 14. The younger child is a boy and is now aged 5.

The applicant and the respondent are no longer living together and the mother is now married to another man.

Despite their difficult situation, however, the respondent and applicant remain on good terms. The applicant does not object to the respondent having custody of the children and the respondent does not object to the applicant having liberal access.

Judges who have seen the anger and heartbreak which this kind of situation can give rise to cannot but admire the good will and common sense shown by both parties and the way they have co-operated in the best interests of the children.

Unfortunately, the situation is threatened by the understandable desire of the respondent to have the two children adopted by herself and her husband.

The respondent and her husband applied for adoption of the two children in July, 1993. The applicant responded by applying in the District Court to be appointed guardian of the infant children pursuant to the provisions of s 6A of the Guardianship of Infants Act, 1964, as inserted by s 12 of the Status of Children Act, 1987. The applicant's application to be appointed a guardian was refused in the District Court but he was granted liberal access.

The respondent and her husband are happy that he should have this access and the applicant has exercised it.

The respondent and her husband wish, however, to proceed with the application for adoption. The applicant has accordingly appealed against the order refusing to appoint him a guardian because, if he is appointed a guardian, his consent to the making of an adoption order will be required under s 14 of the Adoption Act, 1952. The applicant's appeal is now pending before the learned Circuit Court Judge and the learned judge has stated a case to this Court seeking guidance as to the factors he should take into consideration in exercising his discretions under s 6A of the Guardianship of Infants Act, 1964.

The problem is complicated by the policy of the notice party. On the 22 December, 1993, the Registrar of the notice party wrote to the solicitor for the applicant pointing out that the making of an adoption order terminates all existing parental rights and duties in relation to the child given in adoption and transfers these absolutely and permanently to the adopters, so that the child becomes as one born to them in lawful wedlock. He pointed out that an adoption order could not be made subject to conditions; that the notice party had no power to limit the effects of an adoption order, and that it "cannot incorporate a right to access into same". He concluded by writing:-

"As your client has an order for access to the children, I wish to let you know that the Board's practice is to request the prospective adoptive parents to make arrangements to have the order for access set aside before making an adoption order."

On the 11 November, 1994, the Registrar again wrote to the applicant's solicitor stating:-

"It is the Board's practice to require any such (access) order to be discharged before proceeding to make an adoption order."

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However by a letter dated the 27 March, 1996, a different Registrar wrote to the applicant's solicitor seeking to correct the impression conveyed by the letters of the earlier Registrar and stating:-

"I wish to clarify that the Board does not seek to set aside access orders which have been made on consent in consideration of the making of an adoption order. In such circumstances the Board has made adoption orders in the past where there was agreement between the parties."

The effect of an adoption order

The notice party's second or corrected opinion is clearly a humane one. Unfortunately it is difficult to reconcile with the express wording of the Adoption Act, 1952, s 24 of which provides as follows:-

"Upon an adoption order being made:-

(a) the child shall be considered with regard to the rights and duties of parents and children in relation to each other as the child of the adopter or adopters born to him, her or them in lawful wedlock;

(b) the mother or guardian shall lose all parental rights and be freed from all parental duties with respect to the child."

Mr Rogers, for the applicant, submits therefore that the effect of the making of an adoption order would be to wipe out all rights of the applicant in respect of these children. Miss Clissman, for the respondent, does not accept this, arguing that the natural father is not referred to in section 24. This argument, however, is not convincing. There is no necessity to refer to the natural father in s 24 because he is excluded from the category of "parent" by s 3 of the Act which provides that "parent" does not include the natural father of an illegitimate child.

This brings Miss Clissman to her second submission which is that the natural father, as such, is not recognised as having any right in respect of his child under the Irish Constitution and that the only rights he has got are the right to make such applications as are accorded to him by statute law. She relies on *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567. Mr Rogers seeks to distinguish the present case from that case because of the fact that for many years the applicant and the respondent together with their children constituted a de facto family of the kind recognised by the European Court of Human Rights in *Keegan v Ireland* (1994) 18 EHRR 342. His problem is that that judgment, however instructive it may be to read, is not part of the domestic law of Ireland and not binding on the Irish courts. He accordingly submits that the time has come to look again at the reasoning in *The State (Nicolaou) v An Bord Uchtala*.

Custody proceeding

A question arose in argument as to whether the provisions of s 16, sub-s 4 of the Adoption Act, 1952, might contain the solution to Mr Rogers' problem. Section 16, sub s 4 provides as follows:-

"Where the Board has notice of proceedings pending in any court of justice in regard to the custody of a child in respect of whom an application is before the Board, the Board shall make no order in the matter until the proceedings have been disposed of."

It is now the received wisdom of the courts that no final order is ever made in custody proceedings as all orders may have to be revised if the circumstances of the parties change. There is also a formal problem that an application under s 6A of the Guardianship of Infants Act, 1964, is concerned not with the question of custody but with the question of guardianship. I note, however, that the order granting the applicant access to the children was made under s 11 of the Guardianship of Infants Act, 1964, and these

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proceedings could be classified as custody proceedings. However, the real problem is that s 16, sub-s 4 of the Adoption Act, 1952, cannot be construed as referring to ongoing custody proceedings. It must refer to proceedings which terminate with the granting of custody to one of the parties. Otherwise it would simply forbid the making of an adoption order if custody proceedings existed, and would not merely provide that no order was to be made "... until the proceedings have been disposed of".

The Nicolaou case

I agree with Mr Rogers' submissions that the time has come to reconsider the reasoning in *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567. I do so not only because I think the reasoning in that case is fundamentally flawed, but also because I do not think it is possible to develop a coherent code of rights in relation to non-marital children and their parents while that reasoning stands.

Before proceeding further I should, however, state that I was one of the counsel who acted for the prosecutor, Mr Nicolaou, in that case.

I should also like to state that there was never at any time any conflict between the parties as to the facts of the case. The application was for certiorari and the Adoption Board showed cause against the conditional order by notice. This was in accordance with O 84, r 47 of the Rules of the Superior Courts, 1962, which provided as follows:-

"Cause against a conditional order may be shown by affidavit or where it was not desired to adduce evidence in support thereof, by notice . . ."

Counsel for the respondent might still have served notice to cross-examine the prosecutor or his deponents but, no doubt for very good reason, they did not do so. The comments made in the judgments of the Divisional Court on the prosecutor were made of a man who had been neither contradicted in evidence nor cross-examined. One judge even expressed reservations as to whether the prosecutor was the father of the child in respect of whom the proceedings were brought, which allegation he accepted only for the purposes of the argument. This was despite the fact that the mother had sworn that the prosecutor was the father of the child; the prosecutor had sworn that he was the father of the child; the child's birth had been registered within days of her birth and showed the prosecutor as the father; the subsequent conduct of the parties was explicable only in the context that the prosecutor was the father; there was no evidence to the contrary; and the deponents had not been cross-examined.

Teevan J in the course of his judgment in the High Court (see p 600 of the report) made some interesting comments on the alleged rights of a natural father. He stated:-

"The case has been presented on the footing that the prosecutor has suffered within the State a personal injustice at the hands of a national body. Let the matter be looked at in the way of a general proposition, leaving out of account any special controversy peculiar to the facts of this particular case. A father's natural right (not waived or forfeited by abandonment or otherwise) to his child is no less because of its birth out of wedlock than to a child born in wedlock, and his duty to the one no less sacred than to the other. Thus approached it will be seen that if, by the operations of the Board, or by anyone else within the State, in furtherance of a correctly interpreted statutory power and complying with statutory dictates, a man has been permanently deprived of his child, albeit illegitimate, whom he has taken to him and cherishes as his child, such a man will indeed have suffered a cruel injustice."

He then went on to add:-

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"It may be that the injustice, not being of a kind cognisable by the law, will be irremediable in law, but that will be a substantive issue in any proceedings the victim may take. Whether he has in fact suffered the injustice complained of is quite another question."

Teevan J therefore had a clear view of the alleged injustice at the theoretical level, but could not accept the undisputed evidence which was before him. This was in no way inconsistent with the more elaborate version of the facts set out in the judgment of Walsh J in the Supreme Court (see pp 630-633 of the report). The part of the judgment of the Supreme Court which is most open to criticism is that which begins at p 639 of the report and contains the following passages:-

"In the opinion of the Court, section 1 of Article 40 is not to be read as a guarantee or undertaking that all citizens shall be treated by the law as equal for all purposes, but rather as an acknowledgment of the human equality of all citizens and that such equality shall be recognised in the laws of the State. The section itself in its provision, 'this shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function', is a recognition that inequality may or must result from some special abilities or from some deficiency or from some special need and it is clear that the Article does not either envisage or guarantee equal measure in all things to all citizens. To do so regardless of the factors mentioned would be inequality . . ."

Walsh J continued at page 641:-

"Under the provisions of these sections of the Act certain persons are given rights and all other persons are excluded. Whether or not the natural father is excluded depends upon the circumstance whether or not he comes within the description of a person who is given a right, and he may or may not come within some such description. If he is in fact excluded it is because in common with other blood relations and strangers he happens not to come within any such description. There is no discrimination against the natural father as such. The question remains whether there is any unfair discrimination in giving the rights in question to the persons described and denying them to others.

In the opinion of the Court each of the persons described as having rights under s 14, sub-s 1 and s 16, sub-s 1 can be regarded as having, or capable of having, in relation to the adoption of a child a moral capacity or social function which differentiates him from persons who are not given such rights. When it is considered that an illegitimate child may be begotten by an act of rape, by callous seduction or by an act of casual commerce by a man with a woman, as well as by the association of a man with a woman in making a common home without marriage in circumstances approximating to those of married life, and that, except in the latter instance, it is rare for a natural father to take any interest in his offspring, it is not difficult to appreciate the difference in moral capacity and social function between the natural father and the several persons described in the sub-sections in question. In presenting their argument under this head counsel for the appellant have undertaken the onus of showing that in denying to the natural father certain rights conferred upon others s 14, sub-s 1 and s 16, sub-s 1 of the Act are invalid having regard to Article 40 of the Constitution. In the opinion of the Court they have failed to discharge that onus."

I find this reasoning inadequate. The Adoption Act, 1952, does expressly exclude the natural father from the category of "parent". Under these circumstances it is hardly sufficient to say to him that he is not excluded; he merely fails to come within the category of persons who are included. This was particularly relevant to *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567 where the evidence showed that the category of persons included was not wide enough to catch the prosecutor whom the Court accepted to be a concerned and caring parent. Moreover, once the Court had accepted that the prosecutor was a concerned and caring parent it was not logical to justify his exclusion by a reference to natural fathers who had no interest in the welfare of their children. This was to fall into the logical trap warned against in

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the opening paragraph of the passage quoted by treating equally persons who were in different situations, and amounted therefore to unfair discrimination.

The logical flaw in the argument can more easily be seen if one reduces it to a syllogism:-

(1) Many natural fathers show no interest in their offspring and the State may properly exclude them from all say in their children's welfare.

(2) The prosecutor is a natural father.

(3) Therefore the State may properly exclude him from all say in his child's welfare.

With regard to the prosecutor's delay in bringing his proceedings the Supreme Court had the following comment to make (see page 639 of the report):-

"So far as the question of the delay on the appellant's part in bringing his proceedings is concerned it is but fair to state that in the opinion of this Court, on the facts before it, he acted throughout with solicitude for the position of the child's mother and the Court is satisfied that the delay was in a very large measure due to his concern to do nothing to aggravate the mother's condition of ill health."

This being so, the prosecutor's sole protection against his daughter being given in adoption was the letter from his solicitor to the Adoption Board dated the 7 October, 1960, informing them of the prosecutor's opposition to adoption. On the 17 October, 1960, the Adoption Board had acknowledged receipt of this letter and had stated that "the matter has been noted". Under these circumstances, for the Adoption Board to have given his child in adoption without further reference to him was quite extraordinary and merited an adjective somewhat stronger than the word "impolitic" used by the Supreme Court to describe it (see p 639 of the report).

Legal developments since the Nicolaou case

Since *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567 there has been a number of decisions which have given us a greater insight into the Irish Constitution. In particular, the courts have emphasised the importance of Article 40, s 3 of the Constitution which subordinates the law to justice. For instance there is the well known passage in the judgment of Walsh J in *McGee v Attorney General* [1974] IR 284 at p 318 which reads as follows:-

"In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law. The same considerations apply also to the question of ascertaining the nature and extent of the duties which flow from natural law; the Constitution speaks of one of them when it refers to the inalienable duty of parents to provide according to their means for the religious, moral, intellectual, physical and social education of their children: see s 1 of Article 42. In this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable. In the performance of this difficult duty there are certain guidelines laid down in the Constitution for the judge. The very structure and content of the Articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. In particular, the terms of s 3 of Article 40 expressly subordinate the law to justice."

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But if this is so, would not one expect the Constitution to provide a remedy for the "cruel injustice" which Teevan J was able to envisage, if only on a hypothetical basis, in his judgment in *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567?

The second important development in our case law which I would wish to refer to is *East Donegal Co-Operative v Attorney General* [1970] IR 317. In particular, I should like to refer to the famous passage in which Walsh J, giving the judgment of the Supreme Court, states that the presumption of constitutionality of an Act of the Oireachtas carries with it the necessary implication that all proceedings, procedures, discretions and adjudications which were permitted and prescribed by the Act were intended by the Oireachtas to be conducted in accordance with the principles of constitutional justice and not otherwise.

Again it is difficult to believe that a modern court, in the light of the principles set out in that case, would regard the decision of the Adoption Board to give Nicolaou's child in adoption without reference to him as merely "impolitic".

Analysis of the problem

But both suggestions which I have made could be wrong if the natural father has no rights. It therefore becomes necessary to analyse the problem more thoroughly. Article 42 of the Constitution is an extension of Article 41 and refers to parents and children within a family context. It refers to the inalienable rights and duties of parents and to the imprescriptible rights of the child. In other words it refers to a relationship between three people which carries with it reciprocal rights and duties which the positive law is enjoined to respect. The rights of the child are clearly predominant. They alone are described as being imprescriptible, but the parents also have rights. The positive law has accordingly prescribed (in s 3 of the Guardianship of Infants Act, 1964) that a court, in deciding any question concerning custody or guardianship of an infant shall regard the welfare of the infant "as the first and paramount consideration". The clear implication of this phrase is that the welfare of the infant is to be the most important consideration, but also that it is not the only consideration. Otherwise the statute would not choose the adjective "first". The welfare of the infant, while paramount, has to be reconciled so far as practicable with the rights of both parents.

Article 42 of the Constitution is concerned primarily with the relative rights and duties of parents and children, though it also defines the role of the State in the event of the parents failing in their duties to their children.

Article 41, by contrast, is concerned with the family as a group or institution and with its rights vis-a-vis other groups or institutions in society.

Article 41 and Article 42 both refer to the family based on marriage. But Article 42 is helpful in describing the relationship between parent and child.

In *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567 the Supreme Court held (at p 644 of its judgment) that the right of a natural mother to the care and custody of her child, borne out of wedlock, is governed not by Articles 41 and 42 of the Constitution, but is a personal right within the meaning of Article 40, s 3 of the Constitution. Few would now dispute the dictum of Gavan Duffy P in *In re M*, an infant [1946] IR 334 at p 344) that a child born out of wedlock has the same "natural and imprescriptible rights . . . as a child born in wedlock" though he may have been mistaken in deriving them directly from Article 42 of the Constitution. But if the dictum of Gavan Duffy P is to be anything more than a pious platitude, one must ask oneself the second question, "in respect of whom do these rights exist and from where are they derived."

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One cannot derive them from positive law because what the positive law gives the positive law can take away. Moreover, at common law an illegitimate child was nullius filius and was regarded as a charge on the parish. To have held otherwise would have threatened the system of primogeniture and the whole system of feudal landholding. As pointed out by Gavan Duffy P in *In re M, an infant* [1946] IR 334, the common law judges were, at a later stage, driven to the expedient of justifying the natural mother's right to the custody of her child by reference to the fact that she was under a statutory duty to maintain it. Other judges refer to the "blood tie" between mother and child or to the bonds of nature between them. Finally the courts of equity were prepared to listen to anyone -- be he or she natural parent or not -- who could offer anything touching the welfare of the child.

