



The Law Reform Commission  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

# **CONSULTATION PAPER**

**ASPECTS OF INTERCOUNTRY ADOPTION LAW**

**(LRC CP 43-2007)**

**IRELAND**

**Law Reform Commission  
35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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First Published March 2007

**ISSN 1393-3140**

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## ACKNOWLEDGEMENTS

The Commission would like to thank in particular the following people and organisations for their advice and assistance in the preparation of this Consultation Paper:

Adoption Ireland: The Adopted People's Association  
Adoption Board (An Bord Uchtála)  
Barnardos  
British Association for Adoption and Fostering  
Department of Foreign Affairs  
Department of Justice, Equality and Law Reform  
Health Service Executive  
Passport Office  
Elizabeth Canavan, Deputy Director, Office of the Minister of State for Children  
Bernard Carey, Assistant Secretary, Department of Health and Children  
Gerard Durcan SC  
Norah Gibbons, Director of Advocacy, Barnardos  
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The Hon Monte Solberg PC, MP, former Minister of Citizenship and Immigration, Canada  
United Kingdom Department of Education and Skills  
New Zealand Department of Internal Affairs - Te Tari Taiwhenua

Full responsibility for the content of this publication, however, lies with the Commission.

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Adoption (Intercountry) Aspects Act 1999	1999 c. 18	Eng
Adoption (Northern Ireland) Order 1987	SI 1987/2203 (NI 22)	NI
Adoption Act 1952	No. 25/1952	Irl
Adoption Act 1974	No. 24/1974	Irl
Adoption Act 1988	No. 30/1988	Irl
Adoption Act 1991	No. 14/1991	Irl
Adoption Act 1998	No. 10/1998	Irl
Adoption and Children (Scotland) Act 2007	2007 asp 4	Scot
Adoption and Children Act 2002	2002 c. 38	Eng
Adoption Bill 1990	No. 47a/1990	Irl
Adoption of Children Act 2006	No. 6/2006	NT
Age of Majority Act 1985	No. 2/1985	Irl
British Nationality Act 1981	1981 c. 61	Eng
Child Care Act 1991	No. 17/1991	Irl
Child Pornography and Trafficking Act 1998	No. 22/1998	Irl
Children Act 2001	No. 24/2001	Irl
Citizenship Act 1955		Ind
Citizenship Act 1977	No. 61/1977	NZ
Civil Registration Act 2004	No. 3/2004	Irl
Diplomatic Relations and Immunities Act 1967	No. 8/1967	Irl
Education (Welfare) Act 2000	No. 22/2000	Irl
Education Act 1998	No. 10/1998	Irl
Education for Persons with Special Educational Needs 2004	No. 30/2004	Irl
Equal Status Act 2000	No. 8/2000	Irl
European Convention on Human Rights Act 2003	No. 20/2003	Irl
Family Law (Divorce) Act 1996	No. 33/1996	Irl
Family Law Act 1995	No. 26/1995	Irl
Guardianship of Infants Act 1964	No. 7/1964	Irl
Health Act 2004	No. 42/2004	Irl
Irish Nationality and Citizenship Act 2001	No. 15/2001	Irl
Irish Nationality and Citizenship Act 2004	No. 38/2004	Irl

Law Reform Commission Act 1975	No. 3/1975	Irl
Ministers and Secretaries Act 1924	No. 16/1924	Irl
Recognition of Foreign Adoptions Bill 1990	No. 47/1990	Irl
Rules of the Superior Courts (No.1) (Proof of Foreign, Diplomatic, Consular and Public Documents) 1999	SI No. 3/1999	Irl
Rules of the Superior Courts 1986	SI No. 15/1986	Irl
Social Welfare Consolidation Act 2005	No. 26/2005	Irl
Status of Children Act 1987	No. 26/1987	Irl
Succession Act 1965	No. 27/1965	Irl
The Adoption (Designation of Overseas Adoptions) Order 1973	SI 1973/19	Eng

## TABLE OF CASES

Al Habtoor v Fotheringham	[2001] EWCA Civ 186	Eng
Attorney General v Dowse	[2007] 1 ILRM 81	Irl
Attorney General v Hamilton (No. 1)	[1993] 2 IR 250	Irl
Attorney General v McKenna (TD)	[1995] 1 FC 694	Can
Attorney General v X	[1992] 1 IR 1	Irl
B and B v An Bord Uchtala	[1997] 1 ILRM 15	Irl
Cameron v Gibson	[2005] ScotCS CSIH 83	Scot
Cameron v Gibson	[2003] ScotsCS 298	Scot
DG v Eastern Health Board	[1997] 3 IR 511	Irl
Dharamal v Lord Holmpatrick	[1935] IR 760	Irl
FN and EB v CO	[2004] IEHC 60	Irl
FN v Minister for Education	[1995] 1 IR 409	Irl
G v An Bord Uchtala	[1980] IR 32	Irl
GMcG v DW (No. 2)	[2000] 4 IR 1	Irl
Grehan v Medical Incorporated	[1986] IR 528	Irl
Hanrahan v Merck Sharp & Dohme	[1988] ILRM 629	Irl
Harben v Harben	[1957] 1 All ER 379	Eng
Hope v Hope	[1854] All ER 441	Eng
In re Article 26 and the Adoption (No. 2) Bill 1987	[1989] IR 656	Irl
In re J an Infant	[1966] IR 295	Irl
J and J v C's Tutor	[1948] SC 636	Scot
Keegan v Ireland	[1994] 18 EHRR 342	ECtHR
Kent County Council v S	[1984] 4 ILRM 292	Irl
Lennon v Ganly and Fitzgerald	[1981] ILRM 84	Irl
London Borough of Sutton v M	[2002] 4 IR 488	Irl
M v An Bord Uchtala	[1977] IR 287	Irl
MC v Delegacion Provincial de Malaga	[1999] 2 IR 363	Irl
McKenna v Attorney General (CA)	[1999] 1 FC 401	Can
McKenna v Secretary of State	1993 CanLII 308 (CHRT)	Can
MF v An Bord Uchtala	[1991] ILRM 399	Irl
N v Health Service Executive	[2006] IESC 60	Irl

Netherlands v Sweden	[1958] ICJ Rep 55	ICJ
North Western Health Board v HW	[2001] 3 IR 622	Irl
Northampton County Council v ADF and MF	[1982] ILRM 164	Irl
Northern Area Health Board v An Bord Uchtala	[2002] 4 IR 252	Irl
Nottebohm Case	[1955] ICJ Rep 4	ICJ
PAS v AFS	[2005] ILRM 306	Irl
Pini and Others v Romania	[2004] ECHR 275	ECtHR
Re a Ward of Court (No. 2)	[1996] 2 IR 79	Irl
Re B (Adoption Order: Nationality)	[1999] 1 FLR 907	Eng
Re B (Adoption: Jurisdiction to set aside)	[1995] 2 FLR 1	Eng
Re B (Adoption: Setting Aside)	[1995] 1 FLR 1	Eng
Re Haughey	[1971] IR 217	Irl
Re P (GE) (An Infant)	[1964] 3 All ER 977	Eng
Re Willoughby	(1885) 30 Ch D 324	Eng
Ryan v Attorney General	[1965] IR 294	Irl
T v District Court at North Shore (No. 2)	[2004] NZFLR 769	NZ
The State (McFadden) v Governor of Mountjoy Prison	[1981] ILRM 113	Irl
The State (Nicolaou) v An Bord Uchtala	[1966] IR 567	Irl
The State (Trimbole) v Governor of Mountjoy Prison	[1981] ILRM 117	Irl
Webb v Ireland	[1988] IR 353	Irl
Western Health Board v M	[2001] IESC 104	Irl

## INTRODUCTION

### **A The Attorney General's Request**

1. This Consultation Paper arises from a request to the Commission made by the Attorney General, Mr. Rory Brady SC, on 17 November 2005 in accordance with section 4(2)(c) of the *Law Reform Commission Act 1975*. The request seeks the Commission to “consider and recommend reforms in the laws of the State” concerning:

1. The status and rights (including citizenship rights) of a child resident outside the State who is the subject of a foreign adoption order made in favour of an Irish citizen or citizens.
2. The most effective manner of securing the performance of the constitutional and legal duties of the adoptive parents in respect of such a child.
3. The most effective manner of ensuring the fulfilment of the duties of the State in respect of such a child arising from Article 40.3 and Article 42.5 of the Constitution.<sup>1</sup>

### **B Aim of the Consultation Paper**

2. In accordance with that request, this Consultation Paper is largely confined to an examination of the status and rights of children adopted by Irish citizens who are resident outside of the State. Where it has proved necessary to do so, this Paper also addresses the wider setting of intercountry adoption. The request from the Attorney came against the immediate

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<sup>1</sup> Article 40.3 of the Constitution of Ireland states:

“1° The State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen.”

“2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

Article 42.5 states:

“In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptable rights of the child.”

background of *Attorney General v Dowse*.<sup>2</sup> The *Dowse* case involved the status of an adoption order made in Indonesia in respect of an Indonesian child who had been adopted by a married couple resident in Indonesia. One of the adopting couple was an Irish citizen and the adopting couple subsequently registered the adoption as a foreign adoption order in this State under the *Adoption Act 1991*. The *Adoption Act 1991*, as amended by the *Adoption Act 1998*, is the current legislative basis for recognition of intercountry adoptions or foreign adoptions.<sup>3</sup> The 1991 Act was largely based on the Commission's 1989 *Report on the Recognition of Foreign Adoption Decrees*. It was enacted in response to the phenomenon of people resident in Ireland who travelled abroad to adopt children, notably to Romania in the aftermath of the fall of its Communist regime in the late 1980s.<sup>4</sup> The *Adoption Act 1998* was enacted to deal with some specific issues of recognition that arose in the mid 1990s.

3. The Commission's 1989 Report and the 1991 Act, as amended by the 1998 Act, involved a national response to the issue of foreign or intercountry adoption in the absence of a satisfactory international regime. In 1998 the Commission recommended that the State should ratify the 1993 *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*.<sup>5</sup> In 2005 the Department of Health and Children published *Adoption Legislation: 2003 Consultation and Proposals for Change*.<sup>6</sup> This Report signalled the State's commitment to ratification of the Hague Convention and the designation of the Adoption Board (An Bord Uchtála) as the Adoption Authority which will act as the central authority for intercountry adoptions as required by the Convention. The Commission notes that the Government's legislative programme published in January 2007 indicates that the *Adoption (Hague Convention and Adoption Authority) Bill* is scheduled for publication in 2007.<sup>7</sup>

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<sup>2</sup> [2006] IEHC 64, [2007] 1 ILRM 81.

<sup>3</sup> The term used in the *Adoption Acts 1991 to 1998* is "foreign adoption". These Acts will be discussed in detail in Chapters 2 and 3. In this Consultation Paper, the Commission will use this term interchangeably with the term "intercountry adoption".

<sup>4</sup> LRC 29-1989.

<sup>5</sup> See *Report on the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, 1993* (LRC 58-1998). This was preceded by the *Consultation Paper on the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, 1993* (LRC CP 11-1997).

<sup>6</sup> See [www.dohc.ie/publications/pdf/adoption\\_legislation\\_2003\\_consultation\\_and\\_proposals\\_for\\_change.pdf?direct=1](http://www.dohc.ie/publications/pdf/adoption_legislation_2003_consultation_and_proposals_for_change.pdf?direct=1).

<sup>7</sup> See *Government Legislation Programme for Spring Session 2007* at [www.taoiseach.gov.ie/index.asp?locID=186&docID=-1](http://www.taoiseach.gov.ie/index.asp?locID=186&docID=-1).

4. In the Commission's response to the Attorney General's request, the current legislative regime represented by the *Adoption Act 1991* as amended by the *Adoption Act 1998* is examined against the context of the 1993 Hague Convention and the proposed implementation of the Convention in Irish law.

### **C Outline of the Consultation Paper**

5. In Chapter 1 the Commission discusses intercountry adoption from an international and Irish perspective against the background of the Attorney's request. The Commission also sets out the guiding principles which have informed its consideration of the Attorney's request.

6. In Chapter 2 the Commission discusses the High Court decision in *Attorney General v Dowse* which forms the immediate background to the Attorney's request. The Commission indicates its provisional view on the first question raised by the Attorney General, dealing with the status and rights, including citizenship rights, of a child resident outside the State who is the subject of a foreign adoption order made in favour of an Irish citizen or citizens.

7. In Chapter 3 the Commission examines the duties of parents and of the State regarding an Irish citizen child who is resident in a foreign jurisdiction and sets out its provisional views on the second and third questions raised by the Attorney General's request. These deal with the most effective manner of securing the performance of the constitutional and legal duties of the adoptive parents in respect of such a child, and the most effective manner of ensuring the fulfilment of the duties of the State in respect of such a child under Articles 40.3 and 42.5 of the Constitution.

8. In Chapter 4 the Commission discusses a number of issues related to the Attorney's request, including procedural aspects concerning the proof of the validity of foreign adoptions and issues concerning pre-adoption and post-adoption.

9. Chapter 5 contains the Commission's provisional recommendations for reform.

10. The Appendix contains relevant provisions of the *Adoption Act 1991*, as amended by the *Adoption Act 1998* which are referred to throughout this Consultation Paper.

11. This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations made are provisional in nature. Following further consideration of the issues and consultation with interested parties, the Commission will make its final recommendations. Submissions on the provisional recommendations contained in this Consultation Paper are most welcome. In order that the Commission's final

Report may be made available as soon as possible, those who wish to do so are requested to send their submissions in writing by post to the Commission or by email to [info@lawreform.ie](mailto:info@lawreform.ie) by **29 June 2007**.

## CHAPTER 1 INTERCOUNTRY ADOPTION

### A Introduction

1.01 This Chapter discusses intercountry adoption from an international and Irish perspective. Part B considers the history of intercountry adoption in Ireland and the international legal context against which international adoption occurs.<sup>1</sup> Part C contains a discussion of the relevant Irish legislation, namely the *Adoption Act 1991*, as amended by the *Adoption Act 1998*. In Part D, the precise nature of the Attorney's request is outlined by reference to statistical data and current intercountry adoption legislation. In Part E, the guiding principles which have informed the Commission in its consideration of the request are discussed.

### B Intercountry Adoption: An Overview

1.02 Intercountry adoption involves the movement of children across national borders for the purposes of adoption, and it has increased greatly in recent years.<sup>2</sup> While it is difficult to ascertain its actual level, it has been estimated that over 30,000 children are adopted in this way annually, moving between a 100 different countries.<sup>3</sup> It is a long established facet of the international migration of children. It was and continues to be associated

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<sup>1</sup> The terms "intercountry adoption" or "international adoption" are generally used to describe an adoption which has some foreign element. For the purposes of this Consultation Paper the term "intercountry adoption" will be used alongside the term "foreign adoption", which is used in the *Adoption Act 1991* as amended by the *Adoption Act 1998*.

<sup>2</sup> See generally Doek, van Loon and Vlaardingerbroek (eds) *Children on the Move* (Martinus Nijhoff Publishers 1996).

<sup>3</sup> Selman "The Demographic History of Intercountry Adoption" in Selman (ed) *Intercountry Adoption: Developments, Trends and Perspectives* (British Agencies for Adoption and Fostering 2000) at 16. See also conference papers entitled "Intercountry Adoption in the New Millennium: the 'Quiet Migration' Revisited" delivered at the European Population Conference, Helsinki, Finland, 7-9 June 2001 and "Movement of Children for Intercountry Adoption: A Demographic Perspective" delivered at 24<sup>th</sup> IUSSP General Population Conference, Salvador, Bahia, Brazil, 18-24 August 2001.

with the disruption to normal family life caused by war and civil unrest.<sup>4</sup> It is also associated with the desire of couples and individuals from the more affluent western world to adopt children from poorer countries. It is also quite noticeable that modern intercountry adoption has its origins in the changing patterns and uses of domestic adoption.<sup>5</sup> Indeed this is reflected in the more recent experience of intercountry adoption in Ireland.

1.03 There are opposing views on the merits or otherwise of intercountry adoption. One view is that it is a humanitarian gesture which can help a small number of children escape from a lifetime of poverty. If a child can be afforded a loving home and even spared an early death then intercountry adoption is a worthwhile endeavour. A second competing view is that it is a form of exploitation by adopters who have the financial resources available to take a child away from its country of origin. It is often argued that solutions to prevent world poverty should be devised to prevent the removal of children from the place of their cultural heritage.<sup>6</sup>

**(1) Ireland**

1.04 The history of intercountry adoption in Ireland can be divided into two phases. From the late 1940s Ireland could be described as a “sending country” because Irish children were sent abroad, mainly to the United States, for the purposes of adoption.<sup>7</sup> These “intercountry adoptions” first began to occur at a time when there was, in fact, no legislative regime on adoption in Ireland. The *Adoption Act 1952*, which remains the core legislative enactment on adoption in the State, was enacted against this backdrop. In *Western Health Board v M McGuinness J* noted that:

“At the time of the enactment of the *Adoption Act 1952*, which was the first legislation permitting legal adoption in this State, a particular problem had arisen by which prospective adopters from

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<sup>4</sup> O’Halloran *The Politics of Adoption: International Perspectives on Law, Policy & Practice* (Springer 2006) at 263.

<sup>5</sup> Bridge and Swindells *Adoption: The Modern Law* (Family Law 2003) at 21.

<sup>6</sup> O’Halloran fn 4 above, at chapter 9. For a sample of the range of views expressed on intercountry adoption see the Department of Health and Children Report *Adoption Legislation: 2003 Consultation and Proposals for Change* (Stationary Office 2005) at 81-82. See also O’Halloran *Adoption Law and Practice* (Butterworth Ireland Ltd 1992).

<sup>7</sup> Milotte *Banished Babies: The Secret History of Ireland’s Baby Export Business* (New Island Books 1997) at 46. The author traces how Irish children were made available to foreign couples for the purposes of adoption. He quotes a German newspaper report from 1951 which stated that “Ireland has become a sort of hunting ground today for foreign millionaires who believe they can acquire children to suit their whims.” For a discussion of some historical aspects of adoption in Ireland see Adie *Nobody’s Child* (Hodder 2005) at chapter 11.

other jurisdictions, the majority from the United States, were taking Irish infants abroad for the purpose of adoption. In the main these were infants born to unmarried mothers who in the circumstances of the time felt themselves unable to care for their own children. There was little or no enquiry or assessment as to the suitability of the families or environments to which these infants were being brought and no evidence as to whether their removal from the State was in the best interests of their welfare.”<sup>8</sup>

1.05 McGuinness J also noted that this ceased in Ireland many years ago, but that parallel situations have since arisen in other jurisdictions.<sup>9</sup> Indeed, in the second phase of adoption in this State, which emerged in the late 1980s, Ireland became a “receiving country”. At this time, the numbers of children placed for adoption in Ireland had decreased and so Irish people began to adopt children from abroad.<sup>10</sup> For example when the communist regime in Romania was overthrown in the late 1980s, many Irish people travelled to the country where they adopted children and returned to Ireland. In response to this, the *Adoption Act 1991* provided a legislative basis for the recognition of these adoptions by giving them the same status as domestic adoptions in Irish law.

1.06 It is notable that in 2004 the Adoption Board made 648 adoption orders, of which 375 (58%) were entries in the Register of Foreign Adoptions which was established by the 1991 Act. This rate of foreign adoptions is high by international standards. By comparison, in the United Kingdom, which has a population of about 15 times the size of Ireland’s, 367 children were adopted abroad by UK based adopters.<sup>11</sup> The increase in

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<sup>8</sup> [2001] IESC 104. For an historical account of the difficulties in introducing adoption legislation in Ireland see Whyte *Church and State in Modern Ireland 1923-1979* (2<sup>nd</sup> ed Gill & Macmillan 1980) at 185 and Ferriter *The Transformation of Ireland 1900-2000* (Profile Books 2004).

<sup>9</sup> Milotte notes that this practice continued until the 1970s without interruption. See fn 7 above, at 14.

<sup>10</sup> Duncan notes that this is partly attributable to improved social welfare provisions for single mothers which enabled them to look after their children. For example in 1973 a social welfare allowance was made available for the first time to single mothers. See Duncan “Foreword” to O’Halloran *Adoption Law and Practice* (Butterworth Ireland 1992) at viii. Also, the social stigma which attached to single parenthood in the past has reduced significantly in Irish society. The Central Statistics Office *Annual Report on Vital Statistics 2004* shows that in 2004 there were 19,798 births in Ireland, 31.9% of which were outside marriage. See [www.cso.ie](http://www.cso.ie).

<sup>11</sup> Statistics from the UK Department of Education and Skills are available at [www.dfes.gov.uk/intercountryadoption/general.shtml](http://www.dfes.gov.uk/intercountryadoption/general.shtml). Norway with a population of 4.6 million has a very high rate of intercountry adoption with 724 such adoptions in 2005. See [www.ssb.no/english](http://www.ssb.no/english).

intercountry adoption in Ireland has been connected with the decrease in the number of children available for adoption in the State.<sup>12</sup> The Annual Reports of the Adoption Board show a yearly increase in the numbers of foreign adoptions recognised and the number of declarations of eligibility and suitability to adopt granted to prospective adopters by the Adoption Board. In 2004, the Board made 461 declarations of eligibility and suitability and granted 250 extensions to declarations made in previous years.

1.07 The Commission now turns to examine the international legal context against which international adoption must be considered.

**(2) *United Nations***

1.08 In 1986 the General Assembly of the United Nations adopted the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally*.<sup>13</sup> Article 13 of the 1986 Declaration states that the primary aim of adoption should be to provide a permanent family for child who cannot be cared for by its own parents. Article 17 recognises that intercountry adoption is a childcare mechanism of last resort and states that:

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For intercountry adoption statistics of the States Parties of the Convention, see [www.hcch.net/index\\_en.php?act=conventions.publications&dtid=32&cid=69](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=32&cid=69).

<sup>12</sup> *Report of An Bord Uchtála (The Adoption Board) for 2004* (The Stationary Office 2004) at 16-17. Of the 273 domestic adoption orders made in 2004, 185 involved the adoption of children by family members. 177 children were adopted by their natural mother and her husband. These are often referred to as step-parent adoptions where the mother's husband adopts the child with her so that he will have the same rights and duties in respect of the child as the mother. 5 children were adopted by grandparents and 3 children by other relatives. There were 88 non-family adoptions. 26 were adoption placements by registered adoption societies, 20 were adoption placements by health boards and 22 concerned children in long term foster placements. The remaining 20 involved foreign children placed for adoption abroad in Guatemala, the Philippines and India, who were then adopted under the *Adoption Act 1952* or the *Adoption Act 1988* which allows for the non-consensual adoption of children born to married and unmarried parents who are deemed by the High Court to have abandoned their children for failing to perform their parental duties. The Board noted that in Guatemala, prospective adoptive parents are granted simple adoption orders which are not recognised under Irish law and so the prospective adopters apply to the Board for adoption orders in respect of these children, either with the consent of the natural parents or through the High Court under the *Adoption Act 1988*. Couples adopting children from India and the Philipinnes are granted guardianship by the relevant courts and then adopt the children under Irish law. See also Horgan "Editorial - The Adoption Law Reform Program - The Shape of Things to Come" [2003] 3 IJFL 1.

<sup>13</sup> Available at [www.unhchr.ch/html/menu3/b/27.htm](http://www.unhchr.ch/html/menu3/b/27.htm).

“If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.”

1.09 In 1989, the General Assembly adopted the *Convention on the Rights of the Child*.<sup>14</sup> The Convention is the leading international treaty on the rights of children and has been ratified by all UN Member States except for Somalia and the United States.<sup>15</sup> In 1992, Ireland ratified the Convention. The Preamble to the Convention recognises that:

“... the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding ....”

1.10 Article 20 acknowledges that the signatory States shall provide special protection and assistance to the child permanently deprived of their family environment. The Convention considers that adoption and intercountry adoption can be an appropriate care option for some children.<sup>16</sup> This is especially so when adoption or fostering within the child’s country is not possible. This is underlined by Article 20(3) which states that when considering child-care solutions “due regard shall be paid to...the child’s ethnic, religious, cultural and linguistic background.”

1.11 Article 21 sets out the guiding principles which should underpin adoption so as to ensure the protection of human rights. This Article also stresses that the child’s best interests must be the paramount consideration in all adoptions. There are also other considerations which must be taken into account, such as those of the natural parents. Article 21 of the Convention states that:

“States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption

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<sup>14</sup> Available at [www.unhcr.ch/html/menu3/b/k2crc.htm](http://www.unhcr.ch/html/menu3/b/k2crc.htm). See Horgan “The United Nations Convention on the Rights of the Child and Irish Family Law” (1991) 9 ILT 162.

<sup>15</sup> See Day O’Connor “Children’s Rights and Youth Justice in the USA” (2006) *International Family Law Journal* at 183.

<sup>16</sup> Ireland has submitted two reports on the implementation of the Convention. to the UN Committee on the Rights of the Child, in 1996 and 2005. Available at [www.nco.ie/un\\_convention\\_on\\_the\\_rights\\_of\\_the\\_child](http://www.nco.ie/un_convention_on_the_rights_of_the_child).

is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

- (b) Recognise that inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by an inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.”

1.12 In addition, Article 9 of the Convention provides that children should not be separated from their parents against their will except where this is determined to be in the best interests of the child and in accordance with law. It is also notable that Articles 11 and 35 place duties on States to take measures to prevent child trafficking.<sup>17</sup>

### **(3) Council of Europe**

1.13 The Council of Europe is active in promoting consistency in the various domestic adoption laws of its member States. A Working Party on Adoption, which is composed of family law experts from member States, including Ireland, is currently attempting a revision of the 1967 *European*

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<sup>17</sup> In 2005, the 4<sup>th</sup> World Congress on Family Law and Children's Rights issued a Communiqué, which, while noting the tension between the Convention on the Rights of the Child and some aspects of international adoption, stated that international adoption has a place, even as a last resort, provided it is properly regulated for the protection of orphaned and refugee children. See 4<sup>th</sup> World Congress on Family Law and Children's Rights, Cape Town, South Africa, 20-23 March 2005 at [www.childjustice.org/html/2005.htm](http://www.childjustice.org/html/2005.htm).

*Convention on Adoption* to which Ireland is a party.<sup>18</sup> While the 1967 Convention does not explicitly deal with intercountry adoption, it establishes the principle that an adoption should not be made unless it is in the best interests of the child.<sup>19</sup> It also directs that the adoption should provide the child with a stable and harmonious home.<sup>20</sup>

1.14 The Council of Europe's 1950 *Convention for the Protection of Human Rights and Fundamental Freedoms* does not contain any specific reference to adoption, but Article 8 safeguards respect for private and family life and Article 12 guarantees the right to marry and found a family.<sup>21</sup> These Articles inevitably interact with adoption issues and have been discussed in case law before the European Court of Human Rights (ECtHR).<sup>22</sup> In *Pini and Others v Romania*<sup>23</sup> the ECtHR dealt with the attempted intercountry adoptions of two Romanian girls by the applicants, who were two couples from Italy. In 2000, the applicants had obtained orders in a Romanian court for the adoption of the children when they were 9 years old and in the care of a private institution in Romania. This State-approved institution provided a home and education for orphaned and abandoned children. The children

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<sup>18</sup> Strasbourg, April 24, 1967. See [www.coe.int/legal](http://www.coe.int/legal). See Irish Treaty Series No. 3 of 1968: *European Convention on the Adoption of Children*.

<sup>19</sup> Article 8(1). This is enshrined in section 2 of the *Adoption Act 1974* as the welfare principle.

<sup>20</sup> Article 8(2).

<sup>21</sup> Available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>. The Convention became part of Irish domestic law with the enactment of the *European Convention on Human Rights Act 2003*. See Report *ECHR Act 2003: A Preliminary Assessment of Impact*, available at [www.lawsociety.ie](http://www.lawsociety.ie). For analysis of the implications of the Convention for Irish family law, see Horgan "Family Law - A European Perspective", paper to Family Law Conference, Dublin, 23 March 2006 and "Implications of the Human Rights Act 2003 on Irish Family Law", paper to 4<sup>th</sup> Annual Family Law Conference, Dublin, 25 November 2006.

<sup>22</sup> From an Irish perspective the most notable adoption related case to come before the Court is *Keegan v Ireland* [1994] 18 EHRR 342. See Kilkelly *The Child and the European Convention on Human Rights* (Ashgate 1999) at chapter 13 and Kilkelly "Child and Family Law" in Kilkelly (ed) *ECHR and Irish Law* (Jordans 2004) at chapter 5.

At the request of the European Union, Romania has placed a moratorium on intercountry adoption. This was a precondition for membership of the Union so that Romania would accept the *acquis communautaire* or body of EU law and fundamental principles. Romania became a member on 1 January 2007. See Bainham "International adoption from Romania-why the moratorium should not be ended" *Child and Family Law Quarterly* Vol 15 No 3 2003 at 223. For analysis of the EU and its policy regarding intercountry adoption in Romania see reports and conference papers at [www.adoptionpolicy.org](http://www.adoptionpolicy.org).

<sup>23</sup> [2004] EHRR 275.

were declared to have been abandoned by a County Court in Romania. One of the girls was declared to have been abandoned in 1994 at the age of 3. The other girl was declared to have been abandoned in 1998 when she was aged 7.

1.15 In 2000, a District Court in Romania made the adoption orders and ordered that the children's birth certificates be amended to reflect this decision. The Romanian Adoptions Board appealed the court decision but it was dismissed as being out of time. The institution where the girls lived refused to abide by the adoption orders and did not allow for the transfer of the girls to their adoptive parents. The institution made a number of applications to court to prevent the enforcement of the adoption orders and also applied unsuccessfully to have the adoptions set aside. In 2002, both children issued proceedings in the District Court in Romania to have the adoption orders revoked on the ground that they did not know their adoptive parents and did not want to leave their native country and the institution. One of the girls was unsuccessful in doing so. The District Court found that it was not in her interests for the order to be revoked. Despite this decision, the girl did not move to Italy with her adoptive parents and remained in Romania. The other girl was successful in having her adoption revoked. The Court decided that she was receiving a good education and living in good conditions at the institution. The Court also noted that she had not formed any emotional ties with her adoptive parents. This decision was not appealed and it became final.

1.16 The adoptive parents claimed that the refusal by the Romanian authorities to enforce the final adoption decisions breached Article 8 of the Convention. The ECtHR stated that the Convention does not guarantee a right to adopt and that the aim of adoption is to provide a child with family. In this case, a conflict of interests existed between the wishes of the children and the applicants. The ECtHR noted the deplorable manner in which the adoption proceedings took place and the lack of contact between the applicants and the children prior to the adoptions. The absence of psychological support for the children was also noted. The ECtHR decided that the wishes of the children and their best interests carried significant weight. Therefore, Article 8 had not been breached as Romania was entitled to consider that the children's interests took precedence over those of the adoptive parents. However the ECtHR held by 4 votes to 3 that there had been a violation by Romania of Article 6.1 of the Convention for failing, for more than 3 years, to take effective measures to comply with the final and enforceable judicial decisions. The ECtHR noted that this time delay had serious consequences for the development of the parent-child relationship. The prospect of the adoptive relationships developing in the future was seriously jeopardised since the children were still opposed to the adoptions

and the move to Italy at the time of the decision of the ECtHR when they were both 13 years of age.

1.17 It is also notable that the Parliamentary Assembly of the Council of Europe has issued a recommendation on international adoption to the Committee of Ministers of the Council so that the rights of children are protected.<sup>24</sup> It emphasises that the purpose of international adoption as a child care option of last resort is to provide children with parents. It denounces the abuses which have sometimes become part of intercountry adoption and calls on Member States to ratify the 1993 *Hague Convention on Intercountry Adoption*.

**(4) 1993 Hague Convention on Intercountry Adoption**

1.18 The 1993 *Hague Convention on Protection of Children and Co-Operation in respect of Intercountry Adoption* was formulated by the Hague Conference on Private International Law.<sup>25</sup> This is an inter-governmental organisation which is responsible for the “progressive unification” of the private international law rules of its Member States. Ireland is a Member State of the Hague Conference on Private International Law. The 1993 Convention sets out a framework to ensure that intercountry adoptions are carried out with the interests and welfare of children to the fore. The Convention envisages a system of co-operation between the child’s country of origin or the “sending country”, and the country to where the child will live with its adoptive parents, or the “receiving country”. The Convention has been described as a practical expression of the fundamental principles set out in the 1989 *United Nations Convention on the Rights of the Child*.<sup>26</sup>

1.19 Article 2(1) of the 1993 Hague Convention defines an intercountry adoption as one:

“...where a child habitually resident in one Contracting State (“the State of origin”) has been, is being, or is to be moved to another Contracting State (“the receiving State”) either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin”.

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<sup>24</sup> Recommendation 1443 (2000) International Adoption: Respecting Children’s Rights, adopted by the Parliamentary Assembly of the Council of Europe on 26 January 2000. See [www.coe.int](http://www.coe.int).

<sup>25</sup> The Convention was concluded on 29 May 1993 and entered into force on 1 May 1995. Ireland signed the Convention on 19 June 1996.

<sup>26</sup> Duncan “The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: Its Birth and Prospects” in Selman (ed) *Intercountry Adoption: Developments, Trends and Perspectives* (British Agencies for Adoption and Fostering 2000) at 41.

1.20 Article 1 of the 1993 Convention states that its objectives are threefold:

“(a) To establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his fundamental rights as recognised in international law;

(b) To establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;

(c) To secure the recognition in Contracting States of adoptions made in accordance with the Convention”.

1.21 In its 1998 *Report on the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993*<sup>27</sup> the Commission recommended ratification of the Convention by Ireland. The Commission stated that the Convention represented a significant step in the regulation of adoptions across national frontiers and that standards of intercountry adoption will be raised, procedures streamlined and abuses addressed through it.<sup>28</sup> In 2006, the United Nations Committee on the Rights of the Child expressed concern that Ireland’s intercountry adoption legislation does not fully correspond with international standards, and recommended that legislative reform remedy this situation.<sup>29</sup> The Commission takes this opportunity to reiterate its recommendation that the 1993 *Hague Convention on Intercountry Adoption* be ratified and incorporated into Irish law, and welcomes the Government’s commitment to do so through an *Adoption (Hague Convention and Adoption Authority) Bill* to be published in 2007.<sup>30</sup>

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<sup>27</sup> LRC 58-1998. See also Pillay “Implementation of the Hague Convention on Intercountry Adoption: The Law Reform Commission Report” [1999] 1 IFLJ 19. It is worth noting that, since 1998, the United Kingdom has incorporated the Convention into UK law in the *Adoption (Intercountry Aspects) Act 1999*, since replaced by the *Adoption and Children Act 2002*.

<sup>28</sup> LRC 58-1998 at 3.

<sup>29</sup> See *UN Committee on the Right of the Child-Concluding Observations: Ireland* 29 September 2006. Available at [www.ohchr.org/english/countries/ie/](http://www.ohchr.org/english/countries/ie/) It should also be noted that the 17<sup>th</sup> World Congress of the International Association of Youth and Family Judges and Magistrates was held in Belfast, Northern Ireland in Autumn 2006. It formulated the *Belfast Declaration* which states that in order to strengthen the international protection of the rights of the child, all States should ratify the Hague Convention on Intercountry Adoption. See [www.youthandfamily2006.com/beldec.htm](http://www.youthandfamily2006.com/beldec.htm). See also “Belfast Declaration” (2006) *International Family Law Journal* at 178.

<sup>30</sup> See *Government Legislation Programme for Spring Session 2007* available at [www.taoiseach.gov.ie/index.asp?locID=186&docID=-1](http://www.taoiseach.gov.ie/index.asp?locID=186&docID=-1). See also the comments made in Dáil Éireann by Mr. Brian Lenihan TD, Minister of State for Children that “the

1.22 *The Commission reiterates its previous recommendation that the 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption be ratified by Ireland and incorporated into Irish law. The Commission welcomes the Government's proposed legislation to do so.*

## **C Adoption Acts 1991 and 1998**

1.23 In 1984, the Review Committee on Adoption Services published a report entitled *Adoption*.<sup>31</sup> It opposed any measure which would encourage or facilitate trafficking in children from foreign countries for adoption purposes. The Committee reported that although there may be many young children orphaned or abandoned as a result of conditions of war or poverty or famine, this should not be regarded as a justification for removing them from their native environment. It was the Committee's view that concern for deprived children of distressed or underdeveloped countries can best be shown by assisting the various national and international agencies working to relieve the problems of such areas by improving conditions within them. It did however acknowledge that there may be particular instances in which persons living in Ireland may wish to adopt a child and where the circumstances would justify a favourable view being taken of such an application. The Committee recommended that such applications should be made through a registered society or health board. This was to ensure that enquiries would be made into the background of the child and to ensure that the necessary conditions, particularly those relating to consent, have been fulfilled.

1.24 In 1989, the Commission published its *Report on the Recognition of Foreign Adoption Decrees*.<sup>32</sup> The Commission recommended the enactment of adoption legislation which would provide for recognition of intercountry adoptions in the State. The Commission did not recommend the adoption by the State of the 1965 *Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption* as the Commission considered that it had some serious shortcomings. The Commission noted that a new Convention was being discussed at that time by the Hague Conference and this became the 1993 *Hague Convention on Intercountry Adoption*.

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Hague Convention will be transposed into legislation. The drafting of the legislation is at a final stage and I hope to publish it early next year." Debate on the *Child Care (Amendment) Bill 2006* Seanad Debates Vol 628 (23 November 2006). Available at [www.oireachtas-debates.gov.ie](http://www.oireachtas-debates.gov.ie)

<sup>31</sup> The Stationery Office 1984 at 15.

<sup>32</sup> LRC 29-1989.

1.25 As already mentioned, by the late 1980s and early 1990s Irish people were travelling to Romania to adopt children. This was in the wake of the fall of the Communist regime there and in response to the plight of orphans highlighted in various television documentaries. These developments led to the enactment of the *Adoption Act 1991* which was based on the structure set out in the Commission's 1989 Report.<sup>33</sup> The 1991 Act is a national measure to regulate a specific manifestation of intercountry adoption. The primary purpose of the 1991 Act was to facilitate the recognition of adoptions in respect of foreign children made in favour of persons ordinarily resident in Ireland. Indeed, it was one of the first pieces of legislation enacted in Europe to provide for the recognition of such adoptions prior to the formulation of the 1993 Hague Convention. While it was enacted in the immediate wake of the Romanian adoptions it is worth noting that a small number of people from Ireland who adopted children while they were living abroad also applied to have these adoptions recognised under the 1991 Act.<sup>34</sup>

1.26 Prior to the 1991 Act, the common law only allowed for the recognition of an adoption if the adopter was domiciled in the foreign jurisdiction at the date on which the adoption order was made.<sup>35</sup> The common law concept of domicile requires more than mere residence in a place. It also requires evidence of an intention to remain more or less permanently in a place.<sup>36</sup> This common law rule made the recognition of intercountry adoptions unnecessarily restrictive. It contrasted with domestic adoption law which simply required prospective adopters to be ordinarily resident in the State for one year, although this was tempered by there being

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<sup>33</sup> The 1991 Act originated in the *Recognition of Foreign Adoptions Bill 1990* (Bill No. 47 of 1990), a Private Member's Bill introduced by Mr. Alan Shatter TD. The provisions of the Bill were based on the recommendations made in the Commission's *Report on the Recognition of Foreign Adoption Decrees* (LRC 29-1989). Following a number of amendments made in conjunction with the Government, the Bill was renamed the *Adoption Bill 1990* (Bill No. 47a of 1990) and was enacted as the *Adoption Act 1991*. See *Shatter Family Law* (4<sup>th</sup> ed Butterworths 1997) at 511.