None of the matters referred to in the previous paragraph amounts, in itself, to a proper approach to this problem under the Irish Constitution because they all proceed on the approach of severing the relationship between parent and child. The Irish Constitution, by contrast, stresses the relationship between parent and child and derives from that relationship a system of moral rights and duties which the law is enjoined to respect. These reciprocal rights and duties may derive from the blood tie between parents and child but they are not the same thing as that blood tie. Rather do they amount to a moral code based upon it. It appears to me that they can be referred to as natural rights or duties or constitutional rights and duties and that, in the context of Articles 41 and 42, the two terms are indistinguishable. In so far as Kenny J suggests the contrary in *G v An Bord Uchtala* [1980] IR 32 at p 97, I respectfully disagree with him.

The relationship between natural parents and their child can be compared with that existing between married parents and their children under Article 42 of the Constitution but the group does not form a unit group or institution within the meaning of Article 41. The relationship will give rise to reciprocal duties and rights but the manner in which these will, or can, be expressed will vary greatly with the circumstances. On the one hand the parents may be living together in what could be described as a de facto family. On the other hand the circumstances attending the child's conception or birth may be so horrific as to make it undesirable, or unthinkable, that the parents should live together. As Kenny J has pointed out, illegitimate children are not mentioned in the Constitution. Yet the case law acknowledges that they have the same rights as other children. These rights must include, where practicable, the right to the society and support of their parents. These rights are determined by analogy to Article 42 and are captured by the general provisions of Article 40, s 3 which places justice above the law. Likewise a natural mother who has honoured her obligation to her child will normally have a right to its custody and to its care. No one doubts that a natural father has the duty to support his child and, I suggest, that a natural father who has observed his duties towards his child has, so far as practicable, some rights in relation to it, if only the right to carry out these duties. To say that the child has rights protected by Article 40, s 3 and that the mother, who has stood by the child, has rights under Article 40, s 3 but that the father, who has stood by the child has no rights under Article 40, s 3 is illogical, denies the relationship of parent and child and may, upon occasion, work a cruel injustice.

In these circumstances I would accept the dictum of Finlay CJ in *JK v VW* [1990] 2 IR 437 at p 447 where he says:-

"The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly depending on the circumstances of each individual case. The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as a result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as a result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all the characteristics of a constitutionally protected family, when the rights would be very extensive indeed."

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As the rights of the child would be the same in all the circumstances discussed by the learned Chief Justice in the passage quoted, I can only assume that the variation in the strength of the rights of which the Chief Justice speaks refers to variations in the rights of the father.

I am reinforced in this opinion by the provisions of s 13 of the Status of Children Act, 1987. This inserts a new sub-section into s 11 of the Guardianship of Infants Act, 1964. The new sub-section, (to be known as sub-s 4) reads as follows:-

"In the case of an infant whose father and mother have not married each other, the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the father who is not a guardian of the infant, and for this purpose references in this section to the father or parent of an infant shall be construed as including him."

However s 3 of the Guardianship of Infants Act, 1964, provides that where the custody, guardianship or upbringing of an infant is in question before any court, the court in deciding that question shall have regard to the welfare of the infant as the first and paramount consideration. In other words the test to be applied is the same as that to be applied in the event of a dispute between married parents as to the custody of their child. While I have arrived at my conclusions by a route somewhat different to that followed by the Chief Justice I agree with all of the answers which he has given to the questions posed by the learned Circuit Court Judge.

Murphy J.

As the history of this matter has been set out in the judgments already delivered it is unnecessary for me to repeat it. Instead I would gratefully adopt the recital by the Chief Justice in his judgment of the material facts and the legislation relevant to the issues before this Court. I am in agreement too with the answers proposed by the Chief Justice to the questions raised by the consultative case to advise herein, but in deference to the argument presented to the Court I feel I should express my own views thereon. The submission by counsel on behalf of the applicant in his argument before this Court reduced the substantive issue to a net point which could be encapsulated in the question following:-

"Does a natural father applying to be appointed guardian of his child have the prima facie right to obtain such order?"

Counsel for the applicant, Mr Rogers, contended that a natural father did have such a right. In making that argument he recognised that it ran counter to the decision of the Supreme Court in *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567. In that case it was held by the Supreme Court -- as had been found by each of the three judges of the Divisional Court -- that the fact that the consent of the natural father (unlike that of the natural mother) to an order for adoption was not required by the Adoption Act, 1952, or that he had no opportunity of being heard in relation to the making of an adoption order, did not constitute an infringement of his constitutional rights.

It was pointed out on behalf of the applicant that social and moral attitudes have altered significantly in the thirty years since *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567 was decided. No doubt that is so. For better or for worse, it is clearly the fact that long term relationships having many of the characteristics of a family based on marriage have become commonplace. Relationships which would have been the cause of grave embarrassment a generation ago are now widely accepted. In relation to changing circumstances it may be also noted that there have been medical and scientific changes which may likewise affect, and certainly complicate, any analysis of the relationship between a child and the male and female whose genes it inherits. The question of the rights of a natural father has heretofore involved the acceptance of the fact that the natural (or illegitimate) fathers may comprise a range of males

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extending from loving and caring fathers participating in an enduring relationship with the mother and children, to the psychopathic rapist whose only purpose was to do violence and bring humiliation to the mother. In more recent times one has to recognise a category of biological parenthood within which the male contributes sperm which is provided by means of artificial insemination in a female recipient unknown to the donor. This must be the case by which can be tested the basic proposition whether the mere donation of sperm confers on the donor any natural or constitutional right over any child that may subsequently be identified as having been conceived as a result of such a procedure. In my view that cold and clinical scenario would do much to strengthen the view expressed in *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567 that the mere fact of fatherhood does not give rise to natural or constitutional rights.

Scientific advances may pose even greater problems in relation to the rights of mothers. If it is possible -- as I understand it to be -- to transplant a fertilised ovum in a woman who in due course gives birth to a child, who is the mother for the purposes of Article 40 of the Constitution? The woman who provided the ovum or the woman who gave birth to the child?

These very questions illustrate the fundamental distinction between the line which may have to be drawn between the provision of the genetic material on which life depends and the nurturing of the being, not merely from the time of birth, but from the moment of conception.

The applicant placed some reliance on the majority decision of this Court in *JK v VW* [1990] 2 IR 437. That case had many features in common with the present one. It was an application for guardianship by the natural father of an infant and one of the respondents was the natural mother. Whilst the parents had not married, they had a relationship which endured for some two years. Furthermore, the pregnancy of the mother had been intended by both partners. After the birth of the child and the termination of the relationship between the parents, the mother placed the child for adoption and put it in the custody of the prospective adoptive parents. The father applied to the Circuit Court and the decision of that court was to appoint him guardian of the infant and to direct that custody of the child be given to him. The prospective adoptive parents and the mother appealed to the High Court. Barron J then stated a case for the consideration of the Supreme Court. In the case stated Barron J set out his findings and his conclusion that the child would be well looked after if given into the custody of the father, but would be equally well looked after if retained by the prospective adopters. In particular, he formed the view that the child would obtain the benefit of a higher standard of living and a better standard of education with the adopters than with the father. He concluded, however, that the proper interpretation of s 6A of the Guardianship of Infants Act, 1964, required him to apply the following test:-

- "1. Whether the natural father is a fit person to be appointed guardian and, if so,
2. Whether there are circumstances involving the welfare of the child which required that, notwithstanding he is a fit person, he should not be so appointed."

Later in the case stated he expanded that test in the following terms:-

"In my opinion, having regard to the purposes of the Status of Children Act, 1987, the rights of the father should not be denied by consideration of the welfare of the child alone, only where -- and they do not exist in the present case -- there are good reasons for so doing."

He then posed for the determination of the Supreme Court the question:-

"Am I correct in my opinion as to the manner in which s 6A of the Guardianship of Infants Act, 1964, as inserted by s 12 of the Status of Children Act, 1987, should be construed?"

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The then Chief Justice, Finlay CJ, delivering a judgment in which Walsh, Griffin and Hederman JJ concurred, held that the opinion expressed by the learned trial judge in the case stated as to the manner in which s 6A should be construed was not correct in law. Finlay CJ explained (at pp 446 and 447):-

"The construction apparently placed by the learned trial judge in the case stated upon s 6A to a large extent would appear to spring from the submission made on behalf of the applicant on this appeal that he has got a constitutional right, or a natural right identified by the Constitution, to the guardianship of the child, and that the Act of 1987 by inserting s 6A into the Act of 1964 is hereby declaring or acknowledging that right."

The then Chief Justice went on to say expressly:-

"I am satisfied that this submission is not correct."

What the majority judgment unquestionably held was that s 6A aforesaid created merely a right to apply for guardianship: it did not presume its existence.

However, Finlay CJ having rejected the contention that a natural father had a constitutional or natural right to the guardianship of his child commented as follows:-

". . . (Although) there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right of guardianship in the father of the child exists. This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married.

The extent and the character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstance of each individual case.

The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as the result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed."

Clearly the word "rights" as used in that quotation from the then Chief Justice do not refer to any constitutional right or any natural right recognised by the Constitution. The learned judge had expressly negated the existence of any such right. It seems to me that he was identifying what might be described as a "right" deriving from the involvement of the father with his child and that a right or interest which would be co-extensive with the involvement with, and above all the benefit which it conferred on, the child. Where an application is made by a person, other than a parent, to be appointed guardian of a child, the judge to whom the application is made would necessarily and properly consider the circumstances in which the application was made; the familiarity of the applicant with the child; the frequency of their meetings; and the reaction of each to the other. Clearly in a case where the applicant had custody, for whatever reason, of the child and provided generously and successfully for its material, moral and social welfare, these are factors which the court would take into account. Not only that; it could be said on behalf of the applicant that he had the "right" to have these matters taken into account on the basis that the court owed a duty to him so to do.

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The nature and the status of the rights of parents -- even married parents -- seeking custody of their child as against third parties was very fully considered by the House of Lords in *J v C* [1970] AC 668. In that case the married Spanish parents sought custody of their son who had been left with English foster parents from four days after his birth for the greater part of his young life. When he was five years of age his parents sought custody of him and the foster parents responded by having him made a ward of court in England. Unfortunately, another five years were to elapse before the issue was fully heard in the High Court. Whilst the Spanish parents had experienced serious financial problems and there were difficulties arising from the health of both the child and its true mother, these problems had been resolved before the matter came on for hearing by the English court. It was recognised at that stage that the Spanish parents were in a position to provide adequately for the welfare of the child. The argument in the Chancery Division was virtually identical with that presented to this Court. That argument was summarised by Lord Guest in his speech (at p 692) in the following terms:-

"It is argued that united parents are prima facie entitled to the custody of their infant children and that the Court of Chancery as representing the Queen as *parens patriae* will only deprive them of the care and control of their infant children if they are unfitted by character, conduct or position in life to have this control and that in the case of what has been described as an unimpeachable parent the court must, unless in the very exceptional case, give the care and control to the parent."

That argument was rejected in the High Court and again in the Court of Appeal. What the speeches in the House of Lords demonstrated was the evolution away from the "rights" of the parents and towards the welfare of the child. The common law position had been identified by Knight Bruce VC in *In re Fynn* (1848) 2 De G & Sm 457 where he said (at page 474):-

"The acknowledged rights of a father with respect to the custody and guardianship of his infant children are conferred by the law, it may be with a view to the performance by him of duties towards the children, and, in a sense, on condition of performing those duties; but there is great difficulty in closely defining them. It is substantially impossible to ascertain or watch over their full performance; nor could a court of justice usefully attempt it. A man may be in narrow circumstances; he may be negligent, injudicious, and faulty as the father of minors; he may be a person from whom the discreet, the intelligent, and the well-disposed, exercising a private judgment, would wish his children to be, for their sakes and his own, removed; he may be all this without rendering himself liable to judicial interference, and in the main it is for obvious reasons well that it should be so. Before this jurisdiction can be called into action between them it must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended - should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong."

The principle upon which the Chancery courts acted was summarised by Lord Cranworth in *Hope v Hope* (1854) 4 De GM & G 328 (at p 344) in the following terms:-

"The jurisdiction of this court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as *parens patriae*, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects."

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What is described as "the more enlightened view" appears to have found its expression -- though not without some qualifications -- in the judgment of the Irish Court of Appeal in *In re O'Hara* [1900] 2 IR 232. At pp 239 and 240 of that report FitzGibbon LJ summarised his views as follows:-

"The following principles appear to be settled:- 1, At Common Law, the parent has an absolute right to the custody of a child of tender years, unless he or she has forfeited it by certain sorts of misconduct; 2, Chancery, when a separate tribunal, possessed a jurisdiction different from that of the Queen's Bench, and essentially parental, in the exercise of which the main consideration was the welfare of the child, and the Court did what, on consideration of all the circumstances, it was judicially satisfied that a wise parent, acting for the true interest of the child, would or ought to do, even though the natural parent desired and had the Common Law right to do otherwise, and had not been guilty of misconduct; 3, The Judicature Act has made it the duty of every Division of the High Court to exercise the Chancery jurisdiction; 4, In exercising the jurisdiction to control or to ignore the parental right the Court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

In his speech in *J v C* [1970] AC 668 Lord MacDermott reviewed the foregoing among other cases and passed to the UK Guardianship of Infants Act, 1925, s 1, which imposed upon every court dealing with matters touching upon infants the obligation to have "regard to the welfare of the infant as the first and paramount consideration" and expressly provided that the court should not "take into consideration whether from any other point of view the claim of the father, or any right of common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father". Like FitzGibbon LJ before him, Lord MacDermott at the conclusion of his speech summarised his conclusions in numbered paragraphs as follows:-

1. Section 1 of the Act of 1925 applies to disputes not only between parents, but between parents and strangers and strangers and strangers.
2. In applying section 1, the rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to that issue.
3. While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute for the purposes of the investigation, the broad nature of which is still as described in the fourth of the principles enunciated by Fitzgibbon LJ in *In re O'Hara* [1900] 2 IR 232, 240.
4. Some of the authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in the cases containing dicta to that effect. But I think a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by such a change. I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to the expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case."

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I will quote also a passage from the speech of Lord Guest in *J v C* [1970] AC 668 both for the principle which it enunciates and the terminology in which that principle is expressed. I quote from p 697 as follows:-

"It is clear to me that even prior to the 1925 Act the paramount consideration in regard to the custody of infants was the infant's welfare. The father's wishes were to be considered but only as one of the factors as bearing on the child's welfare. The father had no 'right' as such to the care and control of his infant children. The comparative absence of authority in the intervening years between 1900 and 1925 may have been due to the fact that the change in the climate of social conditions was taking place gradually and its influence on the courts was almost imperceptible and was taking place in the chambers of the Chancery Courts. But whatever may have been the state of the law prior to the 1925 Act, section 1 of that Act set any doubts at rest and made it perfectly clear that the first and paramount consideration was the welfare of the infant."

Lord Donovan demoted still further the "rights" of the natural parent. He expressed his views at p 727 in the following terms:-

"It is incredible to me that Parliament would pass such an enactment as section 1 of the 1925 Act if the position were that it made no difference at all to the law as already expounded by the judges. Or that it would not have incorporated a proviso preserving the alleged 'rights' of the natural parent if it had intended to preserve them. I think the section means just what it says -- no more and no less: and although the claim of natural parents to the custody and upbringing of their own children is obviously a most weighty factor to be taken into consideration in deciding what is in the best interests of the infant, yet the legislature recognised that this might not always be the determining factor, whether the parents were unimpeachable or not."

In those circumstances the House of Lords rejected the appeal and upheld the decision of the judge of the High Court in exercising his discretion to refuse custody of the child to his true parents. In reaching their conclusion the House of Lords designated the alleged right of the natural parents to custody as a word encased in inverted commas and at best as one of the many factors to which the court would properly have regard in determining where the best interest of the infant lay in an issue with regard to its custody or guardianship.