<sup>34</sup> *Shatter Family Law* (4<sup>th</sup> ed Butterworths 1997) at 511.

<sup>35</sup> See *MF v An Bord Uchtála* [1991] ILRM 399 (decided in 1987) in which McKenzie J held that the common law rule of recognition based on the domicile of the adopter at the date of the adoption order applied in Ireland. See *Shatter Family Law* (4<sup>th</sup> ed Butterworths 1997) at 510-511. See also Dicey, Morris and Collins *The Conflict of Laws* (Sweet & Maxwell 2006) at 1081. For an account of the difficulties that non-recognition of an adoption can cause see Rose *The Final Decision on Adoption Recognition in Europe* (RD Publishers 2002).

<sup>36</sup> See *Binchy Irish Conflicts of Law* (Butterworth Ireland 1988) at chapter 6. The Commission has previously called for the abolition of domicile as a connecting factor in favour of habitual residence. See *Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws* (LRC 7-1983).

rigorous requirements regarding the suitability of adoptive parents.<sup>37</sup> The 1991 Act introduced a new provision as recommended by the Commission in its 1989 Report, that adoptions made in favour of persons “habitually resident” abroad could also be recognised. This new test reflected the residency test in most international documents on recognition including recognition of foreign adoptions. While the 1991 Act focused on a residency test rather than one based on domicile, section 8 of the 1991 Act also envisaged that prospective adopters ordinarily resident in Ireland would be assessed as to their suitability to adopt by the predecessors of the Health Service Executive (the regional health boards) and registered adoption societies prior to adopting a child from abroad.<sup>38</sup>

1.27 The *Adoption Act 1991* was later amended by the *Adoption Act 1998*, largely in response to problems associated with “simple adoptions” made abroad for which recognition was sought. In Ireland, only “full adoption” which completely terminates the legal relationship between the child and its natural parents is available and this type of adoption is also easily recognised if it is made in another jurisdiction. In other jurisdictions, “simple adoption” which has the effect of not completely severing the legal relationship between the child and its natural parents is also quite common. In the mid 1990s Irish people became interested in adopting children from the People’s Republic of China. The Adoption Board refused to recognise Chinese adoption orders under the *Adoption Act 1991* because Chinese law provided for a form of simple adoption which did not terminate the legal relationship between the natural parent and child. In *B and B v An Bord Uchtála* this view was challenged by a number of couples who sought recognition of Chinese adoptions. The High Court<sup>39</sup>, and on appeal, the Supreme Court<sup>40</sup> upheld these challenges and ordered that Chinese adoptions should be registered under the 1991 Act.

1.28 In *B and B v An Bord Uchtála* the Supreme Court noted that, in general the relationship created by an order for adoption is final in its effect and permanent in its duration, but that this is not necessarily so in Ireland. Delivering the leading judgment, Murphy J referred to section 22(7) of the *Adoption Act 1952* which expressly recognises that an adoption order made in the State may be “set aside”, although he accepted that the circumstances

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<sup>37</sup> Section 13(1) of the *Adoption Act 1952* requires that when making an adoption order, the Adoption Board must be satisfied that the applicant or applicants for adoption are of good moral character, have sufficient means to support the child and are suitable people to have parental rights and duties.

<sup>38</sup> For a discussion of the provisions of the 1991 Act, see Dáil Éireann Debate on the *Adoption Bill 1990*: Dáil Debates Vol 408 (8 May 1990).

<sup>39</sup> High Court (Flood J) 12 April 1996

<sup>40</sup> [1997] 1 ILRM 15 (SC).

in which this could occur are not identified in any of the Adoption Acts and that no case law existed on this point. He also noted that section 18 of the 1952 Act permits further adoption of a child where the original adopters or sole adopter has died. The Court also noted that where the adoptive parents have failed in their parental duties owed to their child, the child could be re-adopted under the *Adoption Act 1988*.<sup>41</sup> As a result the Court concluded that “the concept of permanence as an incident of adoption is not absolute in this jurisdiction”. Therefore Chinese adoptions were capable of recognition in Ireland.

1.29 The Commission notes that the *Adoption Act 1998*, which amended the 1991 Act, placed this approach on a statutory footing. The Commission is also aware that, during the 1990s, Irish people began adopting children from countries other than China where simple adoptions are the norm. The *Adoption Act 1998* took this and the decision of the Supreme Court in *B and B v An Bord Uchtála* into account by amending the *Adoption Act 1991* to ensure that some simple adoptions could be recognised in Ireland. Thus, the definition of a foreign adoption in section 1 of the 1991 Act was amended so that an emphasis was placed on the guardianship rights in respect of the child being substantially the same in Ireland and the foreign jurisdiction. This was a significant change to the original definition in the 1991 Act which required that the adoption had essentially the same legal effect as respects the termination and creation of parental rights and duties in Ireland and the foreign jurisdiction.<sup>42</sup> The 1998 Act thus facilitated the recognition of some simple adoptions which complied with Irish law.

1.30 The 1991 Act, as amended by the 1998 Act provides for the recognition of five different types of adoption orders made outside Ireland:

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<sup>41</sup> The 1988 Act was used to facilitate the re-adoption of a Romanian child who had been adopted by an Irish couple in Romania but who were unable to cope with the child. The child was then placed in the care of a Health Board (now the Health Service Executive) and was subsequently adopted by its foster parents. It appears that this is the only known case of a foreign adoption breaking down in Ireland. See Coulter “Dowse case should not detract from good effects of foreign adoptions” *Irish Times* 3 March 2006 at 16.

<sup>42</sup> The original definition of a “foreign adoption” in section 1(b) of the *Adoption Act 1991* provided that:

“The adoption has essentially the same legal effect as respects the termination and creation of parental rights and duties with respect to the child in the place where it was effected as an adoption effected by an adoption order.”

The definition of a “foreign adoption” in section 1(b) of the 1991 Act, as inserted by section 10(a)(ii)(b) of the *Adoption Act 1998*, provides:

“The adoption has, for so long as it is in force, substantially the same legal effect as respects the guardianship of the child in the place where it was effected as an adoption effected by an adoption order.”

- Section 2 provides for the recognition of a foreign adoption which was made in or recognised under the law of the place of the domicile of either or both of the adopters.<sup>43</sup>
- Section 3 provides for the recognition of a foreign adoption which was made in or recognised under the law of the place of the habitual residence of either or both of the adopters.<sup>44</sup>
- Section 4 provides for the recognition of a foreign adoption which was made in or recognised under the law of the place of one year's ordinary residence of either or both of the adopters on the date on which the adoption was made.<sup>45</sup>
- Section 4A, inserted by the 1998 Act, provides for the recognition of a foreign adoption which was made in a place where neither of the adopters was domiciled, habitually resident or ordinarily resident on the date on which the adoption was made, but is not recognised under the law of the place in which either or both of the adopters were on that date domiciled, habitually resident or ordinarily

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<sup>43</sup> Section 2(2) of the *Adoption Act 1991* states that sections 2, 3, 4, 4A and 5 of the Act are in substitution for "any rule of law providing for the recognition of adoptions effected outside the State". Therefore the common law rule of recognition based on domicile was abolished by the 1991 Act.

<sup>44</sup> Habitual residence has become the most commonly used "connecting factor" in an international family law context. The various Hague Conventions which concern children and family law use "habitual residence" as the primary connecting factor. The prevalence of this term in international conventions can be traced to the International Court of Justice decision in *Netherlands v Sweden* [1958] ICJ Rep 55. See the discussion in paragraph 2.83 below. See also the *Hague Convention on the Civil Aspects of International Child Abduction 1980* and the *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996* in which "habitual residence" is the primary connecting factor. It is also the main "connecting factor" used by the EU in its emerging family and child related law. See *Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* commonly known as the "Brussels II bis Regulation". In *PAS v AFS* [2005] ILRM 306 the Supreme Court defined the term "habitual residence" as being primarily a factual concept.

<sup>45</sup> This is a mirror of the "connecting factor" in section 5(2) of the *Adoption Act 1964* to ensure that prospective adopters in Ireland had a genuine legal connection with Ireland before they could adopt a child. This was a belated attempt to prevent the continuation of a tragic aspect of Ireland's history which had involved the secret adoption abroad of at least 2,000 Irish children by predominantly US based couples who could not be described as having been resident in Ireland. See *Shatter Family Law* (4<sup>th</sup> ed Butterworths 1997) at 446.

resident solely because the law of that place did not provide for the recognition of adoptions made outside that place.<sup>46</sup>

- Section 5 provides for the recognition of a foreign adoption where the adopters are ordinarily resident in Ireland.

1.31 The *Adoption Act 1991*, as amended by the *Adoption Act 1998*, requires that a “foreign adoption” must meet the following conditions so that:

- The age of the child must be less than 18,<sup>47</sup>
- The consent of relevant persons, such as the natural parents to the adoption, was obtained or dispensed with under the law of the foreign jurisdiction,<sup>48</sup>
- The legal effect of the adoption in the foreign jurisdiction where it was made, has substantially the same legal effect regarding the guardianship of the child as a domestic adoption made in Ireland,
- The law of the foreign jurisdiction where the adoption was made required an inquiry to be carried out, as far as was practicable, into the adopters, the child and the parents or guardian,
- The adoption was made to promote the interests and welfare of the child and,
- The adoption did not involve improper payments made by the adopters in consideration of the adoption.<sup>49</sup>

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<sup>46</sup> This provision was inserted by section 12(1) of the *Adoption Act 1998*. It is designed to deal with cases where persons who, while living in an Islamic country or a country whose laws do not provide for the recognition of adoption, adopt a child in some other country. See Jackson, “Adoption Act 1998” Irish Current Law Statutes Annotated, R 63 at 10-16.

<sup>47</sup> The *Age of Majority Act 1985* lowered the age of majority from 21 to 18. Section 6 of the *Adoption Act 1988* amended the *Adoption Act 1952* by defining a child as any person under the age of 18 years. Thus, a child adopted after the enactment of the 1991 Act must be under 18 years of age. An adoption made abroad in respect of someone under the age of 21, prior to the enactment of the *Adoption Act 1991* will be recognised in this jurisdiction.

<sup>48</sup> For the purposes of this Consultation Paper the term “natural parent” and “adoptive parent” have been used. The Commission is aware of the sensitivities in the use of language in the context of adoption but notes that the term “natural parent” is used in the Report of the Department of Health and Children *Adoption Legislation: 2003 Consultation and Proposals for Change* and also in the Adoption Board’s *Corporate Plan 2004-2007* available at [www.adoptionboard.ie/booklets/](http://www.adoptionboard.ie/booklets/)

1.32 Once these conditions have been met, foreign adoptions registered under the 1991 Act have the same legal effects as a domestic adoption order.<sup>50</sup> The adoption is then entered as an entry in the Register of Foreign Adoptions under section 6 of the 1991 Act.<sup>51</sup> This is proof that the adoption is recognised under Irish law. The approach taken in the 1991 Act that a recognised foreign adoption order has the same status as a domestic adoption order, is also used in comparable legislation in other common law countries such as the United Kingdom, Australia and New Zealand. Such an approach “has the virtues of simplicity and practicality.”<sup>52</sup>

1.33 The 1993 *Hague Convention on Intercountry Adoption* does not deal with what the effects of foreign adoption recognition should be. Instead, Article 26, which deals with recognition of intercountry adoptions, allows a Contracting State to deal with this in its domestic law.<sup>53</sup> In that respect, it has been noted that Article 26 contains:

“...a list of the minimal consequences of recognition, which may have to be supplemented by additional rules included in

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<sup>49</sup> See Appendix for the complete definition of a “foreign adoption” order defined in section 1 of the *Adoption Act 1991* as amended by section 10 of the *Adoption Act 1998*.

<sup>50</sup> Section 1 of the *Adoption Act 1991* defines an “adoption order” made under the 1991 Act as an order under section 9 of the *Adoption Act 1952*.

<sup>51</sup> See Appendix for the full text of the relevant provisions of the 1991 Act as amended by the 1998 Act.

<sup>52</sup> *Binchy Irish Conflicts of Law* (Butterworth Ireland 1988) at 375. This approach was favoured by Lord Denning MR in *Re Valentines Settlement* [1965] 2 All ER 226 at 227-232.

<sup>53</sup> Article 26 of the 1993 Convention states that:

“(1) The recognition of an adoption includes recognition of

(a) the legal parent-child relationship between the child and his or her adoptive parents;

(b) parental responsibility of the adoptive parents for the child;

(c) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.

(2) In the case of an adoption having the effect of termination a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting States where the adoption is recognized, rights equivalent to those resulting from adoptions having this effect in each such State.

(3) The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognizes the adoption.”

implementing or already operating in legislation in Contracting States”.<sup>54</sup>

1.34 It is thus important to note that even after the implementation of the 1993 Hague Convention, the State will remain free to provide that a foreign adoption registered in Ireland has the same effect as a domestic adoption order.

#### **D Types of Foreign Adoptions and the Attorney’s Request**

1.35 Since the enactment of the *Adoption Act 1991*, over 4,000 foreign adoptions have been registered by the Adoption Board (An Bord Uchtála) in the Register of Foreign Adoptions.<sup>55</sup> These are broken down as follows with variations depending on the year involved:

- Approximately 70-75% of the 4,000 entries were made under section 5 of the *Adoption Act 1991*, where the adopters are ordinarily resident in Ireland and adopt a child from abroad. In such cases the adopters are assessed as to their suitability to be adoptive parents by the Health Service Executive.<sup>56</sup> The Adoption Board issues them with a declaration of eligibility and suitability to adopt prior to the adoption in the foreign country.
- The remaining 20-30% of the entries come under sections 2, 3, 4 and 4A of the 1991 Act, where the adopters were not resident in Ireland at the time of the adoption but were domiciled, habitually resident or ordinarily resident in the foreign jurisdiction.
- Of these 20-30%, the overwhelming majority involve adults seeking recognition of their own adoption so that they may become an Irish citizen on the basis that one of their adoptive parents is or was an Irish citizen.
- The result of this is that less than 10% of the 4,000 foreign adoptions recognised since 1991 concern the adoptions of children under the age of 18 by Irish citizens who were domiciled, habitually resident

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<sup>54</sup> Duncan “Conflict and Co-Operation; The Approach to Conflicts of Law in the 1993 Hague Convention on Intercountry Adoption” in Lowe and Douglas (eds) *Families Across Frontiers* (Martinus Nijhoff Publishers 1996) 577 at 585-588.

<sup>55</sup> The Commission is grateful to the Adoption Board for providing this statistical information based on its analysis of such orders made between 1991 and 2005.

<sup>56</sup> The Health Service Executive (HSE), established by the *Health Act 2004* which came into operation on 1 January 2005, is the successor to the Health Boards which formerly performed this function.

or ordinarily resident in a foreign jurisdiction at the time of the adoption. It is this small group of foreign adoptions with which the Attorney General's request is concerned.

1.36 The Attorney General's request concerns three main issues.<sup>57</sup> The first relates to the status and rights, including citizenship rights, of a child resident outside the State who is the subject of a foreign adoption order made in favour of an Irish citizen or citizens. The second concerns the most effective manner of securing the performance of the constitutional and legal duties of the adoptive parents in respect of such a child. The third requests the Commission to assess the most effective manner of ensuring the fulfilment of the duties of the State in respect of such a child arising from Article 40.3 and Article 42.5 of the Constitution.

1.37 The Attorney's request arises from *Attorney General v Dowse*,<sup>58</sup> which concerned the adoption of a child in Indonesia by an Irish citizen under section 4 of the 1991 Act and which was subsequently registered under section 6 of the 1991 Act. As a result, the primary focus of the request is on the recognition and registration of adoptions which come within the terms of sections 2, 3, 4 and 4A of the *Adoption Act 1991* as amended by the *Adoption Act 1998*. In particular, the request is concerned with the recognition of foreign adoptions which come under these provisions where the adopted person is a child under 18 years of age residing outside the jurisdiction with their adoptive parents, at least one of whom is an Irish citizen at the time the adoption is recognised and registered in Ireland. As already stated, this particular type of intercountry adoption applies to less than 10% of all intercountry adoptions which have been registered in Ireland under the 1991 Act.

## **E Guiding Principles**

1.38 In considering the issues posed by the Attorney General, the Commission has taken into account a number of key principles.

### **(1) Best Interests of the Child**

1.39 In any decision made which concerns a child, the best interests of the child must be given a very high priority. This is a guiding principle in international child law. Article 3.1 of the *United Nations Convention on the Rights of the Child* expressly provides that:

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<sup>57</sup> For the full text of request, see paragraph 1 of the Introduction above.

<sup>58</sup> [2006] IEHC 64, [2007] 1 ILRM 81.

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>59</sup>

1.40 In Ireland this is expressed as the welfare principle which has already been applied in existing legislative provisions. For example section 3 of the *Guardianship of Infants Act 1964* states that a court in assessing guardianship issues must have regard to the welfare of the child as “the first and paramount consideration”.<sup>60</sup> In the adoption context, section 2 of the *Adoption Act 1974* states that the welfare of the child shall be the first and paramount consideration in all decisions of the Adoption Board or any court relating to the arrangements for or the making of an adoption order. It is likely that this element of the 1974 Act is based on the 1967 Council of Europe Convention on the Adoption of Children, discussed above.

## **(2) Equality**

1.41 There is a fundamental difference between adopted and biological children by virtue of the manner in which the relationship of parent and child was formed, but it is a well established principle that the law treats adopted children in the same manner as biological children. Therefore, the Commission is of the opinion that the equality principle should continue to apply in the context of the acquisition of Irish citizenship by the adopted children of Irish citizens who do not live in Ireland.

## **(3) Presumption of Recognition**

1.42 Where an adoption order has already been made in respect of a child in a foreign jurisdiction, it is generally considered not to be in the best interests of a child if a receiving State refuses to recognise the adoption. This is because the child’s legal status within the adoptive family remains uncertain when he or she crosses national borders. Irish adoption law

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<sup>59</sup> See Fortin *Children’s Rights and the Developing Law* (2<sup>nd</sup> ed LexisNexis 2003) at chapter 2 and Sargent “Best Interest of the Child in the USA and Europe” (2006) *International Family Law Journal* at 24. Note that Article 24.2 of the *Charter of Fundamental Rights of the European Union* also states that:

“In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.” Available at [www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm).

<sup>60</sup> Welfare is defined in section 2 of the 1964 Act as comprising “the religious and moral, intellectual, physical and social welfare of the infant”. Reference to the welfare and best interests of the child is also found in sections 3 and 24 of the *Child Care Act 1991*. See Shannon “Child Custody Law of the Republic of Ireland” [2005-2006] 39 *Fam. L.Q.* 353 at 361.

already operates a presumption in favour of recognising a foreign adoption. Section 9(4) of the *Adoption Act 1991* contains a presumption, which can be rebutted, that a foreign adoption was properly made under the law of the State where it was made. Once the adoption complies with section 1 of the 1991 Act (and with sections 2, 3, 4 and 4A where appropriate), the Adoption Board is under a statutory duty to make an entry in the Register of Foreign Adoptions in accordance with section 6(2)(ii) of the 1991 Act. The Commission considers that this presumptive approach is correct.

**(4) *Duties of the State and Practicability***

1.43 The Constitution of Ireland recognises and confers rights on citizens and human beings. The Commission must examine the extent of such rights in answering the questions posed by the Attorney General. The Attorney's request is concentrated on Irish citizens resident outside the State and the children which they adopt. The Constitution guarantees the protection of the State of the rights of citizens and human beings in Article 40.3 and accepts that these rights can only be guaranteed in "as far as practicable". Where the rights are guaranteed in a setting where the citizen or human being is resident in Ireland, limitations may be placed on the scope of application of these rights. For example, the State guarantees, as far as practicable, to vindicate the person of the human being. This may carry with it some limitations in terms of the technology available in keeping a person healthy. Where the citizen or human being does not live in Ireland the concept of practicability is focused more on the practical ability of the State to enforce its protection of the rights of citizens who are in a different country. Therefore, the rights of an Irish citizen child under the Constitution who is resident in another jurisdiction will very much depend on how they can be enforced in a practical way.

1.44 The State's duty under Article 40.3 of the Constitution regarding the category of foreign adoptions registered under the 1991 Act and which is the focus of the Attorney's request is limited when the adopters are not resident in the State. In such a case, the Adoption Board has had no role in the prior assessment of adoptive parents as to their suitability to adopt in a foreign country. This is in contrast to their role in the case of prospective adopters ordinarily resident in Ireland, and who represent 70-75% of those whose foreign adoptions have been registered under the 1991 Act. The Adoption Board has no role in determining whether the natural parents in the foreign country have given valid consents to the adoption or whether there has been an appropriate match between the child and the adoptive parents. When private and public international law considerations are taken into account, it is clear that there is little that the State can do as a matter of practicability, if its citizens adopt children while resident abroad and they only later make this fact known to the authorities of the State such as the Adoption Board. The Commission has therefore taken into account this

reality of the practicability of the State's duty in the context of the particular type of intercountry adoption at issue in the Attorney General's request.

## CHAPTER 2 STATUS AND RIGHTS OF THE CHILD

### A Introduction

2.01 In this Chapter, the Commission gives its provisional view on the first question raised in the Attorney's request, namely, the status and rights of a child who is the subject of a foreign adoption order made in favour of an Irish citizen or citizens. In Part B, the Commission discusses the High Court decision in *Attorney General v Dowse*<sup>1</sup>, which formed the immediate background to the Attorney General's request to the Commission. In Part C, the Commission examines the revocability of adoption orders in Ireland. In Part D, the Commission examines the interaction between adoption and citizenship law in Ireland and in other jurisdictions. In Part E, the Commission considers case law concerning the rights of the child and the extra-territorial application of the Constitution of Ireland.

### B Attorney General v Dowse

#### (1) Recognition of the Adoption in Ireland

2.02 *Attorney General v Dowse* concerned the adoption of an Indonesian child in August 2001 by an Irish citizen and his Azeri wife who were both ordinarily resident in Indonesia at the time of the adoption. The adoptive father then contacted the Adoption Board in Ireland in August 2001 to register the adoption in the Register of Foreign Adoptions established under the *Adoption Act 1991*. The Board considered that Indonesian adoption law was compatible with Irish adoption law and the adoption was registered in December 2001 as being one made in the place where the adopters were ordinarily resident for a year prior to the adoption, in accordance with section 4 of the *Adoption Act 1991*.<sup>2</sup> The child involved has

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<sup>1</sup> [2006] IEHC 64, [2007] 1 ILRM 81. See "Editor's Briefing" (2006) 16 ILT 244. See also the discussion of the case by Mr. Justice O'Higgins, "Recent Developments in Irish Family Law", Anglo-German Family Law Judicial Conference, Law Society of Ireland, Dublin, September 2006 and Corrigan "Child Law Update: Abduction, Adoption and Children's Rights", 4<sup>th</sup> Annual Family Law Conference 2006, Dublin, November 2006.

<sup>2</sup> See Appendix for the provisions of section 4 of the *Adoption Act 1991*. The Commission notes that Indonesian adoption law was considered to be compatible or "on par" with Irish adoption law by the Adoption Board on two previous occasions in 1992 and 2002. See interview with the Registrar of the Board on RTÉ Radio One's

never been to Ireland, but once his adoption was registered in the Register of Foreign Adoptions under section 6 of the 1991 Act, it facilitated his acquisition of Irish citizenship by virtue of his adoptive father being an Irish citizen. The adoptive father applied for Irish citizenship and an Irish passport for the child and this was granted by the Passport Office.

**(2) *Involvement of the Irish Authorities***

2.03 The child lived with his adoptive parents in Indonesia from August 2001 until May 2003, when they applied to the District Court of South Jakarta for an order relinquishing him to the care of an Indonesian couple. The adoptive parents claimed that the adoption did not succeed because little or no bonding took place between the child and themselves.<sup>3</sup> However this care arrangement with the Indonesian did not happen because the child was placed in a private orphanage. The adoptive parents later left Indonesia to live in Azerbaijan. In 2004, the Adoption Board was informed of these developments. The Board decided that, in accordance with the *Adoption Act 1991*, as amended by the *Adoption Act 1998*, it could not remove the adoption entry from the Register of Foreign Adoptions and that such a removal required the involvement of the High Court. The Adoption Board contacted the Department of Foreign Affairs to inform it of the circumstances of the Irish citizen child. As a result, the Department together with the Office of the Attorney General became directly involved.

2.04 This involved considerable efforts at official level to determine the welfare of the child once his situation had become known through the Adoption Board. For example, during 2004 and 2005, the Irish Embassy in Turkey (whose remit extends to Azerbaijan) wrote to the adoptive father at his work address in Baku enquiring about the child. At the request of the

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*Morning Ireland* 15 April 2005 available at  
[www.rte.ie/news/2005/0415/morningireland.html](http://www.rte.ie/news/2005/0415/morningireland.html)

<sup>3</sup> According to the British Association for Adoption and Fostering, the word “disruption” is used to describe the breakdown of an adoption placement before or after an adoption order is made. See Argent and Coleman *Dealing with Disruption* (British Association for Adoption and Fostering 2006). There appears to be little in the way of official statistics which show the incidence of such breakdowns. See Lowe, Murch et al *Supporting Adoption: Reframing the Approach* (British Agencies for Adoption and Fostering 1999) at 214. In the US, a Department of Health and Human Services study states that between 10% and 25% of adoptions disrupt. See [www.childwelfare.gov/pubs/s\\_disrup.cfm](http://www.childwelfare.gov/pubs/s_disrup.cfm). Only one other intercountry adoption is known by the Adoption Board to have broken down. This involved an Irish couple who had adopted 2 Romanian children. They were unable to look after one of the children. This child was placed in foster care and subsequently re-adopted by the foster parents in accordance with the *Adoption Act 1988*. See Coulter “Dowse case should not detract from good effects of foreign adoptions” *Irish Times* 3 March 2006 at 16.

Attorney General, a senior social worker from the Adoption Board visited Indonesia twice in 2005 to investigate the child's circumstances. The Irish Ambassador to Singapore and Indonesia also paid a number of visits to Jakarta. The Deputy Legal Adviser at the Department of Foreign Affairs also visited Indonesia and consultations took place with Indonesian lawyers regarding Indonesian law.

**(3) Commencement of Legal Proceedings**

2.05 In May 2005, the Attorney General in his position as guardian of the public interest began proceedings in the High Court in Ireland to protect the interests of the child as an Irish citizen.<sup>4</sup> The Attorney sought a number of orders including:

- A declaration that the adoptive parents had failed in their duties as parents to care and provide for their son under Articles 42.1 and 40.3 of the Constitution of Ireland.
- Orders directing the adoptive parents to carry out their constitutional duties as parents, in particular:
  - to provide suitable and appropriate accommodation for the child,
  - to provide by periodic payment and/or lump sum for his support and maintenance,
  - to provide suitable care and facilities so that he receives religious and moral, intellectual, physical and social education appropriate to his needs.
- An order that necessary steps be taken by the High Court to ensure that the child's needs and welfare would be protected.
- In the alternative, that the Court direct that the child be brought to Ireland so that accommodation facilities and care appropriate to his needs could be provided for him in this jurisdiction. Ultimately, this alternative approach was not explored in the case, so that the focus was on how the child's welfare could be catered for in Indonesia.<sup>5</sup>

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<sup>4</sup> See Hogan and Whyte *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed Butterworths 2003) at 589. The Attorney General's role as guardian of the public interest will be discussed in Chapter 3.

<sup>5</sup> The Adoption Board's senior social worker who travelled to Indonesia advised that it would not be in the child's best interests to be removed from his native country of Indonesia for the purposes of adoption or fostering in Ireland. The Irish authorities were also aware that the Indonesian authorities would not be in favour of the child's transfer to Ireland in view of the extensive media attention surrounding the case. If this had been a possibility it is likely that the Attorney General would have had to

2.06 The High Court allowed the Attorney to serve notice of the proceedings on the adoptive parents under Order 11 of the *Rules of the Superior Courts 1986* and, crucially, they consented to the Court's jurisdiction in the case.<sup>6</sup> In August 2005, the adoptive parents initiated proceedings in the High Court in Ireland seeking an order to cancel the December 2001 entry in the Register of Foreign Adoptions concerning the child. The adoptive parents also sought orders under section 7 of the *Adoption Act 1991*, as amended by the *Adoption Act 1998*. These would include orders relating to the guardianship, custody, maintenance and citizenship of the child which the High Court is empowered to make under section 7 of the 1991 Act, as amended, when a registration of adoption is cancelled, and such orders as appear to the Court to be necessary in the circumstances and in the best interests of the child concerned.

**(4) Resolution of the Case**

2.07 In considering the first question posed by the Attorney General in his request to the Commission<sup>7</sup>, as to the status of the child under Irish law, it is necessary for the Commission to discuss the manner in which *Attorney General v Dowse* was resolved by the High Court. As already noted the adoptive parents consented to the Court's jurisdiction and appointed solicitors and counsel to appear in the proceedings which were heard by MacMenamin J. By the time the case came to hearing, the child had been reunited with his natural mother, and MacMenamin J concluded in his judgment that this was ultimately in the child's best interests. The case was then dealt with as an application to cancel the registration of the adoption under the 1991 Act and the related issues raised by the Attorney concerning the child's status and the adoptive parents' duties to him. When the child's adoption was registered in the Register of Foreign Adoptions, he was considered to be the child of the adoptive parents, and having the same status as if he were born to them under Irish law. In the eyes of the Constitution

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institute proceedings in an Indonesian court seeking permission to remove the child from Indonesia to Ireland.

<sup>6</sup> Order 11(1)(i) of the *Rules of the Superior Courts 1986* states that service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever the proceedings concern an infant domiciled in, or a citizen of, Ireland. In *Grehan v Medical Inc* [1986] IR 528 at 532, Walsh J noted that Order 11 applies to "situations in which the defendant is not present within the jurisdiction but in which case is so closely connected with Ireland or with Irish law that there is a justification for it being tried within the jurisdiction". See Delany and McGrath *Civil Procedure in the Superior Courts* (Round Hall Sweet & Maxwell 2001), chapter 3 and Binchy *Irish Conflicts of Law* (Butterworth Ireland 1988).

<sup>7</sup> See the Introduction to this Consultation Paper, paragraph 1, for the text of the Attorney's request.

the adoptive parents and child amounted to a specially protected family unit within the meaning of Articles 41 and 42 of the Constitution.<sup>8</sup>

2.08 In the *Dowse* case MacMenamin J placed particular emphasis on the constitutionally enshrined duties owed by parents to their children. Article 42.1 of the Constitution provides that:

“The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.”

2.09 If in exceptional cases parents fail in these duties, the State has a responsibility under Article 42.5 of the Constitution to step into the parental role so that the rights of children are vindicated. Article 42.5 of the Constitution provides that:

“In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptable rights of the child.”

2.10 These rights are not confined to the provision of education but have been interpreted by the Supreme Court as encompassing the broader spectrum of children’s rights which are dependant upon the performance of correlative parental duties.<sup>9</sup> Article 42.5 is specifically mentioned in the Attorney’s request to the Commission and the discussion of its application in the *Dowse* case is particularly important.

**(a) Cancellation of the Foreign Adoption Registration**

2.11 MacMenamin J noted that if the High Court acceded to the application by the adoptive parents to cancel the registration of the adoption, the child would no longer be considered to be their child under Irish law and they would be freed from their constitutional obligations to provide according to their means for his overall welfare. Because of this serious consequence he deemed that this should only be done if the parents had failed under Article 42.5 to have due regard for the “natural and imprescriptable rights of the child”. In deciding what amounted to a failure of parental duty, MacMenamin J applied the view of McGuinness J in

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<sup>8</sup> See generally Hogan and Whyte *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed Butterworths 2003) at 1825-1969.

<sup>9</sup> See *In re the Adoption (No. 2) Bill 1987* [1989] IR 656.

*Northern Area Health Board v An Bord Uchtála*<sup>10</sup> that there had to be a complete failure to carry out the day to day care of the child.

2.12 MacMenamin J concluded that the adoptive parents had failed in their parental duties and that the child's natural and imprescriptable rights must be vindicated. These included the right to have his religious, moral, intellectual, physical and social educational needs provided for by the adoptive parents in accordance with their means. He noted that the Oireachtas provided for significant limitations and safeguards regarding the exercise of the Court's power to direct a cancellation of an adoption registration when it enacted the *Adoption Act 1998* which amended the *Adoption Act 1991*. It provides that such a direction shall not be given:

“...unless the Court is satisfied that it would be in the best interests of the person who was the subject of the adoption.”<sup>11</sup>

2.13 He also noted that the *Adoption Act 1998* enabled the Court to make an array of orders in the event of such a cancellation, including orders relating to guardianship, custody, maintenance and citizenship.<sup>12</sup> MacMenamin J ultimately concluded that, since the child was no longer receiving the benefits of being a member of the adoptive parents' family, the adoption registration should be cancelled and removed from the Register of Foreign Adoptions in accordance with the 1991 Act, as amended by the 1998 Act.

**(b) Consequential Orders Made**

**(i) Guardianship**

2.14 Following cancellation of the adoption registration, the first issue to be dealt with was the child's guardianship. This was because it was:

“... unclear whether the cancellation of the registration of the adoption will in itself revive her [the natural mother's] guardianship and custody rights which would have been extinguished on the registration of the adoption.”<sup>13</sup>

MacMenamin J appointed the natural mother of the child as his sole guardian with custody. This had the effect that the child's status in Irish law would coincide with his status under Indonesian law.

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<sup>10</sup> [2002] 4 IR 252 at 270.

<sup>11</sup> Section 7(1A) of the *Adoption Act 1991* as inserted by section 15(b) of the *Adoption Act 1998*.

<sup>12</sup> Section 7(1B) of the *Adoption Act 1991* as inserted by section 15(b) of the *Adoption Act 1998*.

<sup>13</sup> [2007] 1 ILRM 81 at 101. Such guardianship and custody rights are enshrined in section 6 and section 10(2)(A) of the *Guardianship of Infants Act 1964*.

**(ii) Maintenance**

2.15 The second issue dealt with by the Court concerned the maintenance of the child by the former adoptive parents. The Court ordered that an initial lump sum be paid so that this would cater for the child's need for appropriate housing and meet his future capital needs. An ongoing monthly payment was also ordered which would be divided in half. One half would be paid directly into the natural mother's bank account and the other half directly into a capital fund which would be available to the child once he reached 18 years of age. A lump sum was also to be paid to the child when he reached 18 years of age. All the sums, except for the monthly payment to the mother, were to be paid into the High Court so that the child's long term interests would be protected. MacMenamin J noted that there was a precedent for the High Court to keep and administer funds for the benefit of a child living abroad.<sup>14</sup> As a form of security, he also ordered that an insurance policy be taken out to cover the risk of the adoptive parents' death before the child reached 18 years of age. He stated that the level of maintenance should not in general be set against the background of the standard of living in Indonesia. He did not consider that the 1991 Act, as amended by the 1998 Act, were distinguishable from section 16 of the *Family Law Act 1995* or section 20 of the *Family Law (Divorce) Act 1996* which provide the factors to be taken into account by a court when deciding the proper financial provision of spouses upon judicial separation and divorce, and that the 1991 Act was to be construed "in accordance with the Constitution", in particular Article 42.1 and Article 42.5.

**(iii) Succession Rights**

2.16 The third issue dealt with in the *Dowse* case was the child's succession rights. Despite the cancellation of the registration of adoption, the Court ordered that the child should enjoy rights to the estates of each of the adoptive parents under the *Succession Act 1965*, including the right to bring an application under section 117 of the 1965 Act.<sup>15</sup> MacMenamin J considered that such an order would act as "...a further and residual form of protection" for the child.<sup>16</sup> Succession rights are not explicitly mentioned in section 7(1)(B) of the *Adoption Act 1991*, as amended by the *Adoption Act 1998*, but it refers to orders "including" guardianship, custody, maintenance

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<sup>14</sup> See *Dharamal v Lord Holmpatrick* [1935] IR 760.

<sup>15</sup> Section 117 of the *Succession Act 1965* permits an application to the Court by a child where a deceased parent has failed in their moral duty to make proper provision during the parent's lifetime for the child in accordance with his or her means. The Court may make an order for the child out of the deceased's estate as it thinks fit and in doing so shall consider the application from the point of view of a prudent and just parent. See generally Brady *Succession Law in Ireland* (2<sup>nd</sup> ed Butterworths 1995).

<sup>16</sup> [2007] 1 ILRM 81 at 105.

and citizenship. MacMenamin J interpreted this as meaning that other orders could be made by the Court by virtue of its inherent jurisdiction.<sup>17</sup> He also noted that the adoptive parents had no difficulty with the preservation of the child's succession rights.

**(iv) Citizenship**

2.17 The fourth issue to be dealt with in the *Dowse* case was the child's Irish citizenship. MacMenamin J prefaced his analysis of this aspect of the case by stating that "it is clear that the position regarding [the child's] citizenship is complex". The effect of cancellation of the registration of adoption on the child's Irish citizenship is not clear. The 1991 Act, as amended, envisages that orders may be made by the Court regarding the adopted person's citizenship. If Irish citizenship is dependant on a legal relationship based on marriage or adoption, breakdown of that relationship will not necessarily have the effect of ending the citizenship since the Irish Nationality and Citizenship Acts 1956 to 2004 do not provide for this.<sup>18</sup> Nonetheless, the *Adoption Act 1991*, as amended, appears to enable the High Court to make an order regarding Irish citizenship if it is in the best interests of the adopted person. A direction that Irish citizenship be withdrawn from the person might be particularly appropriate where the person is a child whose Irish citizenship might cause them to lose the citizenship of their country of origin because that country prohibits dual citizenship.<sup>19</sup> Ultimately MacMenamin J came to the conclusion that on balance the child would be better off retaining his Irish citizenship, particularly because it would give the Irish authorities, including the Irish diplomatic service "a basis for taking such steps as are as necessary for [the child's] welfare and if necessary making appropriate interventions on his behalf". It would also ensure that he would continue to be a citizen of the European Union which would enable him to move freely around the Union and give him access to

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<sup>17</sup> The Court's inherent jurisdiction to vindicate the rights of children derives from the provisions of the Constitution. See generally Hogan and Whyte *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed Butterworths 2003). See also Keane CJ in *North Western Health Board v HW* [2001] 622 at 690, *FN v Minister for Education* [1995] 1 IR 409 and *DG v Eastern Health Board* [1997] 3 IR 511.

<sup>18</sup> In some jurisdictions express provision is made for this situation. Thus, in the UK, section 1(6) of the *British Nationality Act 1981* provides that when an adoption ceases to have effect, whether on annulment or otherwise, this does not affect the adopted person's British citizenship derived from their adoptive parents.

<sup>19</sup> In Ireland the grant or loss of citizenship in accordance with the *Irish Nationality and Citizenship Acts 1956 to 2004* is a matter for the Minister for Justice, Equality and Law Reform. Section 12 of the *Irish Nationality and Citizenship Act 1956* enables the President of Ireland to grant Irish citizenship, on the advice of the Government, as a token honour to a person or to the child or grandchild of a person who, in the opinion of the Government, has done signal honour or rendered distinguished service to the nation.

employment opportunities in later life.<sup>20</sup> He also alluded to the question of the child's Indonesian citizenship. He stated that it would be to his advantage if he was allowed to maintain an Indonesian passport and citizenship, but it should be noted that the effect of Irish citizenship on his Indonesian citizenship was not fully explored. The Commission will return to this issue below.<sup>21</sup>

## **C Revocation of an Adoption Order**

2.18 A crucial aspect of the *Dowse* decision was the legal effect of revoking the registration of the adoption order in the Register of Foreign Adoptions. The Commission now turns to examine the revocation of adoptions in Ireland in the context of the Attorney General's request.