Clearly these English cases have little direct application to any right which is elevated to constitutional status by *Bunreacht na hEireann*. The value of those judgments, as I see it, is the distinction which they have drawn between the rights of parties applying to be appointed as guardian and the factors which must be taken into account by the judge hearing the application. It does seem to me that in fact a similar distinction was made by Finlay CJ in *JK v VW* [1990] 2 IR 437 when he chose the word "factors" rather than the word "rights" to describe the totality of the matters to be reviewed in a guardianship case. He summarised the position in the final paragraphs of his judgment (at p 447) as follows:-

"The discretion vested in the court on the making of such an application [for guardianship] must be exercised regarding the welfare of the infant as the first and paramount consideration.

The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by and the society of its father is one of many factors which may be viewed by the court as relevant to its welfare.

In a case such as the present case where the application for appointment as a guardian is linked to the application for a present order of custody, regard should not be had to the objective of satisfying the wishes and desires of the father to be involved in the guardianship of and to enjoy the society of his child

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unless the court has first concluded that the quality of welfare which would probably be achieved for the infant by its present custody, which is with the prospective adoptive parents, as compared with the quality of welfare which would probably be achieved for the infant by custody with the father, is not to an important extent better."

I do not think it is necessary to reach a final conclusion as to whether there is some residual right in a father in equity to custody of or guardianship over his child. That right, if it does exist, and deriving solely from the biological relationship between the father and the son is unlikely to be a factor of serious significance in determining whether an order for guardianship should be granted or withheld. On the other hand fatherhood, in conjunction with a long standing and active commitment to the welfare of the child is a factor to which the trial judge would be bound to give serious consideration and indeed might well be of decisive importance.

However, the factors to be considered by a judge hearing an application by a natural father (or any other person) to be appointed guardian of an infant child may be very extensive indeed. They will extend to any matter which could impinge upon the present or future welfare of the infant concerned.

In my view the legal principles applicable to the general issue debated before this Court may be summarised as follows:-

1. What are described as "natural rights" whether arising from the circumstances of mankind in a primitive but idyllic society postulated by some philosophers but unidentified by any archaeologist, or inferred by moral philosophers as the rules by which human beings may achieve the destiny for which they were created, are not recognised or enforced as such by the courts set up under the Constitution.
2. The natural rights aforesaid may be invoked only insofar as they are expressly or implicitly recognised by the Constitution; comprised in the common law; superimposed on to common law principles by the moral intervention of the successive Lord Chancellors creating the equity jurisdiction of the courts, or expressly conferred by an Act of the Oireachtas, or other positive human law made under or taken over by, and not inconsistent with, the Constitution.
3. The Constitution does not confer on or recognise in a natural father any right to the guardianship of his child (see *The State (Nicolaou) v An Bord Uchtala* [1966] IR 567 and *JK v VW* [1990] 2 IR 437).
4. The common law right of parents -- and a fortiori the father -- to guardianship and custody of their or his child was moderated by equitable principles (see *In re O'Hara* [1900] 2 IR 232).
5. Such rights as the family or father had in equity to guardianship of their or his child were supplanted by the provisions of the Guardianship of Infants Act, 1964 (see *Lord Donovan in J v C* [1970] AC 668).
6. The undoubted statutory right of the natural father to apply for guardianship of his child carries with it the right to have the application properly considered by the court to which the application is made. That analysis will involve the consideration of a multiplicity of material facts varying with the particular circumstances of the case and in particular the actual personal, financial and emotional relationship that has existed between the father and his child and, above all, the value to the child of that relationship being continued but only in the context of how such benefits would interact with all or any other relevant considerations.

As I have already indicated, I believe that in these circumstances the particular questions posed by the learned judge of the Circuit Court should be answered in the manner suggested by the Chief Justice.

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Keegan v Ireland

Series A, No. 290

Application No. 16969/90

Before the European Court of Human Rights

26 May 1994

(1994) 18 E.H.R.R. 342(The President Judge Ryssdal; Judges De Meyer, Martens, Palm, Pekkanen, Loizou, Morenilla, Makarczyk, Blayney)

26 May 1994

The applicant met his girlfriend in May 1986, and they began living together in February 1987. In February 1988, it was confirmed that she was pregnant. The conception was the result of a deliberate decision, and the couple had planned to marry. Shortly afterwards however, the relationship broke down and they ceased to co-habit. After the child was born, it was placed for adoption by the mother without the applicant's knowledge or consent. The relevant provisions of the Adoption Act 1952 permitted the adoption of a child born outside marriage without the consent of the natural father. The applicant applied to the Circuit Court, under the Guardianship of Infants Act 1964, to be appointed as the child's guardian, which would have enabled him to challenge the proposed adoption. He was appointed guardian and awarded custody of the child. The decision of the Circuit Court was upheld by the High Court, but on appeal by way of case stated the Supreme Court ruled that the wishes of the natural father should not be considered if the prospective adopters could achieve a quality of welfare which was to an important degree better. The case was remitted to the High Court. On the rehearing a consultant psychiatrist gave evidence that if the placement with the prospective adopters was disturbed after a period of over a year, the child was likely to suffer trauma and to have difficulty in forming relationships of trust. The High Court therefore declined to appoint the applicant as guardian. An adoption order was subsequently made.

Held, unanimously:

- (i) that it was unnecessary to examine the Government's preliminary objection concerning the applicant's standing to complain on behalf of his daughter;
- (ii) that the remainder of the Government's preliminary objections should be dismissed;
- (iii) that Article 8 applied in the instant case and had been violated;
- (iv) that Article 6(1) had been violated;
- (v) that it was unnecessary to examine the applicant's complaint under Article 14;
- (vi) that Ireland was to pay, within three months, IR£12,000 in respect of non-pecuniary and pecuniary damage, and in respect of costs and expenses, the sums resulting from the calculation to be made in accordance with paragraph 71 of the judgment. *342

1. Preliminary objections: locus standi to complain on behalf of child; exhaustion of domestic remedies (Art 26).

(a) It was contended by the Government that the applicant had no locus standi to complain on behalf of the child because only a person who exercises parental rights or is a guardian is entitled to bring a complaint under the Convention on behalf of a child. It was unnecessary to examine this objection: in

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the light of the adoption order the applicant no longer pursued any claim in respect of alleged infringements of his daughter's rights. [33–35]

(b) Before the Commission the Government had not argued that the applicant's failure to lodge an appeal to the Supreme Court amounted to a non-exhaustion. The Government was accordingly estopped from raising the objection for the first time before the Court. In any event no appeal would lie. [38]

(c) The only remedies which require exhaustion are those which are effective and are capable of redressing the alleged violation. Although the applicant had not complained before the Irish courts that the law did not permit him to become involved in the adoption process, and had not challenged the constitutionality of the proceedings, such claims would have had no prospect of success, since the caselaw of the Supreme Court denies to a natural father any constitutional right to take part in the adoption process. [39]

2. Applicability of Article 8: whether relationship a “family”.

(a) The notion of the “family” in Article 8 is not confined solely to marriage-based relationships and may encompass other de facto “family” ties, where the parties are living together outside marriage. A child born out of such a relationship is ipso iure part of that family unit from the moment of his or her birth, and by the very fact of it. There thus exists between the child and the parents a bond amounting to family life even if at the time of the child's birth the parents are no longer co-habiting or if their relationship has then ended. [44]

(b) The relationship between the applicant and the child's mother lasted more than two years, during one of which they co-habited. The conception was the result of a deliberate decision, and the couple had planned to get married. The relationship between the applicant and the child's mother had the hallmark of family life for the purposes of Article 8, and accordingly from the moment of the birth a bond amounting to family life existed between the applicant and the child. [45]

3. Compliance with Article 8: whether interference; whether necessary in a democratic society.

(a) The fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order, amounted to an interference with the applicant's right to respect for family life. [51]

(b) The decision to place the child for adoption without the father's knowledge or consent, and the decisions taken by the courts concerning the child's welfare, were in accordance with Irish law, and pursued the legitimate aim of protecting the rights and freedoms of the child. [53]

(c) However, the interference was not necessary in a democratic society. The essential problem was that Irish law permitted the child *343 to be placed for adoption shortly after her birth without the applicant's knowledge or consent. The placement not only jeopardised the applicant's ties with the child, but also set in motion a process which was likely to prove irreversible, thereby putting the applicant at a significant disadvantage in his contest with the prospective adopters for the custody of the child. The Government had advanced no reasons relevant to the welfare of the child to justify this. [55]

4. Compliance with Article 6(1): entitlement to a hearing.

(a) The applicability of Article 6(1) was not seriously contested by the Government. [57]

(b) The adoption process had to be distinguished from the guardianship and custody proceedings. The applicant had no rights under Irish law to challenge the decision to place the child for adoption, and indeed had no standing in the adoption procedure generally. His only recourse to impede the adoption was to bring guardianship and custody proceedings. By the time these proceedings had terminated, the scales concerning the child's welfare had tilted inevitably in favour of the prospective adopters. His right to a hearing under Article 6(1) had accordingly been violated. [59]

5. Just Satisfaction: damages, costs and expenses (Art. 50).

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- (a) The Court awarded IR £2,000 for pecuniary loss incurred in respect of the guardianship and custody proceedings before legal aid was granted. [64 and 65]
- (b) The Court awarded IR £10,000 for non-pecuniary loss incurred in respect of the trauma, anxiety and feelings of injustice that he must have experienced. [66 to 68]
- (c) IR £42,863 (less 51,691.29 FF legal aid) was awarded in respect of costs and expenses, to be increased by any VAT payable thereon. [69 to 71]

Representation

Mrs E. Kilcullen, Assistant Legal Adviser, Department of Foreign Affairs (Agent), Mr D. Gleeson Senior Counsel (Counsel), Mr M. Hanna, Mr D. McFadden, Mr B. Carey (Advisers) for the Government.

Sir Basil Hall (Delegate) for the Commission.

Ms D. Browne (Counsel), Mr B. Walsh (Solicitor), Ms C. Walsh (Adviser) for the applicant.

The following cases are referred to in the judgment:

1. Marckx v. Belgium (A/31) (1979) 2 E.H.R.R. 330.
2. Johnston v. Ireland (A/112) (1986) 9 E.H.R.R. 203.
3. W. v. United Kingdom (A/121-A) (1987) 10 E.H.R.R. 29.
4. Berrehab v. the Netherlands (A/138) (1988) 11 E.H.R.R. 322.
5. Eriksson v. Sweden (A/156) (1989) 12 E.H.R.R. 183.
6. Powell and Rayner v. United Kingdom (A/172) (1990) 12 E.H.R.R. 355.
7. Open Door and Dublin Well Woman v. Ireland (A/246) (1992) 15 E.H.R.R. 244.

The following additional cases are referred to in the Report of the Commission:

8. Le Compte v. Belgium (A/43) (1981) 4 E.H.R.R. 1.
9. Abdulaziz v. U.K. (A/94) (1985) 7 E.H.R.R. 471.
10. Benthem v. Netherlands (A/97) (1985) 8 E.H.R.R. 1.
11. Lithgow v. U.K. (A/102) (1986) 8 E.H.R.R. 329.
12. Van Marle v. Netherlands (A/101) (1986) 8 E.H.R.R. 483.
13. Rees v. United Kingdom (A/106) (1986) 9 E.H.R.R. 56.
14. B. v. France (A/232-C) (1992) 16 E.H.R.R. 1.
15. Beljoudi v. France (A/234-A) (1992) 14 E.H.R.R. 801.

The Facts

I. The circumstances of the case

6. The applicant met his girlfriend Miss V (“V”) in May 1986. They lived together from February 1987 until February 1988. Around Christmas 1987 they decided to have a child. Subsequently, on 14 February 1988, they became engaged to be married.

On 22 February 1988 it was confirmed that V was pregnant. Shortly after this the relationship between the applicant and V broke down and they ceased co-habiting. On 29 September 1988 V gave birth to a daughter S of whom the applicant was the father. The applicant visited V at a private nursing home and saw the baby when it was one-day-old. Two weeks later he visited V's parents' home but was not permitted to see either V or the child.

7. During her pregnancy V had made arrangements to have the child adopted and on 17 November 1988 she had the child placed by a registered adoption society with the prospective adopters. She informed the applicant of this in a letter dated 22 November 1988.

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The proceedings before the Circuit Court

8. The applicant subsequently instituted proceedings before the Circuit Court to be appointed guardian under section 6A(1) of the Guardianship of Infants Act 1964, which would have enabled him to challenge the proposed adoption. He also applied for custody of the child. Pursuant to the Adoption Act 1952, an adoption order cannot be made, inter alia, without the consent of the child's mother and the child's guardian¹ while a married man is a guardian of his children, an unmarried man is not unless so appointed by the court. ²

9. On 29 May 1989 the Circuit Court appointed the applicant guardian and awarded him custody.

The proceedings before the High Court

10. Following an appeal against the judgment of the Circuit Court by V and the prospective adopters, the High Court found in July 1989 that the applicant was a fit person to be appointed guardian and that there were no circumstances involving the welfare of the child which *345 required that the father's rights be denied. Barron J. of the High Court stated:

I am of the opinion that in considering the applications both for custody and guardianship I must have regard to circumstances as they presently exist and that in considering the welfare of the child I must take into account the fact that she has been placed for adoption. Each application must be taken as part of a global application and not as a separate and distinct one. The test therefore is:

- (1) whether the natural father is a fit person to be appointed guardian, and, if so:
- (2) whether there are circumstances involving the welfare of the child which require that, notwithstanding he is a fit person, he should not be so appointed.

In the present case, I am of the opinion that he satisfies the first condition and that unless the welfare of the child is to be regarded as the sole consideration, he satisfies the second condition ...

In my opinion, having regard to the purposes of the Status of Children Act 1987, the rights of the father should not be denied by considerations of the welfare of the child alone, but only where—and they do not exist in the present case—there are good reasons for so doing.

The proceedings before the Supreme Court

11. After the conclusion of the High Court proceedings Barron J. acceded to an application by V and the prospective adopters to state a case for the opinion of the Supreme Court. The questions put to the Supreme Court by the judge were as follows:

- (1) Am I correct in my opinion as to the manner in which section 6A of the Guardianship of Infants Act 1964, as inserted by section 12 of the Status of Children Act 1987, should be construed?
- (2) If not, what is the proper construction of that section and what other, if any, principles should I have applied or considered whether in relation to guardianship or custody which derive either from law or from the provisions of the Constitution?

12. Delivering the majority judgment of the Supreme Court on 1 December 1989, Finlay C.J. stated that the High Court had incorrectly construed Section 6A of the 1964 Act as conferring on the natural father a right to be a guardian. He considered that the Act only gave the natural father a right to apply to be guardian. It did not equate his position with that of a married father. The first and paramount consideration in the exercise of the court's discretion was the welfare of the child, and the blood link between child and father as merely one of the many relevant factors which may be viewed by the court as relevant to that question. He added, inter alia:

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... although there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right to guardianship in the father of the child exists. This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married. *346

The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstances of each individual case.

The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as the result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed ...

He concluded that:

... regard should not be had to the objective of satisfying the wishes and desires of the father to be involved in the guardianship of and to enjoy the society of his child unless the Court has first concluded that the quality of welfare which would probably be achieved for the infant by its present custody which is with the prospective adoptive parents, as compared with the quality of welfare which would probably be achieved by custody with the father is not to an important extent better.

The matter was then referred back to the High Court for the case to be decided in light of this interpretation.

The subsequent proceedings before the High Court

13. The High Court resumed its examination of the case in early 1990. It heard, inter alia, the evidence of a consultant child psychiatrist who considered that the child would suffer short-term trauma if moved to the applicant's custody. In the longer term she would be more vulnerable to stress and be less able to cope with it. She would also have difficulty in forming "trust" relationships.

14. In his judgment of 9 February 1990 Mr Justice Barron recalled that the applicant wished bona fide to have custody of his daughter and that he felt the existence of an emotional bond.

He had also noted that if the child remained with the adopters she would obtain the benefit of a higher standard of living and would be likely to remain at school longer. However, he considered that differences springing solely from socio-economic causes should not be taken into account where one of the claimants is a natural parent. In his view "to do otherwise would be to favour the affluent as against the less well-off which does not accord with the constitutional obligation to hold all citizens as human persons equal before the law".