2.19 Sections 7(1A) and 7(1B) of the *Adoption Act 1991* were inserted into the 1991 Act by section 15(b) of the *Adoption Act 1998*. As mentioned previously, one of the reasons behind the enactment of the *Adoption Act 1998* was to allow for the recognition of adoptions effected in certain countries where "simple" rather than "full" adoptions are permitted.<sup>22</sup> A "full adoption" is the form of adoption which exists in Ireland and in other common law countries. It completely severs the legal relationship between the natural parent and the child. A new legal relationship of parent and child is created between the child and the adoptive parents. Just as a parent and child related by blood cannot decide to terminate their relationship, there is no possibility that this adoptive relationship can be revoked by any of the parties involved. This concept of adoption, which is common to Ireland and most other countries, has the characteristic of permanence.<sup>23</sup>

### **(1) Revocation and Full Adoption**

2.20 Under Irish law, an adoption is generally regarded as being irrevocable and, unlike other jurisdictions, cannot be terminated at the request of the parties involved in the adoption. However, whether a

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<sup>20</sup> The concept of EU citizenship is dealt with in Articles 17-22 of the EC Treaty. See generally Craig and de Búrca *EU Law: Text, Cases and Materials* (3<sup>rd</sup> ed Oxford University Press 2003). For an analysis of the child's right to EU citizenship see Ackers and Stalford *A Community for Children? Children, Citizenship and Internal Migration in the EU* (Ashgate 2005).

<sup>21</sup> See part D.

<sup>22</sup> For a discussion of "full" and "simple" adoptions see paragraphs 1.26 to 1.28, above. See also Duncan "Children's Rights, Cultural Diversity and Private International Law" in Douglas and Sebba (eds) *Children's Rights and Traditional Values* (Ashgate 1998) 31 at 36-38.

<sup>23</sup> Hale, Pearl, Cooke and Bates *The Family, Law and Society: Cases and Materials* (5<sup>th</sup> ed Butterworths 2002) at chapter 14.

revocation, annulment, cancellation, termination, or setting aside of an adoption order in one jurisdiction is correspondingly recognised in another jurisdiction which does not provide for such a procedure depends on the private international law rules operating in that particular jurisdiction. An analogy might be drawn with Ireland's position regarding the recognition of foreign divorces when, prior to 1996, divorce was constitutionally impermissible in this jurisdiction but which nonetheless allowed for the recognition in Irish law of divorces granted in other jurisdictions.<sup>24</sup> A foreign divorce would have been recognised in Ireland if either one of the parties were domiciled in the foreign jurisdiction at the time the divorce was granted. As previously noted by the Commission in its *Report on the Recognition of Foreign Adoption Decrees*<sup>25</sup> which formed the basis for the *Adoption Act 1991*:

“...the Irish courts have been at pains to distinguish between the effects of public policy underlying the Constitution which prohibits the positive enforcement in this jurisdiction of laws which offend public policy and the more passive recognition of the status which those laws bring about as a matter of private international law.”<sup>26</sup>

2.21 Therefore Irish rules of private international law may allow for the passive recognition of something which is not provided for in domestic law. This approach takes into account that the world is divided into different jurisdictions each with their own domestic laws. When these laws affect the legal status of a person, this status may need to be recognised in other jurisdictions.

2.22 In England and Wales, it was held in *Re B (Adoption: Setting Aside)* that the High Court has no common law power or inherent jurisdiction to set aside or nullify an adoption order.<sup>27</sup> The Court held that as a matter of common law:

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<sup>24</sup> See Hogan and Whyte (eds) *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed Butterworths 2003), 1879-1889. For a historical perspective on the drafting of the family articles of the Constitution see Martin “The Family in the Constitution: Principle and Practice” in Murphy and Twomey (eds) *Ireland's Evolving Constitution 1937-1997: Collected Essays* (Hart Publishing 1998) at 79.

<sup>25</sup> LRC 29-1989.

<sup>26</sup> LRC 29-1989 at 12.

<sup>27</sup> *Re B (Adoption: Setting Aside)* [1995] 1 FLR 1. This decision was upheld by the Court of Appeal in *Re B (Adoption: Jurisdiction to set aside)* [1995] 2 FLR 1. Sir Thomas Bingham MR noted at 10 that: “The act of adoption has always been regarded in this country as possessing a peculiar finality. This is partly because it affects the status of the person adopted, and indeed adoption modifies the most fundamental of human relationships, that of parent and child. It effects a change intended to be permanent and concerning three parties.”

“The edifice of adoption would be gravely shaken if adoption orders could be set aside ....”<sup>28</sup>

2.23 The Court noted that the only cases where adoption orders have been set aside are those where there was a procedural irregularity.<sup>29</sup> In Ireland the Supreme Court has held that the High Court has jurisdiction to set aside an adoption order where natural or constitutional justice has not been complied with in the adoption process.<sup>30</sup> It is common for adoption legislation worldwide to provide that an adoption order can be set aside on the grounds of procedural irregularities, where for example the natural parents’ consent to adoption was obtained by duress or fraud.<sup>31</sup>

2.24 As noted earlier, in *Pini and Others v Romania*<sup>32</sup>, a Romanian court revoked an intercountry adoption order because the child did not want

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<sup>28</sup> [1995] 1 FLR 1 at 7.

<sup>29</sup> [1995] 1 FLR 1 at 5. In *Cameron v Gibson* [2005] ScotCS CSIH83 (24 November 2005) the Inner House of the Court of Session in Scotland reversed an earlier decision of the Court of Session in *Cameron v Gibson* [2003] ScotsCS 298 (2 December 2003) and declared invalid a 1950 adoption decree because the proposed adoptee reached 21 years of age hours before the adoption order was made and the relevant legislation required that he be under 21 when the order was made. The effect of this declaration of invalidity was that he was not considered in law to be a member of his “adoptive” family and so he was entitled to inherit his natural brother’s estate. The earlier decision of the Court of Session placed great emphasis on the notion that adoption affects status and is designed to be permanent. This decision was heavily criticised by Professor McK. Norrie in a conference paper entitled “Adoption and the Child’s Right to Identity” delivered at the 4<sup>th</sup> World Congress on Family Law and Children’s Rights, Cape Town, South Africa, 20-23 March 2005. Available at [www.childjustice.org/docs/norrie2005.pdf](http://www.childjustice.org/docs/norrie2005.pdf).

<sup>30</sup> *M v An Bord Uchtála and the Attorney General* [1977] IR 287. In this case the Supreme Court held that an adoption order was null and void because the Adoption Board did not inform the natural mother that she could withdraw her consent to the adoption before the final order was made. In response to this ruling, the *Adoption Act 1976* was enacted to retrospectively validate all consents and adoption orders granted before the Act commenced.

<sup>31</sup> For example section 44 of the *Adoption of Children Act 2006* in the Australian Northern Territory provides that a court may discharge an adoption order if the adoption was obtained by fraud, duress or other improper means or where the consent to the adoption was obtained by fraud, duress or other improper means. The 2006 Act states that the court shall not make such an order if the child has attained 18 years or such an order would be prejudicial to the welfare and interests of the child. When the court makes such an order it may make further ancillary orders as it thinks necessary for the welfare and interests of the children including orders relating to the name of the child, ownership of property, the care, custody and guardianship of the child and the domicile of the child. See also section 20 of the *New Zealand Adoption Act 1955*. See Webb and Auburn “New Zealand Conflict of Laws - A Bird’s Eye View” (1977) 26 ICLQ 971 at 982.

<sup>32</sup> [2004] EHRR 275.

to be adopted by an Italian couple. In 2005 the Scottish Adoption Policy Review Group considered whether revocation should be introduced to Scottish adoption law.<sup>33</sup> The Group decided that it should not because adoption is designed to provide stability and permanence to a child and therefore must last for life. The Group decided that this emphasised that adopted children are in a similar position to biological children.

2.25 At an international level, the 1993 *Hague Convention on Inter-country Adoption* does not deal with annulment or revocation of intercountry adoptions. Its predecessor, the 1965 *Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption*, did allow for the automatic recognition of an annulment or revocation of an intercountry adoption decree.<sup>34</sup> However this was only ratified by three countries, namely, Austria, Switzerland and the UK. Indeed this was one of the reasons why the Commission, in its 1989 *Report on the Recognition of Foreign Adoption Decrees* recommended that Ireland should not ratify the 1965 Convention. Another reason was that the Convention did not enumerate what the incidents and effects of an adoption should be in the State where the adoption is recognised. The Commission's 1989 Report also noted that the 1993 *Hague Convention on Inter-country Adoption* was being formulated at that time and would supersede the 1965 Convention.<sup>35</sup> As already noted, the Commission's 1989 Report formed the basis for the *Adoption Act 1991*.

2.26 Article 13.1 of the Council of Europe's 1967 *Convention on Adoption* provides that before a child reaches the age of majority the adoption may be revoked only by a decision of a competent authority on serious grounds and only if revocation on that ground is permitted by law. Article 13.2 states that this does not affect the annulment of an adoption where this is made by a judicial authority within 3 years of the adoption order being made. Article 13.3 provides that in any decision regarding revocation or annulment of an adoption the best interests of the child shall always be the paramount consideration. In the Draft Explanatory Report to the 1967 Convention, published in 2006, the Council of Europe Working Party on Adoption emphasised that revocation is a grave step and that it must be surrounded by explicit guarantees.<sup>36</sup> The Draft Report also points out that Article 13 places no obligation on Contracting States to make provision for

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<sup>33</sup> See Scottish Adoption Policy Review Group Report *Adoption: Better Choices for Our Children* (June 2005) available at [www.scotland.gov.uk/Resource/Doc/54357/0014208.pdf](http://www.scotland.gov.uk/Resource/Doc/54357/0014208.pdf)

<sup>34</sup> Articles 7 and 8. See *Report on the Recognition of Foreign Adoption Decrees* (LRC 29-1989) at chapter 3.

<sup>35</sup> *Report on the Recognition of Foreign Adoption Decrees* (LRC 29-1989) at chapter 4.

<sup>36</sup> 31 August 2006. Available at [www.coe.int](http://www.coe.int)

revocation in its domestic law. With regard to annulment, the Draft Report notes that the 1967 Convention was quite vague and that any replacement Convention should deal with it in a more detailed manner. This would prevent States from applying contract law in the adoption context, in particular to prevent adoptions being rendered null and void based on the “quality” of the child.<sup>37</sup> The Draft Report emphasised that the best interests of the child must be the paramount consideration when such decisions are made.

## **(2) *Revocation and Simple Adoption***

2.27 By contrast with a “full adoption”, a “simple adoption” does not create a permanent legal relationship between the adoptive parent and child. The simple adoption is the form of adoption which is most common in Central and South American countries. It operates as an alternative to full adoption in Argentina, Bolivia, Brazil, Chile, Colombia, Paraguay as well as a number of Asian and African countries. It also exists alongside full adoption in some European countries such as France, Belgium and the Netherlands.<sup>38</sup> It recognises that the adoptive parents are vested with parental responsibility but that the legal relationship between the biological parents and the child is not completely terminated. The nature of the continuing ties with the biological family differs in many States. Thus, in some States where simple adoption exists, the child may maintain some inheritance or support rights, or the biological parents may retain some vestigial rights in respect of the child in the event of the adoption breaking down. As to revocation of adoption it has been noted that:

“Simple adoptions are often revocable in certain limited circumstances, for example when the child reaches majority and so wishes or all parties consent.”<sup>39</sup>

2.28 In addition, the natural parent may retain the residual power to withdraw consent to the adoption. As a result there is always the possibility that the adoptive relationship might be terminated in accordance with the law of the place which allows for such an adoption.

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<sup>37</sup> For example in *J and J v C's Tutor* [1948] SC 636 the Scottish Court of Session refused a couple's plea that they had adopted a child in error induced by misrepresentation and applied for the order to be set aside. They believed they had adopted a healthy child but, the child suffered from a severe brain injury sustained at birth. The Court acknowledged the hardship but the relevant adoption statute did not empower the Court to set aside the adoption on such a basis.

<sup>38</sup> See O'Halloran *The Politics of Adoption: International Perspectives on Law, Policy and Practice* (Springer 2006).

<sup>39</sup> Duncan “Children's Rights, Cultural Diversity and Private International Law” in Douglas and Sebba (eds) *Children's Rights and Traditional Values* (Ashgate 1998) 31 at 36

(3) *Simple Adoption and Irish Law*

2.29 As noted earlier, in the mid 1990s Irish people became interested in adopting children from the People's Republic of China. The Adoption Board refused to recognise Chinese adoption orders under the *Adoption Act 1991* because Chinese law did not terminate the legal relationship between the natural parent and child. In *B and B v An Bord Uchtála*<sup>40</sup> the Supreme Court found that Chinese adoption orders could be recognised under Irish law. The Commission notes that the *Adoption Act 1998*, which amended the 1991 Act, placed this approach on a statutory footing and introduced greater flexibility into the statutory system governing the recognition of foreign adoption orders.<sup>41</sup> The definition of a foreign adoption in section 1 of the 1991 Act was amended so that an emphasis was placed on the guardianship rights in respect of the child being substantially the same in Ireland and the foreign jurisdiction. This was a significant change of the original definition that the adoption had essentially the same legal effect as respects the termination and creation of parental rights and duties in Ireland and the foreign jurisdiction.<sup>42</sup>

2.30 Section 7(1)(A) of the 1991 Act, as inserted by the 1998 Act, provides that if an adoption is “set aside, revoked, terminated, annulled or otherwise rendered void under and in accordance with the law of the place where it was effected”, it does not automatically follow that the adoption is correspondingly cancelled in Ireland.<sup>43</sup> It seems likely that the intention of the Oireachtas was that if this did happen and the child had been living for a number of years in Ireland, the “applicable law” should be Irish law and not the foreign adoption law. This view is supported by the fact that Ireland

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<sup>40</sup> [1997] 1 ILRM 15.

<sup>41</sup> Jackson “Annotation of the Adoption Act 1998” Irish Current Law Statutes Annotated.

<sup>42</sup> The original definition of a “foreign adoption” in section 1(b) of the *Adoption Act 1991* provided that:

“The adoption has essentially the same legal effect as respects the termination and creation of parental rights and duties with respect to the child in the place where it was effected as an adoption effected by an adoption order”.

The definition of a “foreign adoption” in section 1(b) of the 1991 Act, as inserted by section 10(a)(ii)(b) of the *Adoption Act 1998*, provides:

“The adoption has, for so long as it is in force, substantially the same legal effect as respects the guardianship of the child in the place where it was effected as an adoption effected by an adoption order”.

<sup>43</sup> For a discussion of the codification of private international law rules see Forsyth “The Eclipse of Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era” *Journal of Private International Law* Volume 1 Issue 1 April 2005 at 93.

applies the *lex fori* or the law of the State where the issue is to be decided. This means that only Irish law is to be applied in an Irish court and this is especially the case where questions of legal status arise.<sup>44</sup> In enacting sections 7(1)(A) and 7(1)(B) of 1991 Act, as inserted by the 1998 Act, the Oireachtas was originally trying to cater for such circumstances so that if it was in the child's best interests that the adoption registration be cancelled in Ireland, the High Court was empowered to make an array of protective orders regarding maintenance, guardianship and citizenship as well.<sup>45</sup> As already mentioned, the *Dowse* case is the first occasion in which sections 7(1A) and 7(1B) has been applied by the High Court, and involved the unusual aspect that the child was not resident in Ireland.

## **D Adoption and Citizenship Law**

2.31 The Attorney has specifically requested the Commission to examine the citizenship entitlements of adopted children of Irish citizens who do not reside in Ireland. The interaction between citizenship acquisition and intercountry adoption is a novel area, though it has been noted that nationality may depend on such matters as adoption and naturalisation.<sup>46</sup> It has also been noted that minors generally acquire the nationality of their adoptive parents through legislation but that this is not the invariable situation.<sup>47</sup> The Commission now comes to examine the interaction between citizenship and adoption in Irish law.

### **(1) The Administrative Process**

2.32 Section 11(1) of the *Irish Nationality and Citizenship Act 1956* provides:

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<sup>44</sup> This position has recently been reaffirmed by the Irish and indeed the UK Governments when they refused to “opt-in” to the EC Commission’s proposed Regulation known as “Rome III” regarding choice of law in divorce proceedings. The Commission’s proposal would have involved an Irish court applying the divorce law of other EU Member States where the parties to the proceedings are from other Member States and decide to be bound by their home State’s divorce law. See Department of Justice, Equality and Law Reform press release at [www.justice.ie/80256E01003A02CF/vWeb/pcJ USQ6UFGM4-ga](http://www.justice.ie/80256E01003A02CF/vWeb/pcJ USQ6UFGM4-ga).

<sup>45</sup> As Jackson notes, the withdrawal of recognition of a foreign adoption may not necessarily result in a change in the custody of the adopted person. See Jackson “Annotation of the Adoption Act 1998” *Irish Current Law Statutes Annotated*.

<sup>46</sup> Binchy *Irish Conflicts of Law* (Butterworth Ireland 1988) at 96. For a general analysis of citizenship law in Ireland see Forde *Constitutional Law* (2<sup>nd</sup> ed First Law 2004), 67-71.

<sup>47</sup> See Brownlie *Principles of Public International Law* (6<sup>th</sup> ed Oxford University Press 2003) at 382.

“Upon an adoption being made, under the Adoption Act, 1952 (No.25 of 1952), in a case in which the adopter or, where the adoption is by a married couple, either spouse is an Irish citizen, the adopted child, if not already an Irish citizen, shall be an Irish citizen.”

2.33 A key aspect of the administrative practice which has developed concerning foreign adoptions where the Irish adoptive parents and adopted child are not resident in Ireland is that the Passport Office requires that the foreign adoption be recognised by the Adoption Board before it will issue an Irish passport to the adopted child.<sup>48</sup>

2.34 As already noted, the *Adoption Act 1991* provides that an entry in the Register of Foreign Adoptions has the same legal status as an adoption under the 1952 Act. Thus, the effect of section 11(1) of the *Irish Nationality and Citizenship Act 1956* is that a foreign adoption order which is registered under the 1991 Act ensures that the adopted child is entitled to Irish citizenship if at least one of the adoptive parents is an Irish citizen. The Passport Office also requires documentary evidence which proves the adoptive parent’s Irish citizenship entitlements such as an Irish birth certificate, a certificate of naturalisation, an entry in the Register of Births Abroad or some other evidence of the adoptive parent’s Irish ancestry. The Passport Office also has regard to various Consular Guidelines which set out the circumstances when a passport should be issued with specific reference to the adopted children of Irish citizens living abroad.<sup>49</sup> It is also worth noting that, if it can be proven to the Office’s satisfaction that a natural parent of an adopted child is or was an Irish citizen then the child is entitled to be an Irish citizen by descent irrespective of their adoption.

**(2) *The Acquisition of Irish Citizenship by Descent***

2.35 A child’s citizenship is closely linked with the citizenship of its parents whether they are its birth parents or adoptive parents. As a legal concept, citizenship and its acquisition has traditionally placed an emphasis on a blood link between relatives, which is known as *jus sanguinis* in the common law. Thus, Irish citizenship can be acquired by birth to an Irish

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<sup>48</sup> For reference to this practice see Darling “The Changing Face of Adoption” [1999] 4 IJFL 2 at 3.

<sup>49</sup> Under current law, passports are issued by the Passports Office under the general authority of the Minister for Foreign Affairs. The only legislative reference to this at present is in section 1(xi) of the *Ministers and Secretaries Act 1924* which provides that one of the functions of the Department is “the granting of passports and of visés to passports.” The Commission notes that a Passports Bill is due to be published in 2007, which will set out a clear legislative basis for this area. See *Government Legislation Programme for Spring Session 2007* at [www.taoiseach.gov.ie/index.asp?locID=186&docID=-1](http://www.taoiseach.gov.ie/index.asp?locID=186&docID=-1)

citizen.<sup>50</sup> Irish citizenship can also be acquired by birth in the island of Ireland, subject to certain residency requirements being satisfied by the child's parents if they are not Irish or British citizens.<sup>51</sup> A child born outside of Ireland to an Irish citizen who was born in Ireland will gain Irish citizenship automatically in the sense that they acquire Irish citizenship as of right. The automatic nature of this entitlement is illustrated by section 7(1)(2) of the *Irish Nationality and Citizenship Act 1956*, as inserted by section 3(1) of the *Irish Nationality and Citizenship Act 2001*, which refers to children born in Ireland to an Irish citizen. It states that:

“The fact that the parent from whom a person derives citizenship had not at the time of the person's birth done an act referred to in section 6(2)(a) shall not of itself exclude a person from the operation of subsection (1).”

2.36 Section 6(2)(a) of the 1956 Act as inserted by section 3(1) of the 2001 Act, provides that subject to certain other provisions, “a person born in the island of Ireland is an Irish citizen from birth if he or she does, or if not of full age has done on his or her behalf, any act which only an Irish citizen is entitled to do”. The “acts” contemplated are not defined, but it was noted by the then Minister for Justice, Equality and Law Reform, during the course of the Oireachtas debates on this provision, that they could include a formal declaration of citizenship, an application for a passport or registration to vote in a presidential election.<sup>52</sup> Registration to vote in a referendum to amend the Constitution would also be such an act of significance to adults since this civic duty is entrusted to citizens of Ireland only.<sup>53</sup> The first generation of children born abroad to Irish citizens who were themselves born in Ireland will automatically acquire Irish citizenship without having to do any act such as registration of birth or apply for an Irish passport to acquire Irish citizenship.

2.37 If the child's Irish citizen parent was born outside of Ireland, the child will gain citizenship provided that the parent is registered in the Foreign Births Entry Book (which is held at Irish embassies and consulates) or the Foreign Births Register (which is kept at the Department of Foreign

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<sup>50</sup> Section 7(1) of the *Irish Nationality and Citizenship Act 1956* as inserted by section 3(1) of the *Irish Nationality and Citizenship Act 2001*.

<sup>51</sup> Section 4 of the *Irish Nationality and Citizenship Act 2004*. This provision was enacted following the *Twenty Seventh Amendment of the Constitution Act 2004*.

<sup>52</sup> Volume 518 Dáil Éireann Debates (13 April 2000).

<sup>53</sup> Article 47.3 of the *Constitution of Ireland*. See Ryan “The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland” (2004) 6 *European Journal of Migration and Law* 173.

Affairs in Dublin) before the child's birth.<sup>54</sup> This is designed to facilitate the acquisition of Irish citizenship by second and third generations born outside of Ireland who are descended from an Irish citizen.

### **(3) *The Acquisition of Citizenship by Adopted Children***

2.38 In contrast, a foreign child adopted by an Irish citizen cannot acquire Irish citizenship in this automatic way. For example, a child adopted in a foreign country by an Irish couple, resident in Ireland, obtains the same rights as a child adopted in Ireland once the foreign adoption order is recognised by the Adoption Board under the *Adoption Act 1991*.<sup>55</sup> As stated previously, recognition is contingent on compliance with the conditions set out in the 1991 Act.<sup>56</sup> This Act provides that an adoption effected outside of the State may be registered under section 6 of the 1991 Act by the adopted person themselves, the adopters or any other person having an interest in the matter, provided it complies with the Irish definition of a foreign adoption and is verifiable by documentary evidence.<sup>57</sup> Thus, the child is not entitled to Irish citizenship as an automatic right. It must be shown that the adoption is compatible with the Irish concept of adoption and that proper procedures have been complied with in the adoption process. This is to ensure that the rights of natural parents have been protected and that the adoption is in the best interests of the child. This involves a difference in treatment between biological and adopted children, but in the Commission's view, this difference reflects the need to ensure that an intercountry adoption has complied with national and international human rights standards.

2.39 It is notable in this context that when the *Irish Nationality and Citizenship Act 2001* was being debated in the Oireachtas, a number of amendments were proposed which would have provided for the automatic acquisition of Irish citizenship at birth by the adopted child of an Irish citizen even if the adoption was not recognised under the *Adoption Act 1991*. This would have treated the adopted child as if they were a biological child of an Irish citizen. This was opposed by the Government for a number of reasons. First, it was pointed out that the automatic imposition of Irish citizenship on the child might have serious repercussions for their citizenship of origin. Since many countries abhor the notion of dual citizenship, the child might lose their citizenship of origin. Second, if the adoption is a simple adoption,

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<sup>54</sup> Section 27 of the *Irish Nationality and Citizenship Act 1956* as amended by section 7(3)(a) of the *Irish Nationality and Citizenship Act 1956* as inserted by section 3(1) of the *Irish Nationality and Citizenship Act 2001*.

<sup>55</sup> Section 5 of the *Adoption Act 1991*.

<sup>56</sup> Section 1 of the *Adoption Act 1991* as amended by section 10 of the *Adoption Act 1998*.

<sup>57</sup> Section 6(4) and section 9 of the *Adoption Act 1991*.

the natural parents might still have rights and duties in respect of the child. Therefore the imposition of Irish citizenship on the child would disregard their parental rights. Third, it was also noted that such a provision “might conflict with the rights under our Constitution of the child and its natural parents’ guardianship rights”.<sup>58</sup>

**(4) Citizenship by Naturalisation**

2.40 A child adopted by an Irish citizen can also acquire Irish citizenship through the naturalisation process, but this is likely to be a rare occurrence. Section 16(b) of the *Irish Nationality and Citizenship Act 1956* empowers the Minister for Justice, Equality and Law Reform “if he thinks fit” to grant an application for a certificate of naturalisation to a parent or guardian acting on behalf of a minor of Irish descent or “Irish associations”. Section 16(c) of the 1956 Act empowers the Minister to do so where the applicant is a naturalised Irish citizen acting on behalf of his or her minor child. This is permitted even when the conditions for naturalisation are not met, such as the fulfilment of a period of residency in Ireland, because this can be waived by the Minister.<sup>59</sup> Section 16 of the 1956 Act, as amended by section 10 of the *Irish Nationality and Citizenship Act 2004*, states that a person is deemed to have Irish associations if:

“(a) he or she is related by blood, affinity or adoption to a person who is an Irish citizen or entitled to be an Irish citizen, or

(b) he or she was related by blood, affinity or adoption to a person who is deceased and who, at the time of his or her death, was an Irish citizen or entitled to be an Irish citizen.”<sup>60</sup>

2.41 Thus, the Minister may grant Irish citizenship to a child adopted by an Irish citizen whether they are a minor or an adult “if he thinks fit”.<sup>61</sup> There is no elaboration in the 2004 Act as to the proof needed to verify the adoption. It would seem proper that documentary evidence, which is required under section 9 of the *Adoption Act 1991*, would be needed before

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<sup>58</sup> Volume 536 Dáil Éireann Debates (22 May 2001). Another reason is that an adult who was adopted might be prevented from holding public office in the other State where they are a citizen, if Irish citizenship was imposed upon them. See Council of Europe Committee of Experts on Nationality *Report on Multiple Nationality* at 12.

<sup>59</sup> Section 15 of the *Irish Nationality and Citizenship Act 1956*.

<sup>60</sup> Prior to the 2004 Act, the term “Irish associations” had not been defined.

<sup>61</sup> In the Irish Government’s *Second Report to the United Nations Committee on the Rights of the Child on the Implementation of the Convention on the Rights of the Child*, July 2005 at 80, the Government confirmed that once an intercountry adoption is recognised and assuming the adoptive parents are citizens of Ireland, the child gains an automatic right to Irish citizenship under the *Adoption Act 1952* and the *Irish Nationality and Citizenship Act 2004*. Available at [www.nco.ie](http://www.nco.ie).

such a decision could be made. This is to ensure that the adoption arose by virtue of a proper “legal process” which placed the child’s welfare as paramount. When referring to the term “adoption” in what became the 2004 Act, the then Minister for Justice, Equality and Law Reform indicated that:

“There is adoption where people can be related who have no blood or affinity type relationship, but are deemed by process of law to be the child of another. They are, therefore, entitled to citizenship by virtue of adoption.”<sup>62</sup>

2.42 The Commission is aware that acquiring citizenship by naturalisation is rare. It was used as a transitional method in the case of some Romanian children adopted by Irish citizens resident in Ireland in the early 1990s, at a time when the *Adoption Act 1991* had entered into force but the adoption process in respect of these children was still ongoing in Romania. It is therefore clear that recognition and registration of a foreign adoption by the Adoption Board is the most common mechanism to confer Irish citizenship on children adopted by Irish citizens. However, if the adoption is not recognised, and in cases of genuine hardship, an application for citizenship by the naturalisation process could be made to the Minister.<sup>63</sup>

### **(5) The Concept and Effect of Citizenship**

2.43 Citizenship is an important legal concept.<sup>64</sup> Article 9.3 of the Constitution of Ireland states that fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.<sup>65</sup> Citizenship thus confers rights and imposes responsibilities on those who acquire it. One of the most important rights to spring from Irish citizenship is the right to live in Ireland.<sup>66</sup> For the adult citizen, it also confers the right to vote in

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<sup>62</sup> Volume 593 Dáil Éireann Debates (30 November 2004).

<sup>63</sup> For naturalisation statistics see Irish Naturalisation and Immigration Service *Report on Review of Asylum and Immigration* (September 2006).

<sup>64</sup> For an account of the origins of citizenship see Heater *A Brief History of Citizenship* (Edinburgh University Press 2004) and Heater *Citizenship* (3<sup>rd</sup> ed Manchester University Press 2004). Following the decision of the International Court of Justice in *Nottebohm Case* [1955] ICJ Reports 4, international law requires a genuine link before accepting conferred citizenship. See Biehler *International Law In Practice: An Irish Perspective* (Thomson Round Hall 2005) at 37.

<sup>65</sup> For example, in the context of an Irish citizen who receives a title of nobility or of honour from another State, see Article 40.2.2 of the Constitution which states that:

“No title of nobility or of honour may be accepted by any citizen except with the prior approval of the Government.”

<sup>66</sup> Note the Supreme Court decision in *AO & DL v Minister for Justice, Equality and Law Reform* [2003] 1 IR 1 where it was held that children who were born in Ireland and became Irish citizens, by virtue of statute and constitutional law in operation at the time, but whose parents were not Irish or British citizens, did not have an absolute

constitutional referenda, presidential and General Elections. Until recently, Ireland has traditionally been a land of emigration and its citizens are scattered all over the world.<sup>67</sup> It is often the case that such emigrating countries tend to be liberal in the manner in which they grant citizenship, and in the Commission's view it is appropriate that this should be reflected in the context of adopted children of Irish citizens who seek Irish citizenship.<sup>68</sup>

**(6) Comparative Analysis**

**(a) New Zealand**

2.44 The position of New Zealand regarding the grant of citizenship to the adopted children of its citizens living outside New Zealand is quite similar to the Irish approach. When a child is adopted outside New Zealand by a New Zealand citizen the child may claim New Zealand citizenship by descent if one of the adoptive parents was a New Zealand citizen "otherwise than by descent" at the time of the adoption.<sup>69</sup> The adoption would qualify for recognition if it comes within the terms of section 17 of the *New Zealand Adoption Act 1955* as amended. The original version of section 17 contained a general provision allowing for recognition of foreign adoptions by New Zealand citizens.<sup>70</sup> As amended in 1997, section 17 now provides for

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right to reside in the State in the company and care of their parents. For analysis see Byrne and Binchy *Annual Review of Irish Law 2003* (Thomson Round Hall 2004) at 147. Following this decision, the Irish people voted to approve of the *Twenty Seventh Amendment of the Constitution Bill 2004* which reinforced the power of the Oireachtas to legislate in the area of citizenship. This led to the enactment of the *Irish Nationality and Citizenship Act 2004* which removed the right of automatic Irish citizenship to children born in Ireland to non-Irish parents. Section 4 of the 2004 Act provides that such a child will only have an entitlement to Irish citizenship provided that at least one of their parents has been resident in the State for a period of 3 out of the previous 4 years prior to the child's birth. See also Mullally "Citizenship and Family Life in Ireland: Asking the Question 'Who belongs?'" (2005) 25 *Legal Studies* 578.

<sup>67</sup> For a recent account of the emigration from Ireland and the Irish diaspora in the 20<sup>th</sup> century, see Ferriter *The Transformation of Ireland 1900-2000* (Profile Books 2004). See also Coogan *Wherever Green is Worn: The Story of the Irish Diaspora* (Hutchinson 2001).

<sup>68</sup> Rabel notes "Countries with a tradition of heavy emigration, on the other hand, have been attracted by a principle which tends to preserve the ties between the emigrant and his home country". Quoted in Binchy *Irish Conflicts of Law* (Butterworth Ireland 1988) at 98.

<sup>69</sup> Section 7 of the *Citizenship Act 1977*. This means that the adoptive parent was either born in New Zealand or had a grant of New Zealand citizenship before the child was adopted. Section 3(2)(b) of the 1977 Act states that the child must not have attained 14 years of age before the adoption was made.

<sup>70</sup> The rationale for the original version of section 17 of the *Adoption Act 1955* was that it allowed adoptions made overseas by people resident either in New Zealand or

recognition if the order was made in a country which has adopted the 1993 *Hague Convention on Intercountry Adoption* or if the adoption was made in a Hague Convention country in accordance with section 11 of the *Adoption (Intercountry) Act 1997* which incorporates the Convention into New Zealand law.

2.45 Adoptive parents living outside New Zealand may lodge an application to register the child as a New Zealand citizen at the Department of Internal Affairs Citizenship Office. The child does not have to be resident in the country prior to confirmation of citizenship. The Office assesses each case on its own merits and considers whether all correct legal processes have been followed in the country of adoption. Since New Zealand is a party to the 1993 *Hague Convention on Intercountry Adoption*, adoptions carried out in other Convention countries are easier to assess. Where non-Convention countries are involved the assessment can be more complex. Under section 17 of the *Adoption Act 1955*, as amended, the overseas adoption must:

- Be legally valid according to the law of the country of adoption.
- Result in the adoptive parents having superior custody rights to those of the natural parents.
- Be carried out either in a British Commonwealth country, the US or other country specified by the Governor General, through an adoption order made by a Court or other judicial or public authority.
- In the case of any other country, result in the adoptive parents having equal or superior inheritance rights in respect of the adopted child's property should the child die intestate.

2.46 The Citizenship Office has a collection of various adoption laws of countries with which it is most familiar, such as the Pacific Island States of Samoa, Fiji, Tonga as well as Russia and 1993 Hague Convention countries. Where the law of a foreign State has changed or a new country must be assessed, the adoptive parents are required to present the relevant legislation to the Office as well as original adoption documentation, with

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overseas to be recognised in New Zealand. It was also intended that, when New Zealanders who adopted while living overseas and then returned to New Zealand, the child would have the right to gain entry to the country and access all other rights of a New Zealand citizen. It also intended to ensure that immigrants to New Zealand who adopted children in their native country did not have to adopt their child upon arrival in New Zealand. See

[www.hcch.net/index\\_en.php?act=publications.details&pid=3690&dtid=32](http://www.hcch.net/index_en.php?act=publications.details&pid=3690&dtid=32). New Zealand was the first country to enact adoption legislation, in 1881. For an account of adoption in New Zealand see New Zealand Law Commission Preliminary Paper on *Adoption: Options for Reform 1999* (NZLC PP38) and Report on *Adoption and Its Alternatives: A Different Approach and a New Framework 2000* (NZLC R65). Available at [www.lawcom.govt.nz](http://www.lawcom.govt.nz).

translations where necessary. The possibility of fraud is circumvented by requiring translations to be made by approved translation providers. However, it is quite difficult to assess purported court orders and adoption documentation from countries which the Office has not encountered before. If the Office is unable to determine that an adoption complies with section 17 of the 1955 Act, the child will not be registered as a New Zealand citizen. If this is the case, the adoptive parents may apply to the New Zealand High Court for a declaration that the adoption complies with section 17 of the 1955 Act and, if such a declaration is granted, this can be used in support of the citizenship application.<sup>71</sup>

**(b) Canada**

2.47 The position in Canada regarding the acquisition of Canadian citizenship of the adopted children of Canadian expatriates is one which is moving in the direction of Ireland's law. At the time of writing, a Citizenship Bill 2006 is currently before the Federal Houses of Parliament in Canada to allow for a discretion to grant Canadian citizenship to a child adopted abroad by a Canadian.<sup>72</sup> This would replace existing law which requires that the child become a permanent resident in Canada prior to acquiring citizenship. The Bill proposes that conferring citizenship would be conditional on the following:

- That the adoption was made in the child's best interests.
- That the adoption was a legal adoption.
- That the adoption was lawful in the place where the adoption was made and the country of residence of the adopting citizen.
- That the adoption was not made with the primary purpose of acquiring a status or privilege in relation to immigration or citizenship.

2.48 The Bill also proposes that an adult who was adopted as a child (meaning under 18 years of age) can apply to the Minister to become a Canadian citizen under the proposed amendment.<sup>73</sup>

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<sup>71</sup> The Commission is grateful to Ms. Claire Barton, Legal Advisor at the New Zealand Department of Internal Affairs-Te Tari Taiwhenua for providing information on New Zealand adoption and citizenship law.

<sup>72</sup> *Bill C-14 An Act to amend the Citizenship Act (adoption)* 15 May 2006. Available at [www.parl.gc.ca/39/1/parlbus/chambus/house/bills/government/C-14/C-14\\_1/C-14.html](http://www.parl.gc.ca/39/1/parlbus/chambus/house/bills/government/C-14/C-14_1/C-14.html). The Commission is grateful to the Minister for Citizenship and Immigration for providing the Commission with information on the progress of the Bill through the Canadian Houses of Parliament.

<sup>73</sup> For explanatory memorandum of the Bill see [www.parl.gc.ca/LEGISINFO/index.asp?List=ls&Query=4678&Session=14&Language=e](http://www.parl.gc.ca/LEGISINFO/index.asp?List=ls&Query=4678&Session=14&Language=e). The Bill had its first reading in

**(i) The McKenna Case**

2.49 The Bill represents the legislative response to the issues raised in *McKenna v Attorney General*. The *McKenna* case involved a Canadian citizen, permanently resident in Dublin. Her husband had both Irish and Canadian citizenship. Their three sons were born in Canada and acquired Canadian citizenship by descent. The couple adopted two girls in Ireland in the mid 1970s. Problems arose regarding Canadian citizenship when they decided to visit Canada in 1979 and applied for passports at the Canadian Embassy in Dublin. Since the girls were adopted they could not acquire Canadian citizenship by descent under Canadian law. The only way in which they could become Canadian citizens was by being admitted to Canada for a period of permanent residence to go through the naturalisation process.

2.50 At the Human Rights Tribunal of Canada, Mrs. McKenna claimed that such a difference in treatment between biological and adopted children of Canadian expatriates amounted to discrimination on the ground of family status under the *Canadian Charter of Rights and Freedoms*. The Tribunal agreed with her.<sup>74</sup> The Government sought judicial review of the decision in the Trial Division. There, Simpson J held that the Tribunal erred in finding a discriminatory practice on the grounds of family status. It was held that it was not the daughters' adopted or family status which governed their treatment under the relevant Citizenship Act, but their status as foreign Irish nationals by birth and birthplace which was a ground for differentiation based on long-standing international conventions.<sup>75</sup>

2.51 Mrs. McKenna appealed this decision to the Court of Appeal and by a 2-1 majority the case was remitted back to the Tribunal to be re-heard. The Court noted that the distinction in the acquisition of citizenship was unfair when the prevailing legal view of adopted children is that they become the children of the adopters as if they were born to them. The Court also held that there was no valid justification for refusing automatic citizenship to adopted children on the grounds of protecting the immigration system once the adoption was made in accordance with the laws of the foreign country and created a true parent-child relationship.<sup>76</sup> As a result of the case, the Federal Government introduced an interim measure to facilitate

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the House of Commons and was then referred to the Standing Committee on Citizenship and Immigration for amendments. The Committee reported to the House on 6 October 2006.