Applying the test laid down by the Supreme Court in the light of the dangers to the psychological health of the child he allowed the appeal of the natural mother and the prospective adopters and concluded as follows:

The result, it seems to me, is this. If the child remains where she is, she will if the adoption procedures are completed become a member of a family recognised by the Constitution and freed from the danger of psychological trauma. On the other hand if she is moved she will not be a *347 member of such a family and in the short and long term her future is likely to be very different. The security of knowing herself to be a member of a loving and caring family would be lost. If moved, she will I am sure be a

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member of a loving and caring unit equivalent to a family in her eyes. Nevertheless the security will be lost and there will be insecurity arising from the several factors which have been enumerated.

In my view these differences and the danger to her psychological health are of such importance that I cannot hold that the quality of welfare likely to be achieved with the prospective adopters would not be to an important extent better than that likely to be achieved by custody with the father. That being so, his wish and desire to be involved in the guardianship of and to enjoy the society of his child is not a factor which I am to take into account. In these circumstances, the welfare of the infant requires her to remain in her present custody. Accordingly the application for relief must be refused.

15. An adoption order was subsequently made in respect of the child.

II. Relevant domestic law

Appeals to the Supreme Court

16. A decision of the High Court which determines an appeal from the Circuit Court cannot be appealed to the Supreme Court.³ The High Court can, however, ask for the opinion of the Supreme Court on points of law by way of a case stated.

Adoption

17. The adoption of children in Ireland is governed by the Adoption Act 1952. This Act was amended in 1964, 1974 and 1976.

Section 8 of the 1952 Act established a body to be known as the Adoption Board (An Bord Uchtála) to fulfil the functions assigned to it by the Act, its principal function being to make adoption orders on application being made to it by persons desiring to adopt a child.

18. Arrangements for the adoption of a child under the age of seven years may only be made by a registered adoption society or a Health Board⁴ and where the mother or guardian of a child proposes to place the child at the disposal of a registered adoption society for adoption the society must, before accepting the child, furnish the mother or father with a statement in writing explaining clearly the effect of an adoption order on the rights of the mother or guardian and the provisions of the Act relating to consent to the making of an adoption order. ⁵ When the applicant's child was placed for adoption there was also a requirement that notice in writing had to be given to the Adoption Board before or within seven days after the reception of the child into the home of the proposed adopters. ⁶

1. Consent

19. As regards the requisite consent of the natural parent, section 14 of the 1952 Act provides as follows:

(1) An adoption order shall not be made without the consent of every person being the child's mother or guardian or having charge of or control over the child, unless the Board dispenses with any such consent in accordance with this section.

(2) The Board may dispense with the consent of any person if the Board is satisfied that that person is incapable by reason of mental infirmity of giving consent or cannot be found.

...

(6) A consent may be withdrawn at any time before the making of an adoption order.

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2. Entitlement to be heard by the Adoption Board

20. As regards those persons who are entitled to be heard on an application for an adoption order, section 16 of the 1952 Act provides as follows:

The following persons and no other persons shall be entitled to be heard on an application for an adoption order—

- (a) the applicants,
- (b) the mother of the child,
- (c) the guardian of the child,
- (d) a person having charge of or control over the child,
- (e) a relative of the child,
- (f) a representative of a registered adoption society which is or has been at any time concerned with the child,
- (g) a priest or minister of a religion recognised by the Constitution (or, in the case of any such religion which has no ministry, an authorised representative of the religion) where the child or a parent (whether alive or dead) is claimed to be or to have been of that religion,
- (h) an officer of the Board,
- (i) any other person whom the Board, in its discretion, decides to hear.

(2) A person who is entitled to be heard may be represented by counsel or solicitor.

(3) The Board may hear the application wholly or partly in private.

(4) Where the Board has notice of proceedings pending in any court of justice in regard to the custody of a child in respect of whom an application is before the Board, the Board shall make no order in the matter until the proceedings have been disposed of.

21. The Supreme Court has held in the leading case of the State *Nicolaou v. An Bord Uchtála* (the Adoption Board) [1966] Irish Reports 567 that the relevant provisions of the Adoption Act 1952, which permitted the adoption of a child born out of wedlock without the consent of the natural father or without the right to be heard by the Adoption Board prior to the making of an adoption order, were not repugnant to the Constitution on the grounds that they discriminated against the natural father or infringed his constitutional rights.⁷ It also *349 held that the protection afforded to the “family” in Article 41 of the Constitution related only to the “family” based on marriage.

3. Application to the High Court

22. Section 20 of the 1952 Act provides:

20. (1) The Board may (and, if so requested by an applicant for an adoption order, the mother or guardian of the child or any person having charge of or control over the child, shall, unless it considers the request frivolous) refer any question of law arising on an application for an adoption order to the High Court for determination.

(2) Subject to rules of court, a case stated under this section may be heard in camera.

Custody and guardianship

1. Welfare of the child

23. As regards proceedings relating, inter alia, to the custody or guardianship or upbringing of an infant, the Guardianship of Infants Act 1964 provided as follows:

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3. Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.

'Welfare' in relation to an infant is defined as follows in section 2 of the said Act:

'Welfare', in relation to an infant, comprises the religious and moral, intellectual, physical and social welfare of the infant.

2. Rights of married parents

24. Section 6 of the 1964 Act provided as follows:

(1) The father and mother of an infant shall be guardians of the infant jointly.

(2) On the death of the father of an infant the mother, if surviving, shall be guardian of the infant, either alone or jointly with any guardian appointed by the father or by the court.

(3) On the death of the mother of an infant the father, if surviving, shall be guardian of the infant, either alone or jointly with any guardian appointed by the mother or by the court.

3. Rights of the natural father

25. The definition of "father" under section 2 of the 1964 Act did not include the father of a child born out of wedlock.

26. The Status of Children Act 1987 amended the Guardianship of Infants Act 1964 in the following way:

11. Section 6 of the Act of 1964 is hereby amended by the substitution of the following subsection for subsection (4):

"(4) Where the mother of an infant has not married the infant's *350 father, she, while living, shall alone be the guardian of the infant unless there is in force an order under section 6A (inserted by the Act of 1987) of this Act or a guardian has otherwise been appointed in accordance with this Act."

12. The Act of 1964 is hereby amended by the insertion after section 6 of the following section:

6A

(1) "Where the father and mother of an infant have not married each other, the court may on the application of the father, by order appoint him to be a guardian of the infant.

(2) ... the appointment by the court under this section of the father of an infant as his guardian shall not affect the prior appointment of any person as guardian of the infant under section 8(1) of this Act unless the court otherwise orders ..."

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27. As regards court applications for custody of an infant, the 1964 Act provided as follows:

11.

(1) Any person being a guardian of an infant may apply to the court for its direction on any question affecting the welfare of the infant and the court may make such order as it thinks proper.

The court may by an order under this section

(a) give such directions as it thinks proper regarding the custody of the infant and the right of access to the infant of his father or mother;

...

28. This section of the 1964 Act was amended by the 1987 Act as follows:

13. Section 11 of the Act of 1964 is hereby amended by the substitution of the following subsection for subsection (4):

“(4) In the case of an infant whose father and mother have not married each other, the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the father who is not a guardian of the infant, and for this purpose references in this section to the father or parent of an infant shall be construed as including him.”

4. Powers of guardians

29. The 1964 Act provides, inter alia, that a guardian under the Act shall be entitled (1) to the custody of the infant and to take proceedings for the restoration of his custody of the infant against any person who wrongfully takes away or detains the child and (2) to the possession and control of all property of the infant (section 10).

Recent developments in Irish adoption practice

30. The following developments have taken place subsequent to the facts of the present case.

By memorandum of 30 April 1990 from the Registrar of the Adoption Board, the relevant adoption societies and social workers have been notified, inter alia, of the rights of the natural father to apply for joint guardianship and/or custody of or access to his child. The *351 memorandum also draws attention to the desirability of ascertaining from the mother and, where practicable, the father, his intentions in relation to the child as regards adoption although it recognises the practical difficulties which may arise when mothers do not want to involve the father or do not know who or where he is.

Where an adoption agency is given an indication by the natural father that he opposes the placement of the child for adoption the agency is advised to consider the prudence of delaying the placement for a period. The memorandum further states that where a natural father has applied to a court under no circumstances should the child be placed for adoption pending the determination of the court proceedings.

By a letter of 6 April 1992 the Adoption Board has informed the relevant adoption societies and social workers of a review of its policy in relation to natural fathers of children placed for adoption and the necessity of following new procedures. The letter indicates that whenever a natural father is

(a) named as father on the child's birth certificate,

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(b) in a continuous relationship with the mother, he should be notified, if not already aware, of the application to adopt his child and offered a hearing by the Board on the application.

In addition two forms must now be completed by the adoption agency or by the applicant or applicants. These forms make the fullest relevant enquiries for the purpose, *inter alia*, of ascertaining the identity and intentions of the natural father as regards the proposed adoption.

PROCEEDINGS BEFORE THE COMMISSION

31. Mr Keegan applied to the Commission on 1 May 1990. He complained that there had been a violation of his right to respect for family life (Article 8 of the Convention) in that his child had been placed for adoption without his knowledge or consent and that national law did not afford him even a defeasible right to be appointed guardian. He further complained of a denial of his right of access to court (Article 6(1)) in that he had no *locus standi* in the proceedings before the Adoption Board. He also alleged that, as the natural father, he had been discriminated against in the exercise of the above-mentioned rights (Article 14 taken in conjunction with Article 6 and/or Article 8) when his position was compared to that of a married father.

32. The application was declared admissible on 13 February 1992. In its report of 17 February 1993, the Commission expressed the opinion that there had been a violation of Article 8 and of Article 6(1) (unanimously) and that it was not necessary to examine whether there had been a violation of Article 14 taken in conjunction with Article 6 and/or Article 8 (by eleven votes to one).

The full text of the Commission's opinion follows.

Opinion

A. Complaints declared admissible⁴³. 8 The Commission declared admissible the applicant's complaints that the State has failed to respect his family life in that, *inter alia*, it allows the placement of a child for adoption without the knowledge or consent of the natural father and does not afford a natural father even a defeasible right to be appointed guardian, that he had no standing before the Adoption Board and that he has been discriminated against as a natural father.

B. Points at issue⁴⁴. The issues to be determined are:

- whether there has been violation of Article 8 of the Convention in that the applicant's daughter was placed for adoption without his knowledge or consent;
- whether there has been violation of Article 8 of the Convention as regards the determination of the applicant's claim to guardianship of his child;
- whether there has been a violation of Article 6(1) of the Convention in that the applicant had no standing in the adoption procedure;
- whether the applicant has been discriminated against as a natural father contrary to Article 14 of the Convention in conjunction with Article 6 and/or Article 8 of the Convention.

C. Article 8 of the Convention⁴⁵. Article 8 of the Convention provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or

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crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

46. The Commission has first examined whether the applicant's relationship with his daughter S falls within the scope of “family life” as protected by the above provision.

47. The applicant submits that he enjoyed a steady relationship with the child's mother V and that the pregnancy was planned, the applicant having every intention of fulfilling the role of father to the child in a stable family setting. The Government submit that the applicant and S have never co-habited and that a mere blood relationship is insufficient in itself to base a claim to the existence of “family life”.

48. The Commission recalls that the existence or not of a “family life” falling within the scope of Article 8 of the Convention will depend on a number of factors, of which co-habitation is only one, and on the circumstances of each particular case.⁹ The application of this principle has been found by the Commission to extend equally to the relationship between natural fathers and their children born out of wedlock. ¹⁰ Further, the Commission considers that Article 8 cannot be interpreted as only protecting “family life” which has already been established but, where the circumstances warrant it, must extend to the potential relationship which may develop between a natural father and a child born out of wedlock. Relevant factors in this regard include the nature of the relationship between the natural parents and the natural father's demonstrable interest in the commitment to the child both before and after the birth.

49. The Commission notes that in this case the applicant and the child's mother co-habited and that their relationship could not be characterised as casual or fleeting. The High Court found as fact that the child was planned by both parents and that the applicant felt an emotional bond with the child whom he had seen briefly after the birth at the hospital and in respect of whom he had a bona fide desire for custody. In the light of these factors, the Commission finds that the applicant's links with the child are sufficient to bring the relationship within the scope of Article 8 of the Convention.

50. The Commission has therefore examined whether there has been any failure to respect, or interference with, the applicant's family life in regard to his complaints that his daughter was placed for adoption without his knowledge or consent and that he is not afforded as a natural father even a defeasible right to be appointed guardian of his child born out of wedlock.

51. The Commission considers that, in effect, the applicant is not only arguing that the State should refrain from acting as regards the proposed adoption order but also, and primarily, that it should take steps to ensure adequate recognition and protection of his rights as a natural father in respect of his child born out of wedlock. Although the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective “respect” for family life.¹¹ In this context, the notion of “respect” is not clear-cut and its requirements will vary considerably from case to case according to the practices followed and the situations obtaining in Contracting States.

52. In determining whether or not such positive obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual.¹² In striking this balance the aims mentioned in the second paragraph may be of a certain relevance, although this provision refers in terms only to “interferences” with the right protected in the first paragraph i.e. regarding the negative obligations imposed. ¹³

53. The Government have submitted that a flexible approach has to be taken in regard to this kind of relationship since the circumstances will vary widely, for example, from a child casually or unintentionally conceived to a child born out of wedlock but into a stable and established relationship bearing nearly all the hallmarks of a constitutionally protected family. They submit that a natural father is able to apply to the court for guardianship and custody and that his interests are taken into

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account but are necessarily subject to the paramount importance of the child's welfare. To grant a natural father automatic guardianship would, in their submission, cause unnecessary testamentary difficulties and inflict anguish on mothers who would be obliged to dispose of the interests of disinterested or even antipathetic fathers.

54. The Commission notes the concern of the Government that in matters concerning children the overriding criterion should be their welfare. It also acknowledges that the relationship between a natural father and a child born out of wedlock will differ in nature and degree. The Commission finds however that under Irish law, the natural father, whose relationship with the child born out of wedlock falls within the scope of Article 8(1) of the Convention, is placed at a considerable disadvantage when attempting to obtain guardianship or custody of a child whom the mother has placed for adoption. Since his prior consent or knowledge is not required, the child may be placed immediately with prospective adopters with whom he or she will begin to form bonds with the result that by the time the application by the natural father is determined by the courts the child will, if the placement has been successful, be secure and established in the adoptive home.

55. Further, the test applied by the Supreme Court as regards the weight to be attached to the natural father's right to guardianship¹⁴ in effect places the burden on the natural father of establishing that in his care the child would receive a better quality of welfare. This poses a formidable, if not insuperable obstacle to a successful application, where, as in the present case, though the natural father will be able to care materially and emotionally for a child, it would inevitably cause the child some psychological trauma to be moved from the adopters.

56. The Commission has found nothing in the Government's submissions to indicate that a greater recognition and protection of the interests of a natural father whose relationship with his child born out of wedlock falls within the scope of Article 8 must necessarily conflict with the primary aim of pursuing the welfare of the child concerned.

57. Consequently, the Commission finds that under Irish domestic law the applicant has not been given sufficient recognition to and protection of his relationship with his daughter S. This situation is not compatible with the respect due to the applicant's family life under Article 8 of the Convention and there has accordingly been a violation of Article 8 of the Convention.

Conclusion⁵⁸. The Commission concludes, unanimously, that there has been a violation of Article 8 of the Convention.

D. Article 6(1) of the Convention⁵⁹. This provision, in so far as relevant, states:

1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...”

a. Applicability of Article 6(1)

60. The Commission has first examined whether Article 6(1) is applicable to the present case.

61. Article 6(1) applies only to disputes (“contestations”) over “rights and obligations” which can be said, at least on arguable grounds, to be recognised under domestic law. It does not in itself guarantee any particular content for “rights and obligations” in the substantive law of the Contracting States.¹⁵ On the other hand, it is not decisive whether a certain benefit, or possible claim, is characterised as a “right” under the domestic legal system. This is so since the term “right” must be given an autonomous interpretation in the context of Article 6(1). In its Report in the case of *W v. the United Kingdom* ¹⁶ the Commission held that:

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Even where a benefit can be granted as a matter of discretion rather than as a matter of right, a claim for such a benefit may well be considered to fall within the ambit of (Article 6 para. 1).