<sup>74</sup> *McKenna v Secretary of State*, 1993 CanLII 308 (CHRT)

<sup>75</sup> *Attorney General v McKenna* [1995] 1 FC 694 (TD).

<sup>76</sup> *McKenna v Attorney General* [1999] 1 FC 401 (CA).

the acquisition of citizenship by the adopted children of Canadian expatriates, pending the enactment of the Citizenship Bill 2006.<sup>77</sup>

**(c) United Kingdom**

2.52 The position in United Kingdom is different to that in Ireland and there is no guarantee that the adopted child of a British citizen living abroad will acquire British citizenship. In the United Kingdom, registration of a foreign adoption in the Adopted Children Register does not give an automatic entitlement to British citizenship, unless it is made in a country which has ratified the 1993 *Hague Convention on Intercountry Adoption*, at least one of the adopters is a British citizen, and both adoptive parents are habitually resident in the UK. This complies with Article 21(c) of the 1989 *United Nations Convention on the Rights of the Child* which states that children concerned by intercountry adoption should enjoy safeguards and standards equivalent to those existing in the case of national adoption.<sup>78</sup> If the child is adopted in a “designated list” country whose adoption orders the UK Government recognises, the child will not automatically receive British citizenship and will have to apply for it to the Home Secretary. Countries included in this designated list are predominantly Commonwealth countries, United Kingdom Dependant Territories and EU Member States, whose adoptions the UK Government have deemed to be capable of recognition.<sup>79</sup> If the child has been adopted in none of these categories of countries, the child will have to be re-adopted in the UK and this order will automatically confer British citizenship on the child, provided that one of the adopters is a

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<sup>77</sup> See [http://epe.lac-bac.gc.ca/100/201/301/guides\\_citoyennete\\_immigration/2002-10/english/om-nso/cp/2001/cp01-05.htm](http://epe.lac-bac.gc.ca/100/201/301/guides_citoyennete_immigration/2002-10/english/om-nso/cp/2001/cp01-05.htm).

<sup>78</sup> See paragraphs 1.09 to 1.12 above.

<sup>79</sup> See *The Adoption (Designation of Overseas Adoptions) Order 1973* SI 1973/19. See also Report of the UK Department of Health entitled *Intercountry Adoption Guide* (2003). Note that this report pre-dates the *Adoption and Children Act 2002* which came into effect on 30 December 2005 and which incorporated much of the *Adoption (Intercountry Aspects) Act 1999*. That 1999 Act incorporated the 1993 *Hague Convention on Intercountry Adoption* into UK law. These legislative provisions on intercountry adoption also apply in Scotland and Northern Ireland. The primary adoption legislation in Northern Ireland is the *Adoption (Northern Ireland) Order 1987*. Following a review of adoption legislation in Scotland, the *Adoption and Children (Scotland) Act 2007* was recently enacted and it restated the legislative provisions on intercountry adoption. There has been criticism that the UK intercountry adoption legislation does not provide automatic British citizenship to children adopted by British citizens in designated countries which would avoid the need for applying to the Home Secretary for citizenship. See Rodgers, “The Adoption and Children (Scotland) Bill: Adoption with a Foreign Element” (2006) *International Family Law Journal* 218.

British citizen at the time the adoption order is made and both partners are habitually resident in the UK.<sup>80</sup>

2.53 These adoption scenarios apply where the adoptive parents are British citizens residing in the UK. In contrast to Ireland and its position regarding the Irish citizenship of children adopted by Irish citizens who live outside the State, when British citizens who are not habitually resident in the UK adopt a child in a foreign jurisdiction which may be the place of their habitual residence, the child will not become a British citizen unless an application is made to the Home Secretary who may, as a matter of discretion, register the child as a British citizen in accordance with section 3(1) of the *British Nationality Act 1981*.<sup>81</sup>

**(d) United States of America**

2.54 In the United States, the adopted child of a US citizen resident outside of the US must go through the naturalisation process in order to acquire US citizenship. The Federal *Child Citizenship Act 2000* provides that at least one parent must be a US citizen, he or she must have been physically present in the US for a period of 5 years (if this is not possible, the residency of the child's US citizen grandparent is taken into account), the child is under 18 years of age and is under the legal and physical custody of the US parent. The child may then be brought temporarily to the US to go through the naturalisation process, and the oath of allegiance must be taken by or on behalf of the child. The adoption must be full and final for this to apply.<sup>82</sup>

**(e) Australia**

2.55 The *Citizenship Bill 2005* which is currently before the Federal Australian Parliament proposes to reform the Australian *Citizenship Act*

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<sup>80</sup> Cretney Masson and Bailey-Harris *Principles of Family Law*, (Sweet & Maxwell 2003) at 798-799 and Bridge and Swindells *Adoption: The Modern Law* (Family Law 2003), at 304 and 315.

<sup>81</sup> This is done by applying to the Immigration and Nationality Directorate of the Home Office. The Commission is grateful to Mr. Christopher Connolly of the UK Department of Education and Skills for providing relevant information.

UK law thus illustrates a certain amount of wariness that adoption might be abused to secure an unfair immigration advantage. See Bridge and Swindells *Adoption: The Modern Law* (Family Law 2005) at 326-333. In *Re B (Adoption Order: Nationality)* [1999] 1 FLR 907, the House of Lords held that an adoption order should not be recognised if it was obtained solely to acquire the right to live in the UK and where the child's welfare would not benefit from the adoption.

<sup>82</sup> See US Department of State. Available at [http://travel.state.gov/family/adoption/info/info\\_457.html](http://travel.state.gov/family/adoption/info/info_457.html)

1948.<sup>83</sup> The Bill as initiated does not make any provision for the acquisition of Australian citizenship by those who were adopted by an Australian citizen living outside Australia and who continue to live outside Australia. In November 2005, the Australian House of Representatives Standing Committee on Family and Human Services recommended that children either adopted or born overseas to Australian citizens should have equivalent rights to Australian citizenship by descent.<sup>84</sup> Interest groups representing the Australian diaspora are actively campaigning for the Bill to be amended to reflect this recommendation.<sup>85</sup>

**(f) International Guidance**

2.56 International organisations such as the Hague Conference on Private International Law acknowledge that citizenship law is the preserve of sovereign nation states. Nonetheless, they encourage States to facilitate a child's acquisition of its adoptive parents' citizenship. The 1993 *Hague Convention on Inter-country Adoption* does not deal with the issue of nationality.<sup>86</sup> However in its 2005 *Draft Guide to Good Practice under the Hague Convention*, the Hague Conference on Private International Law points out that States should avoid a position where a child would be left stateless, in the context of traditional intercountry adoption where sending and receiving countries are involved.<sup>87</sup> It draws attention to Article 7(1) of the 1989 *United Nations Convention on the Rights of the Child* which directs that the child shall have the right to acquire a nationality.<sup>88</sup> Similarly, the Council of Europe 1967 *European Convention on the Adoption of Children* advocates that Contracting States of which the adopters are nationals shall facilitate the acquisition of its nationality by the child.<sup>89</sup> In 2000, a Special

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<sup>83</sup> See Australia Department of Citizenship and Immigration at [www.citizenship.gov.au/law-and-policy/legislation/changes200406-announce.htm](http://www.citizenship.gov.au/law-and-policy/legislation/changes200406-announce.htm).

<sup>84</sup> See report entitled *Overseas Adoption in Australia: Report on the Inquiry into Adoption of Children from Overseas* (November 2005) at 83. Available at <http://www.aph.gov.au>.

<sup>85</sup> See [www.southern-cross-group.org](http://www.southern-cross-group.org).

<sup>86</sup> The Hague Conference on Private International Law considered the interaction between adoption and nationality in the *Report on Inter-country Adoption* (1990) at 156-158.

<sup>87</sup> *Draft Guide to Good Practice under the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Inter-country Adoption*, August 2005 available at [www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php).

<sup>88</sup> The child's right to a nationality is also recognised in Article 24(3) of the 1966 *International Covenant on Civil and Political Rights (ICCPR)* available at [www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm).

<sup>89</sup> See also the Council of Europe Committee of Experts on Family Law 2006 *Report on Principles Concerning the Establishment and Legal Consequences of Parentage*-“The White Paper” at 29-30 available at [www.coe.int/T/E/Legal\\_affairs](http://www.coe.int/T/E/Legal_affairs).

Commission of the Hague Conference on the Practical Operation of the 1993 *Hague Convention on Intercountry Adoption* also made reference to citizenship acquisition outside the traditional intercountry adoption context, such as the adoption in *Attorney General v Dowse*.<sup>90</sup> It pointed out that:

“...the acquisition of the nationality of the receiving State was regarded by certain States of origin (for example, Paraguay and Chile) as a precondition to intercountry adoption. Indeed, this could cause a problem where the adoptive parents are habitually resident in, but do not have the nationality of, the receiving State. In a case of this kind the country of origin might allow the adoption to proceed if the child obtains the nationality of the prospective adopters. It was pointed out that some systems do allow, in the case of certain categories of parents living abroad, the assumption by the adopted child of the parent’s nationality.”<sup>91</sup>

2.57 The Special Commission noted that there is merit in the child’s acquisition of the adoptive parent’s nationality as it would promote the child’s full integration into the adoptive family. It would also place the child in a similar position to that of the child born naturally to a family who would acquire citizenship by descent. In this way, there would be no distinction between children and a measure of equality would exist between the children.<sup>92</sup>

#### **(7) *Loss of Existing Citizenship***

2.58 Another consideration is the issue of multiple citizenship and citizenship loss. Unlike Ireland, the UK, the US and other common law countries, some countries do not allow for its citizens to possess dual citizenship.<sup>93</sup> The traditional objections to dual nationality have been concerned with conflicts between states over personal jurisdiction, conflicts of loyalty, the burdens arising from multiple obligations for individuals and

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<sup>90</sup> [2006] IEHC 64, [2007] 1 ILRM 81.

<sup>91</sup> *Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption*, November 2000 at paragraph 81.

<sup>92</sup> This echoed the view of the Institut de Droit International when it stated that a difference in nationality between the adopted person and the adopters may be an obstacle to unity within the adoptive family. It recommended that the competent authorities of each State should develop rules, procedures and practices leading to the prompt extension to an adopted minor of the nationality of his, or her, adopter or adopters. See *1973 Rome Resolution on the Effects of Adoption in Private International Law* at [www.idi-iil.org/idiE/resolutionsE/1973\\_rome\\_03\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/1973_rome_03_en.pdf).

<sup>93</sup> There would seem to be a growing tendency to allow for dual-citizenship. See the Law Reform Commission of Tanzania’s position paper on the *Introduction of Dual Citizenship in Tanzania* (2002) available at [www.lrc-tz.org/projects.html](http://www.lrc-tz.org/projects.html).

unjustified privileges from the accumulation of rights.<sup>94</sup> In 1993 the Secretary General of the Hague Conference on Private International Law noted that:

“Few countries have expressly regulated the question of loss of nationality as a result of adoption by a foreigner. In the absence of an express rule, the conclusion must be that no loss of nationality occurs. Some countries have a procedure for dismissal of nationality (e.g. Greece). A number of States provide that adoption abroad automatically leads to loss of nationality (e.g. Korea).”<sup>95</sup>

2.59 In *Attorney General v Dowse*, there was no determination as to whether the acquisition by the adopted child of Irish citizenship led to the loss of the child’s Indonesian citizenship. A child might be considered to be an alien or illegal immigrant in its country of origin if acquiring its adoptive parents’ citizenship has the effect of depriving it of its citizenship of origin. Indeed, as was pointed out during the Oireachtas debates surrounding the *Irish Nationality and Citizenship Act 2001*, constitutional considerations regarding the rights of the child and natural parents must be taken into account.<sup>96</sup> Therefore, when an Irish citizen living outside Ireland seeks recognition of a child’s adoption in Ireland, an onus is on them to consider what effect the acquisition of Irish citizenship might have on the child’s

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<sup>94</sup> See Summary and Recommendations of the Institute for European Integration Research, Austrian Academy of Sciences, Vienna: *Acquisition and Loss of Nationality. Policies and Trends in 15 European States* (2006) at 21 available at <http://www.imiscoe.org/natac>.

<sup>95</sup> Van Loon “International Cooperation and Protection of Children with regard to Intercountry Adoption”, Hague Academy of International Law, (1993) 244 *Recueil des cours* 195 at 298. A more recent paper by the Deputy Secretary General of the Hague Conference on Private International Law highlights that a similar mixed picture continues to exist and notes that some countries expressly provide for the retention of its nationality by the child. For example in Bolivia, Article 105 of the *Minor’s Code* provides that a minor adopted by foreigners maintains their nationality without prejudice of acquiring that of the adopters. This is also the case in the UK. Colombia’s Constitution allows for dual nationality and permits a child born in Colombia to maintain Colombian nationality unless it is expressly provided waived. This is also the case in Costa Rica, Ecuador and India. However, in India, voluntary renunciation of Indian citizenship is possible under section 8 of the *Indian Citizenship Act 1955*. Under *Romanian Law No 21 of 1 March 1991*, a child who has Romanian citizenship and is adopted by foreigners loses Romanian citizenship only if the adopters expressly so request. If the adoption is nullified, the child is considered as never having lost Romanian citizenship. See Duncan, “Nationality and the Protection of Children Across Frontiers: The Case of Intercountry Adoption” paper delivered at the 3<sup>rd</sup> European Conference on Nationality-Nationality and the Child, Strasbourg, 11-12 October 2004.

<sup>96</sup> See paragraph 2.39, above.

existing citizenship entitlements particularly in a country which prohibits dual citizenship.

2.60 As already mentioned, having regard to Ireland's long history of emigration, the State's citizenship laws are liberal in the sense that Irish citizenship may pass by descent to second and third generations born outside of Ireland provided they register in the Foreign Births Entry Book or the Register of Foreign Births. The Commission is of the opinion that the adopted children of Irish citizens living outside Ireland should be allowed to continue to exercise their entitlement to become Irish citizens if they so wish provided that their adoption is capable of recognition under Irish adoption law. In the Commission's view, this is a reasonable requirement and acknowledges that there are obvious differences between biological and adopted children in terms of the manner in which the legal relationship of parent and child is formed. If recognition is not possible it is open to them to petition the Minister for Justice, Equality and Law Reform to obtain Irish citizenship through the naturalisation process. This will ensure that comparability will exist between the adopted and biological children of Irish citizens living abroad in terms of acquiring Irish citizenship. Accordingly, the Commission provisionally recommends that there should be no change to the citizenship entitlements of the adopted children of Irish citizens who live outside of Ireland.

2.61 *The Commission provisionally recommends that there should be no change to the citizenship rights of a child resident outside the State who is the subject of an intercountry adoption order made in favour of an Irish citizen or citizens.*

## **E Rights of the Child**

2.62 The Attorney's request to the Commission reflects the growing internationalisation of families and in consequence family law.<sup>97</sup> The effects of globalisation together with modern modes of transport and communications systems have combined to facilitate the movement of people across national borders with relative ease. Many people including Irish people move quite regularly across national borders and often have

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<sup>97</sup> See generally McNamara and Martin "Brussels Calling: The Unstoppable Europeanisation of Irish Family Law" [2006] 3 IJFL at 8 and Shannon "The Internationalisation of Irish Family Law" (2005) 5 *Judicial Studies Institute Journal* 42. In England and Wales Lord Justice Thorpe has been appointed to the newly created post of Head of International Family Law which reflects the "international" nature of family law in that jurisdiction. See Thorpe "The Contribution of the UK to the Developing Systems of International Family Law" (2006) *International Family Law Journal* at 124.

family links spanning more than one jurisdiction.<sup>98</sup> Ireland's old pattern of lifelong emigration has been replaced by a mixture of short-term emigration, some lifelong emigration and a new phenomenon of inward migration to Ireland due to a flourishing economy.<sup>99</sup> Traditional patterns of emigration have been replaced by Irish citizens leaving the State for shorter periods of time and often with the intention of returning home.<sup>100</sup> Their temporary residence abroad might be for work or travel. Sometimes they establish roots in their host countries by marrying and raising families. As we have seen from *Attorney General v Dowse*, they may also adopt children. Thus, family law is giving rise to greater conflict of laws situations.<sup>101</sup> As has been noted:

“Lawyers inevitably encounter clients whose family law problems extend beyond national boundaries, including problems in which the laws of more than one state must be taken into account. Lawyers everywhere are increasingly confronted with issues regarding international adoption, child abduction, divorce, custody and domestic violence, where the parties reside in, or are citizens of, different states.”<sup>102</sup>

2.63 The legal and constitutional rights of an Irish citizen child who is not resident in the State must be considered alongside the constitutional and legal duties of their parents. In the *Dowse* case, the child as an Irish citizen was held to possess rights under the Constitution of Ireland. These were given practical effect by the orders which the MacMenamin J granted in

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<sup>98</sup> See speech by The Honourable Justice Michael Kirby, Justice of the High Court of Australia entitled “Children and Family Law-Paramount Interests and Human Rights” delivered at the International Association of Youth Judges and Family Judges and Magistrates 16<sup>th</sup> World Congress, Melbourne, 27 October 2002 available at [www.hcourt.gov.au](http://www.hcourt.gov.au).

<sup>99</sup> See Cubie and Ryan *Immigration, Refugee and Citizenship Law in Ireland: Cases and Materials* (Thomson Round Hall 2004) at vii where they note that this trend has changed utterly: “In only a couple of decades, this State has swung from being one in which its youth “like cattle, were bred for export” to a land where net immigration is the order of the day”. On average there were 46,000 more immigrants than emigrants annually during 2002 and 2006. See *Census 2006 Preliminary Report* (Central Statistics Office 2006) available at [www.cso.ie/census/documents/2006PreliminaryReport.pdf](http://www.cso.ie/census/documents/2006PreliminaryReport.pdf).

<sup>100</sup> The preliminary estimates of Census 2006 show that 17,000 people emigrated from this country between April 2005 and April 2006. See press release by the Central Statistics Office 12 September 2006.

<sup>101</sup> See foreword of Walsh J to Binchy *Irish Conflicts of Law* (Butterworth Ireland Ltd 1988) at viii.

<sup>102</sup> Stark *International Family Law: An Introduction* (Ashgate 2005) at 1. See also Murphy *International Dimensions in Family Law* (Manchester University Press 2005).

applying the provisions of the *Adoption Act 1991*, as amended, and by exercising the inherent jurisdiction of the High Court.

**(1) The Status of Citizen**

**(a) Overview**

2.64 The Constitution of Ireland is applicable to both citizens and non-citizens in Ireland by virtue of their human personality. Where an individual, whether an adult or a child, is present in Ireland, the Constitution guarantees protection for their fundamental human rights regardless of their citizenship status. For example, a child has the right to freedom from torture and the right to the same level of health provision in the same way as citizens are. Indeed, the *Child Care Act 1991* refers to the “child” without any mention of the child’s citizenship status. A non-citizen adult present in Ireland is also entitled to protection from torture and to the same fundamental protections as citizens are, for example in a criminal trial.<sup>103</sup>

2.65 But, of course, non-citizen adults who are present in Ireland are not entitled automatically to claim citizenship. Citizenship carries additional entitlements and responsibilities including participation in the democratic process. Therefore, non-citizen adults who are present in the State may have fewer entitlements and rights than citizens.<sup>104</sup> The precise level of these rights is difficult to specify as the case law discussed below illustrates. To take an example, Article 40.1 of the Constitution states that all citizens shall, as human persons, be held equal before the law.<sup>105</sup> On one reading, this means that Article 40.1 does not apply to a citizen of, for example, Indonesia, such as the child in *Attorney General v Dowse*. But, at the same

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<sup>103</sup> Article 38.1 of the Constitution states that:

“No person shall be tried on any criminal charge save in due course of law.”