62. It is also established caselaw that Article 6(1) guarantees to everyone who claims that an interference by a public authority with his “civil rights” is unlawful the right to submit that claim to a tribunal satisfying the requirements of that provision.¹⁷ The claim or dispute must be “genuine and of a serious nature”.¹⁸ The dispute may relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised. The dispute may concern both questions of fact and questions of law.¹⁹

63. The Government argue that Article 6(1) is not applicable as regards the adoption proceedings since the Adoption Board has no jurisdiction to settle disputes but merely deals with the making of adoption orders in compliance with the relevant legislation.

64. The Commission notes that the applicant as a natural father did not enjoy an automatic right to be appointed as guardian or custodial parent. The Guardianship of Infants Act 1964 as amended however made specific provision for a natural father to apply to court to be appointed guardian and to obtain access or custody.²⁰ The domestic courts must have regard on such application to the wishes and desires of a natural father to enjoy the society of his child subject to other overriding considerations and have, in the Government's submission, acknowledged a range of rights which the natural father has depending on the particular circumstances.

65. The Commission finds therefore that domestic law recognises a nexus, though a limited and variable one, between a natural father and a child born out of wedlock.

66. The Commission recalls that the applicant sought to claim guardianship and custody of S and to oppose thereby the adoption, which would have had the effect of extinguishing any right he might have in respect of her. He argued that he had the right to guardianship and custody unless there were convincing reasons to override it and that the welfare of the child would be adequately met by placement with himself instead of with the adopters.

67. Consequently, the Commission finds that there was a “genuine” and “serious” dispute over the applicant's rights within the meaning of Article 6(1) of the Convention. These rights, relating to family life, are “civil” in character.²¹

b. Compliance with Article 6(1)

68. The present applicant had no standing in the adoption procedure. The Adoption Board had no duty to consult him or to listen to any submissions from him. He could not apply by case stated to the High Court from the Adoption Board.²²

69. The Government have submitted that the applicant was nonetheless able to have his claims determined before the Irish courts in a manner complying fully with the requirements of Article 6(1) of the Convention, referring to his application for guardianship which²³ was considered on four occasions—once before the Circuit Court and Supreme Court and twice before the High Court.

70. Since however the guardianship proceedings were distinct from the adoption procedure, the Commission finds no substance in the above argument.

71. The Commission considers it unnecessary to decide whether the Adoption Board is itself a “tribunal” within the meaning of Article 6 or whether the possibility of review by the High Court would have furnished the necessary judicial control. The applicant did not in any case have the possibility of having his objection to the adoption determined by either. The Commission finds that

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consequently the applicant did not have at his disposal a procedure satisfying the requirements of Article 6(1) in respect of his dispute as to the placement of S for adoption.

Conclusion

72. The Commission concludes, unanimously, that there has been a violation of Article 6(1) of the Convention.

E. Article 14 of the Convention in conjunction with Article 6 and/or Article 8. In view of its findings in paragraphs 59 and 73 above, the Commission does not consider it necessary to examine the complaint that as the result of the shortcomings complained of in the domestic system the applicant also suffered discrimination contrary to Article 14 in the enjoyment of his right to respect for his family life or his right to a fair hearing in the determination of his civil rights.²³

Conclusion

74. The Commission concludes, by 11 votes to one, that it is unnecessary to examine whether there has been a violation of Article 14 of the Convention in conjunction with Article 6 and/or Article 8.

F. Recapitulation⁷⁵. The Commission concludes, unanimously, that there has been a violation of Article 8 of the Convention.²⁴

76. The Commission concludes, unanimously, that there has been a violation of Article 6(1) of the Convention.²⁵

77. The Commission concludes, by 11 votes to one, that it is unnecessary to examine whether there has been a violation of Article 14 of the Convention in conjunction with Article 6 and/or Article 8.²⁶

JUDGMENT

I. The Government's Preliminary Objections

A. Whether the applicant can complain on his daughter's behalf³³. The Government submitted that the applicant has no locus standi in relation to complaints by his daughter since only a person who exercises parental rights or is a guardian is entitled to bring a complaint under the Convention on behalf of a child.

34. In the course of the hearing before the Court the applicant indicated that it would no longer be appropriate for him to pursue any claim in respect of alleged infringements of his daughter's rights in the light of an adoption order now having been made in respect of her.²⁷

35. In view of this position, the Court considers that it is only called upon to examine allegations concerning violations of the applicant's rights. It is thus unnecessary to examine the Government's objection on this point.

B. Whether the applicant failed to exhaust domestic remedies³⁶. The Government contended that the application should be rejected for non-exhaustion of domestic remedies, contrary to Article 26 of the Convention, on the grounds:

(1) that the applicant had not appealed to the Supreme Court against the final determination of the guardianship and custody proceedings by the High Court;

(2) that he had failed to complain before the Irish courts of the fact that the law did not enable him to become involved in the adoption process and, in particular, to be consulted by the Adoption Board prior to any adoption;

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(3) that he had not challenged the constitutionality of the legal provisions relating to a natural father by bringing proceedings in the High Court alleging that the State had failed to afford him equal treatment compared to a married father and had failed to vindicate his personal rights.

37. Both the applicant and the Commission contended that there was no substance in any of these grounds.

38. The Court notes that the Government had raised points (2) and (3) in the proceedings before the Commission but not point (1). Accordingly they are estopped from raising this objection before the Court.

Apart from this, under Irish law no appeal lies from the decision of the High Court on an appeal from the Circuit Court.²⁸

39. As regards points (2) and (3) the Court recalls that the only remedies required to be exhausted are remedies which are effective and capable of redressing the alleged violation.²⁹ It considers that the applicant would have had no prospect of success in making these claims before the courts having regard to the caselaw of the Supreme Court which denies to a natural father any constitutional right to take part in the adoption process. ³⁰

40. It follows that the Government's objections based on non-exhaustion of domestic remedies fail.

II. Alleged violation of Article 8. The applicant alleged a violation of his right to respect for family life contrary to Article 8 of the Convention which provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

A. Applicability of Article 8. The Government maintained that the sporadic and unstable relationship between the applicant and the mother had come to an end before the birth of the child and did not have the minimal levels of seriousness, depth and commitment to cross the threshold into family life within the meaning of Article 8. Moreover, there was no period during the life of the child in which a recognised family life involving her had been in existence. In their view neither a mere blood link nor a sincere and heartfelt desire for family life were enough to create it.

43. For both the applicant and the Commission, on the other hand, his links with the child were sufficient to establish family life. They stressed that his daughter was the fruit of a planned decision taken in the context of a loving relationship.

44. The Court recalls that the notion of the "family" in this provision is not confined solely to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together outside of marriage.³¹ A child born out of such a relationship is *ipso iure* part of that "family" unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended. ³²

45. In the present case, the relationship between the applicant and the child's mother lasted for two years during one of which they co-habited. Moreover, the conception of their child was the result of a deliberate decision and they had also planned to get married.³³ Their relationship at this time had thus the hallmark of family life for the purposes of Article 8. The fact that it subsequently broke down does

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not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation. It follows that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life.

B. Compliance with Article 81. Paragraph 1 of Article 8

46. The applicant maintained that the State failed to respect his family life by facilitating the secret placement of his daughter for adoption without his knowledge or consent and by failing to create a legal nexus between himself and his daughter from the moment of birth.

Moreover, the test applied by the Supreme Court to determine the question of custody placed him at a considerable disadvantage vis-à-vis the adoptive parents by requiring him to show that any advantages that they had to offer the child were not important for her welfare. In his submission, to be consistent with Article 8 the law ought to have conferred on him a defeasible right to guardianship and, in any competition for custody with strangers, there ought to have existed a rebuttable legal presumption that the child's welfare was best served by being in his care and custody. He stressed, however, that he was not seeking to overturn the adoption order that had been made in respect of his child.

47. For the Government, Contracting States enjoy a wide margin of appreciation in the area of adoption. The right to respect for family life cannot be interpreted so broadly as to embrace a right to impose the wishes of the natural father over the interests of the child in disregard of the findings of fact made by the courts.

The applicant, as the Supreme Court had held, had a right to apply to be made a guardian, which right he had exercised. Furthermore, the Supreme Court took into account the blood link between him and his daughter as one of the factors to be weighed in the balance in assessing the child's welfare. In addition, the applicant had every opportunity to present his case and to have his interests considered by the courts. However, in this process the rights and interests of the mother, who had wanted her child to be adopted, had also to be taken into account.

In particular, the Government emphasised that to grant a natural father a defeasible right to guardianship could give rise to complications, anguish and hardship in other cases and concerned a matter of social policy on which the European Court should be reluctant to intervene.

48. In the Commission's view the obstacles under Irish law to the applicant establishing a relationship with his daughter constituted a lack of respect for his family life in breach of a positive obligation imposed by Article 8.

49. The Court recalls that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, none the less, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.³⁴

50. According to the principles set out by the Court in its caselaw, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family.³⁵ In this context reference may be made to the principle laid down in Article 7 of the United Nations Convention on the Rights of the Child of 20 November 1989 that a child has, as far as possible, the right to be cared for by his or her parents. It is, moreover, appropriate to recall that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down.

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51. In the present case the obligations inherent in Article 8 are closely intertwined, bearing in mind the State's involvement in the adoption process. The fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order, amounted to an interference with his right to respect for family life. Such interference is permissible only if the conditions set out in paragraph 2 of Article 8 are satisfied.

52. In view of this finding, it is not necessary to examine whether Article 8 imposed a positive obligation on Ireland to confer an automatic but defeasible right to guardianship on natural fathers such as the applicant.

2. Paragraph 2 of Article 8

“In accordance with the law” and legitimate aim

53. It is clear that the decision to place the child for adoption without the father's knowledge or consent was in accordance with Irish law as were the decisions taken by the courts concerning the welfare of the child. That they pursued the legitimate aim of protecting the rights and freedoms of the child is evident from the judgments of the High Court and the Supreme Court in this case.³⁷

Necessity in a democratic society

54. For the Government, the interference was proportionate to the protection of the child's health as well as of her rights and freedoms. The interpretation of Irish law by the Supreme Court took proper account of the paramount interests of the child. It remained open to the natural father to apply to the courts to be appointed, where appropriate, the guardian and/or custodian of the child.

They contended that it was fair and wholly consistent with the Convention that special regulations be enforced to protect the interests of a child born out of wedlock. Indeed it would be impractical and potentially harmful to the interests of such a child to grant the natural father rights that extended beyond a right to apply for guardianship. In any event the Adoption Board may, in its discretion, decide to hear the natural father.

55. The Court notes that the applicant was afforded an opportunity under Irish law to claim the guardianship and custody of his daughter and that his interests were fairly weighed in the balance by the High Court in its evaluation of her welfare. However, the essential problem in the present case is not with this assessment but rather with the fact that Irish law permitted the applicant's child to have been placed for adoption shortly after her birth without his knowledge or consent.

As has been observed in a similar context, where a child is placed with alternative carers he or she may in the course of time establish with them new bonds which it might not be in his or her interests to disturb or interrupt by reversing a previous decision as to care.³⁸ Such a state of affairs not only jeopardised the proper development of the applicant's ties with the child but also set in motion a process which was likely to prove to be irreversible, thereby putting the applicant at a significant disadvantage in his contest with the prospective adopters for the custody of the child.

The Government have advanced no reasons relevant to the welfare of the applicant's daughter to justify such a departure from the principles that govern respect for family ties. That being so, the Court cannot consider that the interference which it has found with the *363 applicant's right to respect for family life, encompassing the full scope of the State's obligations, was necessary in a democratic society. There has thus been a violation of Article 8.

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III. Alleged violation of Article 6(1)⁵⁶. The applicant complained that he had no access to a court under Irish law to challenge the placement of his child for adoption and no standing in the adoption procedure. He invoked Article 6(1) of the Convention according to which:

1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...

The Commission upheld his complaint.

A. Applicability

57. The Court considers that Article 6(1) is applicable to the present dispute.³⁹ Indeed this has not been seriously contested by the Government in the proceedings before the Court.

B. Compliance

58. The Government submitted in the first place that the Adoption Board was not a court and thus the fact that the applicant had no statutory right to be heard by that body could not infringe this provision. Secondly, it was open to the applicant to apply to the courts for guardianship and custody of his daughter, which he did. Since these proceedings controlled and determined the activities of the Adoption Board which can make no order where it has notice of such an action, Article 6(1) was complied with.⁴⁰

59. In the Court's view the adoption process must be distinguished from the guardianship and custody proceedings. As has been previously observed, the central problem in the present case relates to the placement of the child for adoption without the prior knowledge and consent of the applicant.⁴¹ The applicant had no rights under Irish law to challenge this decision either before the Adoption Board or before the courts or, indeed, any standing in the adoption procedure generally. ⁴² His only recourse to impede the adoption of his daughter was to bring guardianship and custody proceedings. ⁴³ By the time these proceedings had terminated the scales concerning the child's welfare had tilted inevitably in favour of the prospective adopters.

Against this background, it is not necessary to decide whether the Adoption Board, which admittedly exercises certain quasi-judicial functions, is a tribunal within the meaning of Article 6(1).

60. There has thus been a breach of this provision.

IV. Alleged violation of Article 14⁶¹. The applicant further complained that he had been discriminated against contrary to Article 14 of the Convention in conjunction with Article 8 in the enjoyment of his right to respect for family life and in conjunction with Article 6(1) as regards his right of access to court. He maintained that a married father in similar circumstances enjoyed the full protection of Articles 8 and 6.

62. Having regard to its findings in respect of both of these provisions⁴⁴ the Court does not consider it necessary to examine this complaint. ⁴⁵

V. Application of Article 50⁶³. Article 50 of the Convention provides as follows:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

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A. Damage

1. Pecuniary loss

64. The applicant claimed IR £2,000 which he had been obliged to pay before his entitlement to legal aid in respect of the guardianship and custody proceedings.

65. The Government made no objection. The Court considers that this sum should be awarded in full.

2. Non-pecuniary loss

66. The applicant submitted that he should be awarded substantial damages having regard to the fact that his daughter has now been adopted following two years of traumatic court proceedings and that it is unlikely that he will ever be re-united with her. He emphasised, as previously mentioned, that he was not seeking to overturn the adoption order.⁴⁶

67. The Government contended that a finding of a violation would constitute adequate just satisfaction in the circumstances of the case.

68. The Court is of the view that damages are appropriate in this case having regard to the trauma, anxiety and feelings of injustice that the applicant must have experienced as a result of the procedure leading to the adoption of his daughter as well as the guardianship and custody proceedings. It awards him IR £10,000 under this head.

B. Costs and expenses

69. The applicant claimed a total amount of IR £42,863 by way of costs and expenses. He submitted inter alia an affidavit from a practising cost accountant in Ireland by way of substantiation of the reasonableness of his claim.

70. The Government submitted that there should be a reduction of IR £5,000 in respect of solicitor's fees and IR £3,700 in respect of counsel's fees.

71. The Court observes that whereas the applicant has furnished it with a detailed substantiation of his claim the Government have provided no evidence in support of their submission. In such circumstances the claim should be allowed in full less 51,691.29 Ff already paid by way of legal aid in respect of fees and expenses.

This amount is to be increased by any value-added tax that may be chargeable.

Order

For these reasons, THE COURT unanimously

1. Holds that it is not necessary to examine the Government's objection concerning the applicant's standing to complain on behalf of his daughter;
2. Dismisses the remainder of the Government's preliminary objections;
3. Holds that there has been a violation of Article 8;
4. Holds that there has been a violation of Article 6(1);
5. Holds that it is not necessary to examine the applicant's complaint under Article 14;
6. Holds that Ireland is to pay to the applicant, within three months, IR £12,000 (twelve thousand) in respect of non-pecuniary and pecuniary damage and, in respect of costs and expenses, the sums resulting from the calculation to be made in accordance with paragraph 71 of the judgment. *366

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Footnotes:

1. See para. 19 below.
2. See paras. 25 and 26 below.
3. *Eamonn Andrews Productions Ltd v. Gaiety Theatre Enterprises* [1978] Irish Reports 295.
4. S. 34 of the 1952 Act.
5. S. 39 of the 1952 Act.
6. S. 10 of the Adoption Act 1964.
7. Art. 40, ss. 1 and 3 of the Constitution.
8. The paragraph numbering from here to para. 77 in bold is the original numbering of the Commission's opinion. Then we revert to the numbering of the Court's judgment.—Ed.
9. See e.g. No. 12402/86 Dec. 9.3.88 DR 55 p. 224 at p. 234.
10. No. 18280/91 April 9, 1992.
11. See e.g. Eur. Court H.R. *Marckx (A/31)*: (1979) 2 E.H.R.R. 330 para. 31.
12. See e.g. Eur. Court H.R. *Abdulaziz (A/94)*: (1985) 7 E.H.R.R. 471 para. 67, and *B. v. France (A/232-C)*: (1992) 16 E.H.R.R. 1 para. 44.
13. Eur. Court H.R. *Rees (A/106)*: (1986) 9 E.H.R.R. 56 para. 37.
14. See para. 26 above.
15. cf. Eur. Court of H.R. *Lithgow and Others (A/102)*: (1986) 8 E.H.R.R. 329 para. 192.
16. Comm. Report 15.10.85 para. 115, Eur. Court H.R. (121-A): (1987) 10 E.H.R.R. 29.
17. See Eur. Court H.R. *Le Compte, Van Leuven and de Meyere (A/43)*: (1981) 4 E.H.R.R. 1 para. 192.
18. See e.g. Eur. Court H.R. *Bentham (A/97)*: (1985) 8 E.H.R.R. 1 para. 32.
19. See e.g. Eur. Court of H.R. *Van Marle and Others (A/101)*: (1984) 8 E.H.R.R. 483 para. 32.
20. See paras 38 and 41 above.
21. See e.g. Eur. Court of H.R. *W. v. United Kingdom (A/121)*: (1987) 10 E.H.R.R. 29, para. 78.
22. See para. 34 above.
23. See e.g. Eur. Court of H.R. *Beljoudi (A/234-A)*: (1992) 14 E.H.R.R. 801.
24. See para. 58 above.
25. See para. 72 above.
26. See para. 74 above.
27. See para. 26 above.
28. See para. 16 above.
29. See amongst many other authorities, the *Open Door and Dublin Well Woman v. Ireland (A/246)*: (1992) 15 E.H.R.R. 244, para. 48.
30. See para. 21 above.
31. See, inter alia, *Johnston and Others v. Ireland (A/112)*: (1986) 9 E.H.R.R. 203, para. 55.
32. See *mutatis mutandis Berrehab v. the Netherlands (A/138)*: (1988) 11 E.H.R.R. 322 para. 21.
33. See para. 6 above.
34. See for example *Powell and Rayner v. United Kingdom (A/172)*: (1990) 12 E.H.R.R. 355, para. 41, and the above-mentioned *Johnson and Others v. Ireland* para. 55.
35. See *mutatis mutandis Marckx v. Belgium (A/31)*: (1979) 2 E.H.R.R. 330, para. 31, and the above mentioned *Johnson and Others v. Ireland* para. 72.
36. See inter alia *Erikson v. Sweden (A/156)*: (1989) 12 E.H.R.R. 183, para. 58.
37. See paras. 10–14 above.
38. See inter alia the *W. v. United Kingdom (A/121)*: (1987) 10 E.H.R.R. 29, para. 62.
39. See inter alia the above mentioned *W. v. United Kingdom* paras. 72–79.
40. See para. 20 above.
41. See para. 51 above.
42. See paras. 20–22 above.
43. See paras. 8–14 above.
44. See paras. 55 and 60 above.
45. See the above mentioned *Open Door and Dublin Well Woman v. Ireland* para. 83.

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46. See para. 46 above.

THE SUPREME COURT

[S.C. No: 112/2007]

**Denham J.
Fennelly J.
Finnegan J.**

**In the Matter of the Guardianship of Infants Act, 1964
In the Matter of the Family Law Act, 1995
In the Matter of the Child Abduction and Enforcement of Custody Orders, 1999
and
In the Matter of H.L., an infant**

Between/

J.McD.

Applicant/Respondent

and

P.L. and B.M.

Respondents/Appellants

Judgment delivered the 19th day of July, 2007 by Denham J.

1.

This is an appeal on an interlocutory matter by P.L. and B.M., the respondents/appellants, hereinafter referred to as 'the respondents', from the judgment and order of the High Court (Abbot J.) of the 23rd March, 2007.

2. At the heart of this case is an infant, H.L.. J.McD., the applicant/respondent, hereinafter referred to as 'the applicant', is the biological father of the infant, by means of artificial insemination. The respondents, who are both female, underwent a Civil Union Ceremony in England in January, 2006.

3. The respondents wished to have a child. After months of consideration and discussion the applicant agreed to have a child with the first named respondent by means of artificial insemination. The baby was conceived and the good news was shared with the applicant's family.

4. In September, 2005 it was agreed to formalise the arrangement. There were a number of drafts of an agreement. Finally an agreement was signed on 11th September, 2005. The agreement states that it would be in the best interests of the child to know his biological father and that the child would know that the applicant is his father. It states that the applicant's role will be as a favourite uncle and that he will be welcome to visit the child at times mutually convenient to the parties. It states that in the event of the first named respondent's death that the applicant's contact with the child would continue uninterrupted, and that in addition his opinion would be sought regarding the best guardianship arrangements for the child.

5. The infant was born in May, 2006, taking the applicant's first name as his second name. In the following months the parties visited each other regularly, the applicant took the infant for walks in his buggy, and the parties had dinner in each others homes. The applicant provided items to assist with the new arrival. The applicant offered financial assistance for the birthing, but this was declined. The applicant also offered to assist with the child's day to day expenses, but this was declined. The applicant has informed the respondents that he has opened a trust account for the infant, to which he makes monthly lodgements.

6. In September, 2006 the respondents' attitude to the applicant and his role with the infant altered. They informed him that the parties had become too close and that a greater distance and formality was required. After this the applicant had only two further contact visits with the infant, one in October, 2006 and one in November, 2006.

There has been no substantive hearing as yet in this case, thus the facts have yet to be determined. It was submitted by the applicant that after November, 2006 he was giving the respondents the space they sought.

7. On hearing that the respondents were about to embark on a holiday in Australia with the infant, and that they were thinking of relocating there, the applicant brought an action restraining the respondents.

8. The applicant sought and obtained an interim order. Subsequently, he obtained an interlocutory order, from which the respondents have appealed. In that interlocutory order the High Court (Abbott J.) ordered:-

"a. The first and second named respondents be at liberty to remove the infant H.L. from the jurisdiction of this Court for the purpose of a vacation in Australia from Sunday 25th March, 2007 returning to the jurisdiction of this Court on or before midnight on the 9th day of May, 2007.

b. On the return of the child to the jurisdiction that his two passports (Irish and Australian) be lodged with the Registrar of the Family Law List High Court by 4 pm on Monday 14th day of May, 2007.

c. On the return of the child to this jurisdiction the applicant, the respondents, their servants and agents, and any persons having notice of the making of the Order, be restrained from thereafter removing the said infant from the jurisdiction of this Court without the leave of this Court pending the determination of these proceedings.

d. Liberty to notify:-

i. the relevant Garda Síochána and Port Authorities, and

ii the relevant Northern Irish Police and Port Authorities,

iii the Australian Embassy.

e. The applicant be and he is hereby at liberty to amend the Notice of Motion herein dated the 22nd day of March 2007 so as to include therein a claim for interim access to the said infant H.L. - the said amended Notice of Motion to be served on the solicitors for the respondents by the 20th day of April, 2007.

f. The Special Summons herein listed before the Master of this Court on the 18th day of April 2007 be transferred from the Master's List to the Family Law List forthwith.

g. The said Special Summons and this Notice of Motion be listed for mention in the Family Law List on Friday the 18th day of May, 2007."

On the 30th March, 2007 the learned High Court judge ordered that a named person be appointed for the purpose of the preparation of a report, pursuant to s.47 of the Family Law Act, 1995, for the court.

9. The first named respondent took leave of absence from her employment to become pregnant and take care of the baby. The respondents planned to visit Australia for a year, from March, 2007 to approximately May, 2008. The first named respondent is Australian and she wished to give the infant an opportunity to spend time with her family. Her mother is unwell and unable to

visit Ireland. The second named respondent secured temporary employment in Australia, for the planned year away, and they have let their home in Ireland.

10. The applicant was informed in March, 2007 of the respondents' plans. On 22nd March, 2007 the applicant instituted proceedings under the Guardianship of Infants Act, 1964 seeking, inter alia, to be appointed guardian of the child and joint custody. He also sought orders pursuant to the Child Abduction and Enforcement of Custody Orders Act, 1991 and Article 8 of the European Convention on Human Rights. This substantive action has not yet been heard by the High Court.

11. Right to apply

The applicant has a right to apply to the court. Under s.6A of the Guardianship of Infants Act, 1964, as amended, it is provided:-

"(i) Where the father and mother of an infant have not married each other, the Court may on the application of the father, by order appoint him to be guardian of the infant."

In **J.K. v. V.W.** [1990] 2 I.R. 437 this Court held that:

(i) s. 6A of the Act of 1964 gave a natural father the right to apply to be appointed guardian but it neither gave him the right to be guardian nor equated his position at law with regard to the infant with the position of a father married to the mother who is and must remain a guardian.

(ii) That the court must regard the welfare of the infant as the first and paramount consideration.

(iii) That the natural father did not have a constitutional right or a natural right identified by the Constitution to guardianship of the child and s. 6A of the Act of 1964 did not declare or acknowledge that right although the blood link between the father and the child and the possibility for the infant to have the benefit of the guardianship and society of its father were one of many factors relevant to its welfare which might be viewed by the court.

Finlay C.J. stated:

"Section 6A gives a right to the natural father to apply to be appointed guardian. It does not give him a right to be guardian, and it does not equate his position vis-à-vis the infant as a matter of law with the position of a father who is married to the mother of the infant. In the latter instance the father is the guardian of the infant and must remain so, although certain of the powers and rights of a guardian may, in the interests of the welfare of the infant, be taken from him.

The right to apply to be appointed guardian of the infant under s.6A of the Act of 1964 (as inserted by the Act of 1987) is a right to apply pursuant to a statute which specifically provides that the court in deciding upon such application shall regard the welfare of the infant as the first and paramount consideration."

However, this appeal does not raise the substantive issues. At issue in this appeal is whether an interlocutory injunction should restrain the infant from leaving the State pending the hearing of the application.

12. Issues

In fact there are two issues before this Court:-

(a) The injunction restraining the removal of the infant H.L. from the State.

(b) The appointment of an assessor pursuant to s.47.

13. Injunction

The first issue, therefore, is the interlocutory injunction restraining the removal of the infant H.L. from the State, pending the determination of the proceedings, save for the six week period ending on the 9th May, 2007.

14. Test

The High Court identified the test to be applied, as follows:

"The basis upon which the Court in a case such as this should decide the case is firstly to decide whether there is a fair question to be tried, or a fair issue to be tried, and then having decided if there is a fair issue to be tried then to consider the balance of convenience and in relation to this particular case as it is a case dealing with an infant, I consider that the balance of convenience test should be tempered to a very large degree by the provisions of s.3 of the Guardianship of Infants Act, 1964, that in determining a matter in relation to the upbringing etc, of a child and where that is in question the Court shall have regard to the welfare of the child, as the first and paramount consideration".

The learned High Court judge considered the inconvenience to the respondents of unravelling their arrangements to go to Australia, balanced against the interest the infant may have in having contact with the applicant. The High Court found that there was a bond between the applicant and the child, formed very strongly on the part of the applicant which will be reciprocated imminently by the child. Also the High Court found that the lack of employment or economic misfortune is not immediately in sight for the respondents, although the second named respondent will suffer grave inconvenience and possible professional embarrassment by being unable to travel to Australia as planned.

The High Court found:-

"It would appear to me that the balancing exercise should be swung in favour of the child remaining in the jurisdiction, and within proximity of his father for the purpose of developing the relationship between father and child.

Notwithstanding the contract, and notwithstanding the mother, the first named respondent is now sole guardian of the child and has her natural constitutional rights and is entitled to custody of the child to the exclusion of all persons, as defined in the Guardianship of Infants Act. But notwithstanding that I have to consider that there is a fair question to be tried in relation to the issue as to whether the father has a right to be appointed a guardian of the infant too, and I bear in mind that he is not a stranger to the infant, as I said, and indeed the contract itself in some respects, and especially in relation to arrangements on the death of the respondent, is indicative of a fair degree of merit in relation to an application, even though the application results, if it is in favour of the applicant father, would run contrary to the contract".

The High Court then held:-

"I consider that the loss of a critical year, a year when a bond is about to open up on an objective scale a reciprocal scale between father and son is a period not to be missed if at all possible. I do not see any serious and irreparable loss on the part of the respondents if they miss this year".

15. Submissions by respondents

It was submitted on behalf of the respondents that the High Court applied a test of balance of convenience tempered by considerations of the welfare of the child, and that in this balancing exercise the potential relationship between the infant and the applicant outweighed all other factors. It was submitted that the learned trial judge erred in applying such a test. It was submitted that all the evidence was on affidavit and that this Court is in the same position as the High Court and may substitute its findings of fact. It was submitted that the High Court erred in holding that the opportunity for the applicant to develop a relationship with the infant outweighed other factors. The respondents submitted that the proper matters for the Court to take into account in assessing the balance of convenience in a case concerning the removal of an infant from the jurisdiction is:-

"(i) That the welfare of a child, particularly a non-marital child, is best served in the custody of his mother.

(ii) That the first named respondent is the natural mother of the infant possessing a personal constitutional right to the custody of her infant.

- (iii) That the natural father does not possess any rights in relation to the infant, and his right consists of a right to apply for access or guardianship.
- (iv) That the parties have entered into a written agreement whereby the first and second respondents are acknowledged to be the sole parents of the child, and the applicant is to have no part in the upbringing of the child. That the applicant's contract with the child is at the sole discretion of the first and second respondents.
- (v) That the first named respondent is the primary carer for the child, and that her proposals for the temporary relocation of the child to Australia were reasonable and proportionate in all the circumstances of the case.

16. Submissions by applicant

The applicant submitted that the orders of the High Court should be upheld for the following reasons:-

- (i) The agreement signed by the parties on the 11th September, 2005 was not a valid and binding contract.
- (ii) The High Court was entirely correct to take a child-centred approach.
- (iii) It was admitted that the applicant does not possess constitutional rights in relation to his son, but he possesses a statutory right to apply to the courts for access and/or joint guardianship.
- (iv) There are no reported Irish cases concerning access or guardianship applications of identifiable sperm donors. However, the Court was referred to case law in other jurisdictions.
- (v) It was submitted that the facts in the case would amount to the 'close personal ties' necessary to engage Article 8 of the European Convention of Human Rights.
- (vi) The **Payne** decision should not be followed in this jurisdiction, so the 'reasonableness' of the proposed relocation of the respondent does not end the matter.
- (vii) The planned relocation of the respondents cannot be labelled as a temporary relocation. It is a lengthy stay at a critical time in the infant's development.

17. Balance of Convenience

On the matter of the injunction, there is a single issue before the Court, the balance of convenience. It was conceded that there was a fair issue to be tried. Obviously this is not a case where damages would be an adequate remedy. Therefore the single issue for the Court is the determination of the balance of convenience on the facts before the Court. To do this the Court has to weigh the relevant factors. There is no exhaustive list of relevant factors in assessing the balance of convenience. The exercise is required to be carried out in the context of all the circumstances of a case. In this situation the Court seeks to weigh the factors and take the course involving the least risk of injustice. Thus it is necessary to consider the risk of injustice to the parties. Where the risk of injustice is evenly balanced then there may be merit in preserving the status quo. Some cases may have special factors. In this case a significant factor is the welfare of the infant.

18. An infant

At the core of this case is the infant, H.L.. His welfare is of paramount importance. While submissions were made by counsel as to the balance of convenience to the applicant and to the respondents, no counsel was before the Court to make submissions on behalf of the infant. In a case such as this, I would have found it of great assistance to have the benefit of such a submission.

19. Case Law

There is no specific statutory law on the issue before the Court, nor any Irish case law. This case brings novel matters before the Court.

Counsel referred to cases from other jurisdictions. None were directly on point. The Court was referred to the English case of **R.M.** (Sperm Donor Father) [2003] Fam Law 94, where a lesbian couple had advertised for a man to father a child, saying they were happy for the father to act as a father figure to the child, subject to them being the primary carers; the applicant applied and ultimately a child was born. After the child was born the couple became concerned that there was

too much involvement with the father. Apart from initial visits after the birth they did not let him have further contact. He applied for contact and a parental responsibility order. Black J. made a defined contact order and adjourned the application for parental responsibility. She held that there was advantage in sharing contact with the father at an early age.

In **X. v. Y.** 2002 GWD 12-344 a Scottish case, Sheriff Laura Duncan held in Glasgow Sheriff Court that a homosexual sperm donor had parental rights in relation to a child conceived with his sperm and being brought up by a lesbian couple, including the mother. In that case it was held that the child had family ties and Article 8 of the European Convention on Human Rights applied to their relationship, that it was in the best interest of the child that the applicant was involved with decisions as to his education etc.; that it was in the best interest of the child that he have contact with that applicant.

Re Patrick (2002) 28 Fam LR 579 was the first Australian case to deal with the issue of whether a sperm donor has a right of contact with the child under family law. In that case the facts were of the father as a homosexual sperm donor, a lesbian couple and a two year old child. While that case was grounded on Australian Family Law it was based on the principle that the welfare of the child is the paramount consideration of a court, and the court ordered contact visits between father and child.

This Court was referred to conflicting decisions from other jurisdictions on the issue of relocation of a primary carer, with consequent affect on the other parent. None of these cases are entirely on the point at issue in this case. Many relate to married couples who subsequently separate. The factual contexts are not very relevant to this case. In this case it appears that all parties are bona fide in their motives. The wish to relocate is temporary - for a year. However, it does not relate to a significant career enhancing opportunity for the mother, as in **R A (Temporary Removal from Jurisdiction)** (2004) EWCA Civ 1587. The mother's partner has an offer to work for a year in Australia. The primary motive for the relocation does not appear to be this career move. Rather, it appears to be because the first named respondent is Australian and she wishes the infant to have contact with her family. However, contact was achieved in the six week visit to Australia which took place in the Spring of this year.

All in all, I find none of the case law from other jurisdictions to be of assistance on this interlocutory application, this appeal should be decided on first principles, on the facts.

Consequently, the paramount issue is the welfare of the child. There is a dearth of fact on that issue, and consequently, the issue is rendered more difficult to decide.

20. Factors

In considering the balance of convenience in this case, the factors in favour of the respondents include the following:- the welfare of the infant is best served in the custody of the first named respondent, the mother; the mother has a constitutional right to the custody of her child; the first named respondent is Australian and wishes her child to know her family; the parties have entered into a written agreement; the first named respondent is the primary carer for the child; the respondents propose a temporary relocation to Australia, until June, 2008; this is a reasonable and proportionate plan; the second named respondent is the breadwinner and she has taken leave of absence from her job for a year and a temporary job in Australia until June, 2008; the respondents have let their house in Ireland for the year.

On the other hand the factors in favour of the applicant include that he is the biological father; he entered into an agreement with the respondents as to the infant (which will be an issue in the substantive case); he has a right to apply to court for access and joint custody; the applicant has applied to the High Court and this application has to be determined; even if, as appears to be accepted, the relocation to Australia is only for a year, this is at a formative age of the infant.

21. Welfare of the infant

The critical factor in the balancing required of the Court in this case is the welfare of the infant - on which the Court has had no expert assistance. The Court heard submissions by the parties as to their view of the balance of convenience, but that must be considered as being tinted by their

interests.

The welfare of the infant is of paramount importance. In the vacuum of information as to the welfare of the child the Court must use the fulcrum of justice in seeking the balance of convenience. In the circumstances I am satisfied that the welfare of the child must be a weighty factor. In making this decision I do so with the infant in mind. Consequently, I would affirm the judgment of the High Court.

However, from this decision, that the balance of convenience lies in dismissing the appeal, it should not be inferred as presuming rights for the applicant. While the applicant has launched his application, those matters have yet to be decided by the High Court. I make no decision on those matters, and nor should any be presumed from this judgment.

I am guided by the paramount importance of the welfare of the infant, by the young age of the infant, by the fact that a year is a long time in the life of a developing infant, and by the injustice that would be done to the infant if the applicant is ultimately successful in his application.

22. Section 47 Assessor

The second issue is the appointment of an assessor pursuant to s.47. The respondents submitted that this appointment was not in the interest of the welfare of the child; that it is not necessary to address the issue before the High Court decides whether the applicant should have access, and/or guardianship of the infant, and also that such assessment should not be directed prior to the High Court decision on whether the contract entered into between the parties is binding. On behalf of the applicant it was submitted that it was necessary to observe and monitor the interaction of the infant and the natural father as they get to know one another through successive experiences of contact.

In the circumstances I am satisfied that the High Court would be assisted by a s.47 report. It would be relevant to the fundamental issue in the case - the welfare of the child. Consequently, I would affirm this decision of the High Court also.

23. Conclusion

For the reasons given I would dismiss the appeal, affirm both interlocutory orders of the High Court, and remit the matter to the High Court so that the application may proceed. I note that the usual undertaking as to damages was given to the Court by counsel on behalf of the applicant.

JMcD v PL and BM and the Attorney General (Notice Party) 2008 No.186

Supreme Court

10 December 2009

[2010] 1 I.L.R.M. 461(Nem. Diss.) (Murray C.J., Denham, Hardiman, Geoghegan and Fennelly JJ.)

December 10, 2009

MURRAY C.J. delivered his judgment on December 10, 2009

This case gives rise to difficult issues concerning the care and welfare of a child born to his mother the first named respondent PL. PL is in a committed relationship with the second named respondent BM. They are a lesbian couple and entered into a civil union under the law of the United Kingdom in 2006.

The appellant JMcD is a homosexual man and he is the biological father of the child.

The child was born in mid 2006 after PL, the mother, became pregnant by means of artificial insemination from sperm donated by JMcD.

The evidence given in the High Court has been extensively summarised in the careful and extensive judgment of the learned High Court judge. The facts and circumstances of the case are also set out extensively in the judgments of Denham J. and Fennelly J., and I refer to them in summary form solely for the purpose of placing my conclusions and observations in context.

I am of the view that the appeal should be allowed on the issue of access by McD to the child and in that respect I agree with the conclusions of Denham J., Geoghegan J. and Fennelly J. I also agree that the appeal of McD against the refusal to appoint him a guardian of the child should be dismissed for the reasons set out in the judgments of my colleagues. In this judgment I intend to focus principally on the status of the European Convention on Human Rights and the relevance or applicability of Art.8 of the Convention to the situation of the respondents and the child as a “de facto family”, this issue being a central part of the decision of the High Court. Before addressing that issue I propose, after a reference to the background facts, to make brief observations on some of the other issues.

In order that PL could become pregnant McD entered into an agreement with her and BM to donate his sperm for that purpose. That agreement purported to govern the role and relationship which McD would have with the child which would be born as a result, it also being agreed that PL and BM as a couple, would have full care and custody of the child, effectively as if both were in the position of parents. Accordingly under the agreement it was acknowledged that PL and BM were to be the parents fully responsible for the child's upbringing and that JMcD at most would be a “favourite uncle”. This concept was not defined as such but it was explicitly provided that JMcD would not have any responsibility for the child's upbringing and would not seek to influence it. The agreement envisaged that both respondents would to all intent and purposes be the “parents” of the child and would control and determine the manner and extent to which the role *465 of “favourite uncle” could be exercised or performed by the appellant.

After the birth of the child matters did not work out as the parties originally envisaged as is evident from the summary of the evidence in the judgment of the High Court and outlined in particular detail in the judgment of Fennelly J. In substance, subsequent to the birth of the child, the appellant adopted a different stance as regards his relationship with the child than that envisaged by the agreement. Effectively he now seeks to assert rights as the father of the child and, inter alia, to be appointed a guardian of the child and have rights of access. He does not seek custody. The respondents for their

part were disturbed and distressed at this evolution of events which they consider threatens their autonomy as a couple having exclusive parental rights in respect of the child. From their standpoint the appellant has betrayed the terms of the agreement and, inter alia, their right to determine the extent to which he would have access or contact with the child and the degree and circumstances under which he would come to know his biological father.

The child is placed at the centre of this de facto situation which has given rise to the conflicting issues concerning his future welfare and the role which McD, PL and BM should have in it.

In the High Court the learned trial judge effectively treated the agreement as unenforceable since he considered the issues which arise in the case fell to be determined by reference to the interests of the child.

I agree with my colleagues who have written judgments in this matter that the agreement must, at least for the purposes of determining the issues in this case, be considered unenforceable, although it is relevant as a factual background and context to those issues. It is the welfare of the child, as the first and paramount consideration, which is central to the determination of the issues in this case as s.3 of the Guardianship of Infants Act 1964 provides.

There must be some doubt as to whether any such agreement to donate sperm could be enforceable generally. In particular it is difficult to see on what basis an agreement or consent of the putative father at that stage as to his future relationship with his yet to be born child could be considered as valid and binding. In the High Court it was argued at one point that a father in the situation of McD could give his consent in a way that paralleled the consent which a mother or even a married couple could give with regard to adoption. Even if that were a true parallel a consent of a mother to adoption prior to the conception or birth of a child could not, in my view, be considered a full or valid consent. The fact is that a person in the position of McD when faced after birth with the reality of a child, a person, who is his son or daughter, even if biologically in the sense of the facts of this case, may, quite foreseeably, experience strong natural feelings of parental empathy and identity which may overcome previous perceptions of the relationship between father and child arrived at in the more abstract situation before the child was even conceived. That such a change of heart would occur must also be foreseeable as at least a real possibility by parties in a position *466 similar to that of PL and BM. Although the rights of such a father are limited, as explained in other written judgments in this case, such a change of heart may be, as it was in this case, an event which raises issues as to whether in the interests of the child access or guardianship ought to be granted to the father.

It is in this context that I agree with the conclusions of Denham J. for the reasons she gives, that it could not properly be inferred from the evidence that there was deception by McD in seeking to have a “father” relationship with the child after the birth of his son. That of course does not take away from the principle that the first and paramount consideration in these issues remain the welfare of the child. Those considerations transcend any pre-conception agreement between the father and the mother.

I also agree with Fennelly J.'s conclusions concerning the evidence before the High Court and in particular that undue weight was given by the learned trial judge to the psychiatric report obtained pursuant to s.47 of the Family Law Act 1995. I agree that the ordinary rules of evidence concerning such a report should apply. A trial judge must be free, for stated reasons, to depart in his or her findings from evidence contained in such a report either because there is other more persuasive evidence or because he or she is not sufficiently persuaded by the report as to the correctness of a particular fact or conclusion in it.

The learned trial judge concluded that the mother, the second respondent and the infant were, as a “de facto family”, entitled to be treated as having the status of a family within the meaning of Art.8 of the Convention and therefore entitled to directly invoke those rights as a basis for determining the issues in this case. For the reasons set out hereunder I think it is clear that the Convention is not directly applicable as part of the law of the State and may only be relied upon in the circumstances specified in

the European Convention on Human Rights Act of 2003. Therefore the High Court in its decision had no jurisdiction to apply Art.8 of the Convention to the status of the respondents and the child. For the purpose of addressing that issue I propose first of all to consider the status of the Convention in Irish law.

Status of the European Convention on Human Rights

The relationship between international treaties to which Ireland is a party and national law is imbued with the notion of dualism the effect of which finds expression in Art.29.6 of the Constitution. According to the concept of dualism, at national level national law always takes precedence over international law. At international level, as regards a state's obligations, international law takes precedence over its national or internal law which is why a state cannot generally rely on their own constitutional provisions as an excuse for not fulfilling international obligations which they have undertaken. Coming back to the national level the dualist approach means that international treaties to which a state is a party can only be given effect to in a national law to the extent that national law, rather than the international instrument itself, specifies.

Of course many states, including many countries who are party to the European Convention on Human Rights, adopt the monist approach to the relationship between international law and national law. According to the monist concept, in principle international law has primacy over national law at national as well as international level. Nonetheless the application of this principle varies in its effect in states which follow the monist approach, some, for example, giving precedence to national legislation which post-dates the ratification of a relevant international treaty.

Article 29.6 of the Constitution provides in very clear terms “No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.”

This is consistent with the sovereign legislative powers vested in the Oireachtas by Arts 6 and 15 of the Constitution. The Oireachtas, in turn, when determining whether, and to what extent, an international agreement shall be part of the domestic law of the State is governed by the provisions of the Constitution.

In delivering the judgment of the then Supreme Court in *In re Ó Laighléis* [1960] I.R. 93 at 124 and 125 Maguire C.J. stated:

“When the domestic law makes its own provisions it cannot be controlled by any inconsistent provisions in international law. ... The insuperable obstacle to importing the provisions of the Convention for the Protection of Human Rights and Freedoms into the domestic law of Ireland—if they be at variance with that law—is, however, the terms of the Constitution of Ireland. By Article 15.2.1°, of the Constitution it is provided that ‘The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State’. Moreover, Article 29, the Article dealing with international relations, provides at s.6 that ‘no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas’.

The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law.

No argument can prevail against the express command of s. 6 of Article 29 of the Constitution before judges whose declared duty is to uphold the Constitution and the laws.”

Maguire C.J. went on to acknowledge that the State may have obligations under the Convention at international level but that cannot in itself affect the application of national law.

This is not to take away from the fact that recourse may and has been had by our courts to the case law of the European Court of Human Rights (ECtHR) for comparative law purposes when a court is considering the import of a right under our law which is the same or similar to a right under the Convention. (See for example *In re Article 26 and the Health (Amendment) (No.2) Bill 2004* [2005] 1 I.R. 105; [2005] 1 I.L.R.M. 401)

In passing I would note the treaties establishing the European Communities and the European Union, with a consequential creation of a *sui generis* and autonomous legal order within the European Union according to which European law is a part of the domestic law of the State, is a wholly separate matter. The fact that the law of the European Union is directly applicable and may to the extent permitted by the Constitution take precedence over national law stems from the particular manner in which the State became party to those treaties by way of specific constitutional amendments adopted by the various referendums.

The State did not rely on Art.29.6 as a means of incorporating European Union law as part of domestic law. Indeed the Lisbon Treaty may have further consequences for the reception of the provisions of the European Convention on Human Rights (ECHR) in national law in those areas governed by the law of the European Union. None of that is relevant to the issues in this case and in the considerations which follow it is not necessary to refer again to the distinctive position which the law of the European Union occupies in our legal system.

The European Convention may only be made part of domestic law through the portal of Art.29.6 and then only to the extent determined by the Oireachtas and subject to the Constitution. The Oireachtas may also, if it chooses, legislate to provide for express statutory protection of particular Convention rights as a means of fulfilling Convention obligations.

The European Convention on Human Rights is an international treaty open to signature and ratification by Governments who are members of the Council of Europe. The Convention came into force after the deposit of 10 instruments of ratification. The governments of 47 countries have now ratified the Convention.

Every such country, as a high contracting party to the treaty, is under an obligation to secure to everyone within its jurisdiction the rights and freedom defined in s.1 of the Convention. Each government, or high contracting party, is also bound by the protocols to the Convention which have been duly ratified and come into force.

The obligations undertaken by a government which has ratified the Convention arise under international law and not national law. Accordingly those obligations reside at international level and in principle the State is not answerable before the national courts for a breach of Convention obligations unless provision is duly made in national law for such liability.

Even though the contracting parties undertake to protect Convention rights by national measures the Convention does not purport to be directly applicable in the national legal systems of the high contracting parties. Nor does the Convention require those parties to incorporate the provisions of the Convention *469 as part of its domestic law. So far as the Convention is concerned it is a matter for each contracting party to fulfil its obligations within the framework of its own constitution and laws. The Convention does not seek to harmonise the laws of the contracting states but seeks to achieve a minimum level of protection of the rights specified in the Convention leaving the States concerned to adopt a higher level of protection should they choose to do so.

Of course all states on ratifying the Convention would have had already in place, by virtue of the democratic structure of a state founded on the rule of law, protections which in many instances were equal or greater to those specified in the Convention. To the extent that that is so the Convention requires no further action by the contracting state least of all its incorporation as part of domestic law. I hasten to add that on the other hand virtually all, if not all, contracting states have been found to be

deficient in those protections, and in breach of the Convention, as the case law of the European Court of Human Rights, (the ECtHR), amply testifies. The number of times and the extent to which any contracting party has been found by the ECtHR to be in breach of the Convention varies greatly according to the extent of deficiencies in the protection of rights at national level or the absence of an adequate domestic remedy under national law for a breach of rights the subject of protection by the Convention.

It is important to underline that the obligations of contracting parties under the Convention are engaged at international level as was pointed out in Ó Laighléis. The Convention does not of itself provide a remedy at national level for victims whose rights have been breached by reference to the provisions of the Convention. The contracting states are answerable at international level before the ECtHR, an international court, and then only where available national remedies for any alleged wrong have been exhausted. This follows one of the general principles of international law that international courts should not have jurisdiction unless an individual claimant against a state has first exhausted available domestic remedies.

The ECtHR in exercising its jurisdiction to find that a contracting state has breached its obligations under the Convention may, and does, award damages to victims who may also benefit from declarations as to their rights. Even then orders or declarations of the court are not enforceable at national level unless national law makes them so. This is so even though a contracting state may be in breach of its obligations under Art.13 if it fails to ensure that everyone whose rights and freedoms as set out in the Convention have an effective remedy for their breach by the State.

Conceptually the Convention requires what most international instruments require, namely that the contracting parties take steps to introduce at national level measures giving effect to the obligations which they have undertaken. The consequences at international level for failure to fulfil obligations may be purely political, economic, moral or a combination of these sometimes legally reinforced by rulings of an arbitration body or court at international level.

Thus the United Nations Convention on the Rights of the Child (introduced by General Assembly Resolution 44/25 of November 20, 1989) does not envisage its adoption as a part of the domestic law of ratifying states but rather that the states would ensure that their national law or administrative practices provide protection for the rights specified in the Convention. Its effective implementation is politically supervised by specialised agencies of the United Nations such as the United Nations Children's Fund and by the fact that each state must submit periodic reports comprehensively explaining the manner and extent to which that Convention has been implemented by national measures. Again, these are obligations owed in international level and direct applicability of the Convention in national law is not contemplated.

Under the ECtHR when a state has been found to be in breach of its Convention obligations by the court it is the role of the Committee of Ministers of the Council of Europe to supervise the execution of the court's judgments. (Art.46.2).

This body cannot force states to comply, and the ultimate sanction for non-compliance is expulsion from the Council of Europe. Once a decision of the ECtHR has been transmitted to the Committee it invites the country concerned, if in breach of the Convention, to inform it of the steps it has taken to execute it and once that it is done satisfactorily the Committee adopts a resolution concluding that its functions under Art.46.2 have been exercised. Every final judgment of the ECtHR is transmitted to the Committee (Art.46.2 of the Convention).

Thus contracting states may in principle, so far as the effect of the Convention at national level is concerned, ignore the decisions of the court. They do of course have an express obligation under the Convention itself to abide by any judgment of the court (Art.46.1). Fortunately its decisions are generally respected and executed. The ultimate sanction to a totally recalcitrant contracting party is a political one, namely expulsion by the Committee of Ministers from the Council of Europe. Although

many cases have lingered before the Committee of Ministers for years pending a state's fulfilment of its obligations following a decision of the ECtHR only one country has been the object of that ultimate sanction. That country was Greece when the regime of the so-called "Greek Colonels" were in power. In 1967 France, Denmark, Norway, Sweden and the Netherlands had brought proceedings against Greece before the Court of Human Rights in which the then Greek regime refused to participate. The Committee of Ministers, faced with a manifestly undemocratic regime, eventually took steps to expel Greece from the Council of Europe but Greece withdrew from the Council rather than face ultimate expulsion. Greece of course returned as a member of the Council when a democratic government was subsequently elected.

It is in the context of the foregoing perspective of the Convention that an international instrument binding on states as a matter of international law at international level rather than national level that this court has held, at least prior to the coming into force of the European Convention on Human Rights Act 2003, *471 could not be invoked by an individual as having a normative value or a direct legal effect in Irish law.

Consequently no claim could be made before a court in Ireland for a breach as such of any provision of the Convention. To admit such a claim would have been to treat the Convention as directly applicable in Irish law.

This is still the position subject to the special exceptions of a claim against an "organ of the state" as defined in s.3 of the Act of 2003 or a claim for a declaration of incompatibility pursuant to s.5 of that Act.

European Convention on Human Rights Act 2003

Section 2 of the Act provides as follows:

"2.—(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

This section obviously is not a basis for founding an autonomous claim based on a breach of a particular section of the Act. It is an interpretative provision and is limited to requiring that a court, so far as possible, when interpreting or applying any "statutory provision" or "rule of law" do so in a manner compatible with the State's obligations under the Convention. In exercising its jurisdiction pursuant to s.2 a court must identify the statutory provisions or rule of law which it is interpreting or applying. Even then it is subject to any rule of law relating to interpretation and application.

"Rule of law" is not defined except to say that it includes the common law.

Section 3 permits a claimant, if no other remedy in damages is available, to recover damages for injury suffered where an "organ of the State" has failed to perform its functions in a manner compatible with the State's obligations under the Convention. An "organ of the State" is specially defined in s.1 of the Act and excludes the President, the Oireachtas and the courts.

Section 5 permits a provision of the Convention to be relied upon where a court makes a declaration that a statutory provision or rule of law is incompatible with the State's obligations under the Convention. Such a declaration may only be made where a party to proceedings has no other adequate and available legal remedy. Other than the making of a declaration of compatibility any benefit to a claimant is discretionary and extra-judicial. The declaration does not affect the validity or enforcement of any statutory provision or rule of law. The party to the proceedings concerned may

make an application to the Attorney General for compensation for loss and injury sustained as a result of the incompatibility concerned and the government in their discretion may make an ex gratia payment of compensation.

Section 4 facilitates the courts by permitting account to be taken of decisions of the ECtHR and other matters without special proof (*Mahon v Keena* [2009] 2 I.L.R.M. 373 at 390).

Furthermore by virtue of s.4 of the Act of 2003 a court, when interpreting and applying the Convention for the purposes of s.2 shall take account of principles laid down by declarations, decisions and opinions of the ECtHR and the Committee of Ministers on any question in respect of which those bodies have jurisdiction.

In these proceedings the only potentially relevant section of the Act of 2003 is s.2 concerning the interpretation of a “statutory provision” or “a rule of law”. Neither of the other two sections could arise.

Section 2 would appear to be a rather fluid and imprecise mode of determining the manner in which the Convention should be used to interpret national law. Although strictly limited to a statutory provision or a rule of law it requires that such laws be interpreted in the light of any decision of the Court of Human Rights and the Committee of Ministers into the future and subsequent to the Act of 2003. It gives, inter alia, the ECtHR a unique role in the meaning of laws enacted by the Oireachtas. Many international conventions to which the State subscribes have a defined and limited role and the scope of their impact on national law can be objectively ascertained or they may in any event be given effect to in national law by detailed legislative provisions of implementation.

The rights protected in the Convention are often broadly stated in open-ended terms without any substantive attempt to define their meaning or ambit. The open textured nature of the rights referred to in the Convention means that the ECtHR often has recourse to sources outside the text of the Convention both legal and political in order to decide the meaning and effect of the text of the Convention. This occurs in the context of the Convention being, as the court itself puts it, a “living document” which means that laws and practices of contracting states which may have long been considered compatible with the Convention, and which the court itself may have decided were compatible, may later emerge as being in breach of the Convention according as the court overrules its previous decisions or gives an innovative or extended meaning to a particular right mentioned in the Convention. This is not the occasion for an analysis of the sources to which the ECtHR has recourse to or its methods of interpretation.

It may mean however that the Oireachtas in providing, in the most general terms, that the laws which it passes are to be interpreted to the extent possible in accordance with the case law of the ECtHR (or decisions of the Committee of Ministers) that the Oireachtas itself will not always be in a position to perceive or even contemplate, by recourse to any objective considerations, the meaning, by reference to the Convention, which may subsequently be given to the provision of an Act which it is passing (and which it might have passed in *473 altogether different terms if it could have). This raises questions as to how the intent of the Oireachtas by reference to the text of a statute which it has adopted in accordance with the Constitution is to be determined and the relevance of that intent to its interpretation. These questions are relevant to the role of the Oireachtas in whom “the sole and exclusive power of making laws for the State” is vested by Art.15.2 of the Constitution. Perhaps the answers to such questions lie in whole or in part in the proviso in s.2 by which the requirement to interpret a statute in a manner compatible with the Convention is “subject to the rules of law relating to such interpretation and application”.

Such questions do not arise in this case. But they do underline the fact that the role of the Convention as an interpretative tool in the interpretation of our law stems from a statute, not the Convention itself, and can only be used within the ambit of the Act of 2003.

The High Court judgment

Before addressing certain aspects of the High Court judgment I think there are general conclusions that flow from the above considerations.

First of all, the European Convention on Human Rights is not generally part of domestic law and is not directly applicable.

As outlined above the Convention, and associated case law, may be relied upon for the purpose of interpreting a “statutory provision” or “rule of law” as provided for, and subject to the limitations in s.2 of the Act.

Secondly, provisions of the Convention may also be relied upon in a claim pursuant to s.3 for damages against an “organ of the State” as specially defined in that section. Finally the Convention's provisions may be relied upon for the purposes of a declaration that a statutory provision or rule of law is incompatible with the State's obligations under the Convention. Claims under s.3 and 5 are not relevant to the present proceedings.

While I agree with the learned High Court judge that “...it is upon the individual state concerned that the Convention lays the burden of remedying violations found” I must disagree with his conclusion that certain articles of the Convention (Arts 1, 13 and 35) “...lay firmly and clearly upon the Irish courts the duty to secure a remedy where required and apply the rights contained in the Convention.” An international convention cannot confer or impose functions on our courts. The role and functions of courts in the administration of justice are governed by the Constitution and the laws of the State. Of course the courts may be given jurisdiction to enforce or adjudicate on rights which the State has agreed, in an international treaty, to promote or protect. But it can only be conferred by national law and if sought to be done by making an international agreement, wholly or partially, part of domestic law then it must be done in accordance with Art.29.6 and in a manner consistent with the Constitution as a whole. (See *In re Ó Laighléis*, cited above)

As the learned High Court judge correctly pointed out the Convention *474 imposes obligations on the State to secure, inter alia, the rights specified in the Convention and to ensure that any violation of such rights “shall have an effective remedy before a national authority”. (Art.13). While conceptually the Convention does of course expect contracting states to provide remedies before a “national authority”, usually the courts, it does not purport to impose or confer any jurisdiction on national courts.

The duty of the courts is to enforce the Constitution and the laws of the State. Thus the declaration which the Constitution requires every judge to make before entering upon his or her office is, inter alia, to “uphold the Constitution and the laws”. Accordingly, courts will enforce or adjudicate on issues concerning rights which have their origin in an international convention when duly conferred with such jurisdiction as a matter of national law. Otherwise they have no jurisdiction to do so.

It is in this context, and consistent with that approach, that the Convention accords to individuals a right of direct recourse to the ECtHR against a state, once he or she has exhausted any available domestic remedy, not by way of appeal, but by way of petition in separate proceedings claiming that the state has been in breach of its international obligations under the Convention. The absence of an adequate remedy in national law for the breach of a person's Convention rights does not entail a breach of duty by the national courts, who must apply national law, including constitutional law, but by the contracting state as such. For any such breach is answerable before the ECtHR.

Adjudication on claims under Art.8

In the course of his judgment the learned High Court judge then went on to refer to the “apparent silence of domestic law on the question of same sex couples”. On this basis he went on to consider

whether the Convention could provide assistance, absent a constitutional conflict regarding the legal status of such couples.

Thus it was on the basis that the law was silent that the learned trial judge proceeded to consider whether PL and BM together with the child constituted “a family” or, as he put it, a “de facto family”, so as to benefit from the legal status and rights conferred on a family by Art.8 of the Convention.

In so proceeding to examine that question the learned trial judge did not identify any statutory provision or rule of law which required interpretation for the purposes of s.2 of the Act of 2003.

On the contrary, it was the apparent absence of a statutory provision or a rule of law governing the status of same sex couples which gave rise to the learned trial judge's interpretation and application of Art.8.

Since the only potentially relevant basis in the context of these proceedings for having recourse to the terms of the Convention could be s.2, the premise upon which the learned trial judge embarked on what appears to have been an autonomous direct application of Art.8 of the Convention in the circumstances of this case was not correct. In the course of his judgment the learned trial judge *475 specifically mentions that the “Applicant claims rights under Article 8” and rejects that claim. He then examined whether PL, BM and the child were entitled to claim rights under Art.8 of the Convention as a family within the meaning of that article. The learned trial judge decided that they did constitute such a family and had such rights.

Those issues were determined as independent autonomous claims arising under Art.8. In my view the High Court had no jurisdiction to apply directly the provisions of the Convention in that manner. In considering and determining those issues the High Court was not exercising, or indeed purporting to exercise, a function pursuant to s.2 of the Act and no issue had arisen under ss.3 or 5 of the Act. Accordingly there was no basis in law for applying Art.8 of the Convention to the status of PL and BM or any of the parties. On those grounds alone the ruling of the High Court that PL, BM and the child were a family for the purpose of Art.8, may be set aside.

Although it may not be necessary to do so, I should add that the mere fact that the law could be said to be silent as regards a specific situation does not necessarily mean that it is unaffected by the law or the Constitution. Silence of the law may speak volumes for the legal status to be accorded or not to be accorded to a particular subject matter or situation. In any event, in this case, as the law stands, and as the learned trial judge recognised, PL as the mother of the child, is entitled to exercise her rights of custody and parenthood under the law and the Constitution. She must be entitled to do so without those rights being trammelled by any legal rights that might be said to be vested under the Convention in BM on the basis of the interpretation given by the High Court to Art.8. Similarly, McD is entitled to have any rights which he may have as the biological father without being qualified by supposed Art.8 rights vested in the respondents. It is perhaps sufficient for present purposes, to cite, as Denham J. does in her judgment, the statement of Henchy J. in *State (Nicolaou) v An Bord Uchtála* [1966] I.R. 567 at 622:

“For the State to award equal constitutional protection to the family founded on marriage and the ‘family’ founded on extra marital union would in effect be a disregard of the pledge which the State gives in Article 41.3.1° to guard with special care the institution of marriage”.

In short to say that the law is silent on a specific matter is not to say that such a matter necessarily exists in a legal vacuum so as to be unaffected by other rules of law.

That is not to say that the de facto position of BM could or should be totally ignored in considering the issues in this case since so much turns on the ultimate interests of the child. BM's relationship with PL and their relationship with the child are among the factors to be taken into account in that context.

That the situation of a party other than a natural parent, and in particular such a person's *476 relationship with the child, should be a material factor in determining the custody and associated rights of the child is not unique to the situation which has arisen in this case. It may also arise in a variety of other situations such as a household consisting of a mother and child and one, or both, parents or where a child has been raised for a number of years by grandparents or foster parents. In the end these often so difficult situations have to be determined by the best interests of the child being considered paramount and, subject to that, with due regard to constitutional and other rights in law vested in other parties.

For the reasons indicated above I am of the view that the learned trial judge had no jurisdiction to consider the claims of either the applicant McD or of the respondents PL and BM as distinct claims to rights under Art.8 of the Convention.

Interpretation of Art.8 of the Convention

Having concluded that it was not open to the learned trial judge to interpret and apply Art.8 of the Convention to the circumstances of this case it is not strictly necessary to proceed to consider the interpretation of Art.8 although Denham J. and Fennelly J. have very usefully done so. I agree with their conclusions concerning the interpretation of Art.8 in the light of the case law of the ECtHR. As to analysis in detail of the principles to be applied by our courts, in our constitutional and legislative context, when interpreting or applying the Convention, I would prefer to leave that until the necessity to do so arises in another case.

Conclusion

Accordingly I conclude that the appeal and the issue of access only should be allowed and the matter remitted to the High Court for that issue to be decided.