<sup>104</sup> See *The (State) Nicolaou v An Bord Uchtála* [1966] IR 567 at 645 where Walsh J stated that: “This Court [the Supreme Court] expressly reserves for another and more appropriate case consideration of the effect of non-citizenship upon the interpretation of the Articles in question [Article 40] and also the right of a non-citizen to challenge the validity of an Act of the Oireachtas having regard to the provisions of the Constitution.” This was in the context of a British citizen father of a child born outside marriage, who challenged the validity of Irish adoption legislation which did not require his being informed of the prospective adoption of his child. For analysis see Binchy “The Implications of the Referendum for Constitutional Protection and Human Rights” (2004) 11 *ILT* 154 at 157-159.

<sup>105</sup> Article 40.1 of the Constitution states that:

“All citizens shall, as human persons, be held equal before the law.

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.”

time, it does not mean that an Indonesian citizen is without any claim to equality of treatment.

2.66 The Commission must consider whether the Constitution applies to citizens of Ireland who are abroad. The Commission is of the opinion that the Constitution does apply extra-territorially to Irish citizens abroad even if they have never been to Ireland. The Commission must also consider whether the Constitution applies extra-territorially to the adopted children of Irish citizens abroad who have adopted children and register the adoption in Ireland for the purposes of citizenship. The Commission's answer to this is that the protection of rights guaranteed in the Constitution would apply to such an Irish citizen child abroad. Whether the Constitution would apply to an adopted child whose adoption was not registered in Ireland, and has thus not acquired Irish citizenship, is something which the Commission does not need to answer in light of existing law and the Commission's provisional recommendation already made that there should be no change to the citizenship entitlements of such adopted children. However, the Commission acknowledges that such a child who did not formally acquire Irish citizenship, but who has a connection with Ireland because their adoptive parents are Irish citizens, would be in a much better position in seeking the protection of the Constitution even when they are resident outside the State compared to someone with no connection to the State.

**(b) Relevant Case Law**

2.67 As already noted, citizenship brings with it certain entitlements, notably those related to participation in the democratic process. Other constitutional rights arise by virtue of an individual's human personality.<sup>106</sup> For example, procedural legal rights apply to all human persons, whether they are a citizen of Ireland or of another State.<sup>107</sup> The Commission now considers relevant case law where Articles 41 and 42 of the Constitution, which concern the Family, have been applied by the courts to non-Irish citizens.

2.68 In *Northampton County Council v ADF and MF*<sup>108</sup> Hamilton J held that Articles 41 and 42 of the Constitution, were applicable to married parents and children who were not citizens of Ireland but who were present in the State. In doing so, he refused the order sought by the applicant

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<sup>106</sup> See Hogan and Whyte (eds) *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed Lexis Nexis 2003) at chapter 7. See also Binchy "The Implications of the Referendum for Constitutional Protection and Human Rights" (2004) 22 ILT 154 and 166.

<sup>107</sup> See *The State (McFadden) v Governor of Mountjoy Prison* [1981] ILRM 113, *Re Haughey* [1971] IR 217 and *The State (Trimbole) v Governor of Mountjoy Prison* [1981] ILRM 117.

<sup>108</sup> [1982] ILRM 164.

English county council so that the respondent child could be adopted in England.

2.69 In *London Borough of Sutton v M*<sup>109</sup>, Finlay Geoghegan J invoked Articles 41 and 42 in refusing to return three children to the place of their habitual residence in England in the context of an application under the *Child Abduction and Enforcement of Custody Orders Act 1991* which had implemented in Irish law the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*. In this case, the three children were Irish citizens because their father was Irish. They were brought to Ireland from England by their mother, who was not an Irish citizen. She had done this because the local authority had planned to place some of the children for adoption because of alleged parental failure. The Council applied under the 1991 Act for the return of the children to England. Finlay Geoghegan J noted that, even if the children were not Irish citizens, they would, by virtue of their residence in Ireland be entitled to the protection of their constitutional rights in Articles 41 and 42. She took into account that English adoption law allows for the adoption of children on grounds which fall far short of similar Irish law. This was against the background of Articles 41 and 42 of the Constitution and the *Adoption Act 1988* which provides that the parental failure which would justify adoption must constitute “an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise with respect to the child”. Therefore, because the constitutionally protected rights of the family would be at risk with the adoption of the children in England, she exercised her discretion not to return them as is permitted by Article 20 of the Hague Convention.<sup>110</sup>

2.70 However, in other cases where non-Irish children habitually resident in another jurisdiction were removed by a parent and brought to Ireland, Irish Courts have refused to hold that Articles 41 and 42 of the Constitution were applicable. In accordance with the private international law principle of comity between courts, it has been held that the appropriate forum to adjudicate on matters relating to these families was the courts in the place of the child’s habitual residence.<sup>111</sup> Thus, the protection of rights

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<sup>109</sup> [2002] 4 IR 488.

<sup>110</sup> Article 20 of the Convention provides that:  
“The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”

<sup>111</sup> For example *Kent County Council v S* [1984] 4 ILRM 292, *Oxfordshire County Council v JH* High Court (Costello J) 19 May 1988 and *Saunders v Mid-Western Health Board* Supreme Court 23 June 1987.

deriving from the Constitution is afforded to non-Irish citizens depending on their association with Ireland. If such a person is resident in Ireland, then it is more likely that they will be so protected.

**(2) The Constitution and Extra-Territorial Effect**

2.71 Article 29 of the Constitution clearly states that the laws of Ireland apply with extra-territorial effect, but in accordance with accepted principles of international law.<sup>112</sup> It is thus clear that Irish law can apply extra-territorially. For example the *Child Pornography and Trafficking Act 1998* criminalises acts committed by an Irish citizen abroad. At a procedural level, Order 11 of the *Rules of the Superior Courts 1986*, which was used in *Attorney General v Dowse*, provides for the service abroad of a civil claim that is appropriately connected to Ireland.<sup>113</sup>

2.72 In *Eastern Health Board v An Bord Uchtála*<sup>114</sup> an Irish couple had brought to Ireland a child who was born in India. The couple applied to have the child adopted under the provisions of the *Adoption Act 1988* which provides for the adoption of a child, whether they are born to married parents or unmarried parents, who have abandoned their child due to a failure in the performance of parental duties. The child was an Irish citizen since the Minister for Justice had granted her citizenship through the naturalisation process.

2.73 The Supreme Court held that there was nothing in the *Adoption Act 1988* prohibiting its application to a non-Irish citizen child, so that such a child who was abandoned outside of the State could come under its terms. The Court also noted that the only “connecting factor” which a child placed for adoption in Ireland must have is mere residence in Ireland and not Irish citizenship or domicile.<sup>115</sup> Indeed, the Court concluded that the references to “parents” and “child” in Article 42.5 are not confined to citizens of the State.<sup>116</sup> This decision suggests that parents, even non-Irish citizens, may be

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<sup>112</sup> Article 29.8 of the Constitution states that:

“The State may exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law.”

<sup>113</sup> See generally Hogan and Whyte (eds) *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed Butterworths 2003) 40-46. Forde notes that practically no judicial guidance exists on the question of whether or to what extent the Constitution imposes obligations on the State with regard to persons, property and events situate abroad. He makes reference to *Attorney General v X* [1992] 1 IR 1 where Costello J granted an *ex parte* injunction forbidding a young girl in England from having an abortion there. See Forde *Constitutional Law* (2<sup>nd</sup> ed First Law 2004) at 244-245.

<sup>114</sup> [1994] 3 IR 207 at 215.

<sup>115</sup> Section 10(a) of the *Adoption Act 1952*.

<sup>116</sup> [1994] 3 IR 207 at 215 at 230.

found to have failed in their parental duties under the Constitution of Ireland when they are outside of Ireland. On this basis, the State appears to have jurisdiction to intervene in appropriate circumstances so as to protect the child. But the decision in this case does not necessarily extend to protecting children in all circumstances, even where there is some “Irish connection”.

**(3) *The Constitution and Private International Law***

2.74 The Supreme Court’s decision in the *Eastern Health Board* case has been queried to the extent that it might imply that Article 42.5 of the Constitution is applicable to someone who has never set foot in Ireland or someone who has no connection with the State. It has been pointed out that:

“There is a confusion of thought [in the *Eastern Health Board* case] between what in private international law are considered to be the questions of jurisdiction and choice-of-law. The jurisdictional question asks who is entitled to take legal proceedings (in this context under fundamental rights provisions of the Constitution). The choice of law question is different. It asks what country’s laws should apply to a legal issue...It can scarcely be doubted that an overall concern for the welfare of the particular child who had lived in Ireland with its would-be adoptive parents for almost all of her life must have encouraged the Supreme Court to the conclusion that it should authorise her adoption. Nevertheless, the analysis of the international remit of Articles 42 and 42 was scarcely comprehensive.”<sup>117</sup>

2.75 The interaction between the Constitution and private international law is likely to be explored to a greater extent in the future as greater numbers of family law cases with international elements appear before the Irish courts. Irish private international law is part of domestic law and so constitutional principles must impact upon it to some extent.<sup>118</sup>

2.76 The superior courts have an inherent jurisdiction to make orders which will enforce an Irish citizen child’s constitutional rights regardless of the child’s place of habitual residence. In *MC v Delegación Provincial de Malaga*<sup>119</sup>, McGuinness J had to determine whether an Irish court could and should exercise its jurisdiction regarding a child who was an Irish citizen but never actually resided in Ireland. The case arose because the child had been placed for adoption in Spain by her natural mother who was an Irish citizen.

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<sup>117</sup> Binchy “The Implications of the Referendum for Constitutional Protection and Human Rights” (2004) 11 ILT 166 at 171.

<sup>118</sup> See Walsh J writing extra-judicially in Foreword to Binchy *Irish Conflicts of Law* (Butterworths Ireland Ltd 1988) at viii.

<sup>119</sup> [1999] IEHC 138, [1999] 2 IR 363.

She subsequently changed her mind and the natural parents, who were both Irish citizens, petitioned the High Court in Ireland to prevent the adoption process from continuing in Spain.

2.77 In reviewing the law regarding the jurisdiction of an Irish court in respect of an Irish citizen child in another jurisdiction, McGuinness J cited the following views of a leading writer:

“The fact that the child is an Irish national, regardless of where he or she may be living or present at the time of the proceedings appears to be a sufficient ground for exercising jurisdiction although it is reasonable that the Irish courts should do so with circumspection.”<sup>120</sup>

2.78 McGuinness J also referred to *Re P (GE) (An Infant)*<sup>121</sup>, in which the English Court of Appeal held that the jurisdiction of the English courts over a British child not present in England arose from the child’s allegiance to the Crown. In *Re P (GE) (An Infant)* the child was not a British citizen but Lord Denning MR accepted that if the child had been a British subject, the Court of Chancery would have had the jurisdiction to make an order as to its custody, maintenance or education even if the child was in a foreign jurisdiction. The court always retained jurisdiction over a British subject wherever they might be, though it would only exercise it abroad “where the circumstances clearly warrant it”. Pearson LJ was more cautious and stated that an infant of British nationality, wherever they may be, owes a duty of allegiance to the Crown and as a result is entitled to the protection and jurisdiction of the English court to make them a ward of court. However, this jurisdiction must be used with restraint:

“The jurisdiction should be sparingly exercised when the infant is abroad, even if he is of British nationality. The courts of different countries are expected to collaborate for the benefit of the infant, but there may be difficulties of enforcement and there is the risk of conflict between an order of the English court and the order of a court of the country in which the infant is present and resident.”<sup>122</sup>

2.79 The leading English text in this area notes that the inherent jurisdiction of the British Courts over minors is derived from the British

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<sup>120</sup> Binchy *Irish Conflicts of Law* (Butterworths Ireland Ltd 1988) at 324.

<sup>121</sup> [1964] 3 All ER 977. In *Hope v Hope* (CA) [1854] All ER 441 it was held that the Court of Chancery had jurisdiction over the custody of infants born of an English subject although such children were born and resident abroad. This was followed by the Probate, Divorce and Admiralty Division of the High Court in *Harben v Harben* [1957] 1 All ER 379.

<sup>122</sup> [1964] 3 All ER 977 at 983.

sovereign as *parens patriae*.<sup>123</sup> British nationals owe a duty of allegiance to the sovereign and in return the sovereign is bound to ensure the maintenance and education of all his subjects. Therefore, the British Court has jurisdiction if the child is a British national even though they are not present in England. The Commission notes that there is a clear difficulty in translating any jurisdiction based on Crown sovereignty to Ireland, since it has been doubted whether any Crown prerogatives survived the enactment of the Constitution under which the People of Ireland are sovereign.<sup>124</sup> Nonetheless, some form of prerogative provisions may have been “converted” into comparable jurisdictions based on the sovereignty of the People of Ireland.<sup>125</sup> In consequence, the High Court in Ireland may have some jurisdiction over an Irish citizen child resident in a foreign jurisdiction.

2.80 In the *MC* case, McGuinness J held that an Irish court could exercise jurisdiction over an Irish citizen child habitually resident in another jurisdiction but acknowledged that there was a dearth of Irish authority on this point of law.<sup>126</sup> She concluded that any decision by the court to exercise its jurisdiction must be guided by whether it is appropriate or proper in the circumstances for the court to do so bearing in mind the private international law rule of the comity of courts, by which the courts are reluctant to intervene in a case which a foreign court already has jurisdiction and out of respect to that court’s authority.<sup>127</sup> In the *MC* case, it is notable that despite a level of Irish connection, McGuinness J declined to assume jurisdiction.

2.81 A similar circumspect approach was taken in the English case *Al Habtoor v Fotheringham*.<sup>128</sup> This concerned the appropriateness of an English court exercising its inherent jurisdiction to make a wardship order in respect of a child who was a British national and had been habitually resident in Dubai. Thorpe LJ stated that:

“...in my opinion the courts of this jurisdiction should be extremely circumspect in assuming any other jurisdiction in relation to children physically present in some other jurisdiction founded only on the basis of nationality. *Parens patriae*

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<sup>123</sup> Dicey, Morris and Collins *The Conflict of Laws* (14th ed Sweet & Maxwell 2006) at 976-977. See also Lowe and Douglas Bromley’s *Family Law* (9<sup>th</sup> ed Butterworths 1998) at chapter 16.

<sup>124</sup> See generally Hogan and Whyte (eds) *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed Butterworths 2003) at 2114.

<sup>125</sup> *Webb v Ireland* [1988] IR 353.

<sup>126</sup> See also the Commission’s *Report on the Hague Convention on the Civil Aspects of International Child Abduction and some related Matters* (LRC 12-1985) at Chapter 2.

<sup>127</sup> [1999] 2 IR 363 at 382.

<sup>128</sup> [2001] EWCA Civ 186, [2001] 1 FLR 951.

jurisdiction has a fine resounding history. However its practical significance has been much diminished domestically since the codification of much child law within the *Children Act 1989*. In order to achieve essential collaboration internationally it has been necessary to relax reliance upon concepts understood only in common law circles. Thus our historic emphasis on the somewhat artificial concept of domicile has had to cede to an acknowledgement that the simpler fact-based concept of habitual residence must be the currency of international exchange. The *parens patriae* concept must seem even more esoteric to other jurisdictions than the concept of domicile. If we are to look for reciprocal understanding and co-operation, so vital with the steady increase in mobility and mixed marriage together with an equal decrease in the significance of international frontiers, we must refrain from exorbitant jurisdictional claims founded on nationality.”<sup>129</sup>

2.82 This approach reflects the view expressed by McGuinness J in the *MC* case of the need to temper extra-territorial reach with respect for principles of international law. The central role of habitual residence as a more appropriate connecting factor regarding children in private international law can be justified on a number of grounds.<sup>130</sup> First, the child may never have had any real connection with the country of nationality or may have lost it altogether. Second, complications may also arise where the child has more than one nationality. Third, the authorities of the country where the child has their habitual residence are usually better placed to make decisions concerning the welfare of the child. This is because of the likely availability of relevant evidence, as well as convenience for the child and their family. Fourth, the application of the nationality principle in matters of child protection may lead to differences in the levels of protection afforded to children who are living in similar circumstances in the same country and who may be just as vulnerable. Thus, from a practical perspective:

“...the claim by the country which constitutes the child’s current social environment to exercise jurisdiction to protect the child is a strong one, based as it is on practicality and convenience for family members as well on a sense of responsibility which States

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<sup>129</sup> [2001] 1 FLR 951 at 968.

<sup>130</sup> Duncan “Nationality and the Protection of Children Across Frontiers: The Case of Intercountry Adoption” paper delivered at the 3<sup>rd</sup> European Conference on Nationality-Nationality and the Child, Strasbourg, 11-12 October 2004.

have developed in relation to children living within the territories.”<sup>131</sup>

2.83 The origins of the “habitual residence” test appear to have emerged from a decision of the International Court of Justice in *Netherlands v Sweden*, known as the *Boll* case, in 1958.<sup>132</sup> Both the Netherlands and Sweden were parties to the 1902 *Hague Convention on the Guardianship of Minors*. The case concerned protective arrangements made for a child, Elizabeth Boll, who was Dutch but had been living in Sweden with her mother prior to her mother’s death. The Dutch authorities assigned a guardian to her, but the Swedish authorities placed the girl under a public care order maintaining her residence in Sweden with her maternal grandparents. The International Court of Justice supported Sweden by interpreting narrowly the concept of guardianship under the 1902 Convention and deciding that it did not preclude the operation of a public care order. In response to this the Hague Conference drafted the 1961 *Convention concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants* which extended to both private and public measures of protection of children. The Convention designated habitual residence as the basic connecting factor and this has continued to be used in succeeding Conventions concerning children.<sup>133</sup>

2.84 Thus, while habitual residence is a key factor, it can be countered by a countervailing factor, such as where the court of the foreign country where the child resides refuses to exercise jurisdiction over aliens.<sup>134</sup> EU Law also envisages situations where child related matters should be heard in the jurisdiction of the child’s habitual residence, which is likely to be the

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<sup>131</sup> Duncan “Nationality and the Protection of Children Across Frontiers: The Case of Intercountry Adoption” paper delivered at the 3<sup>rd</sup> European Conference on Nationality-Nationality and the Child, Strasbourg, 11-12 October 2004.

<sup>132</sup> *Netherlands v Sweden* [1958] ICJ Rep 55. Available at [www.icj-cij.org/](http://www.icj-cij.org/). See also Forde “The ‘Ordre Public’ Exception and Adjudicative Jurisdiction Conventions” (1980) 29 ICLQ 259 and Lipstein “One Hundred Years of Hague Conferences on Private International Law” (1993) 42 ICLQ 553.

<sup>133</sup> Although nationality was preserved as a lesser connecting factor in Article 4. See Beaumont and McEleavy *The Hague Convention on International Child Abduction* (Oxford University Press 1999) at chapter 7. The authors suggest that, in the case of children, 6 months should be treated as a guideline figure when considering the length of time necessary before a residence might be classified as habitual. However, this should be subject to the court’s discretion because there may be exceptional cases where in the interests of a child, a shorter period of time should be accepted as establishing a habitual residence. See also Rogerson “Habitual Residence: The New Domicile?” (2000) 49 ICLQ 86.

<sup>134</sup> *Re Willoughby* (1885) 30 Ch D 324 (CA). See Dicey, Morris and Collins *The Conflict of Laws* (14th ed Sweet & Maxwell 2006) at 977.

more appropriate jurisdiction.<sup>135</sup> However, Article 15 of *Council Regulation (EC) No. 2201/2003*, concerning jurisdiction and recognition and enforcement of judgments in matters of parental responsibility, does allow for a transfer of proceedings by a Member State court to another Member State court if the child has a “particular connection” with the State, it would be a better jurisdiction to deal with the case and it would be in the best interests of the child. Therefore, the Member State of the child’s nationality may fall into this category. It should be noted however that the 2003 Regulation does not extend to parental responsibility matters in the context of adoption.

2.85 The Hague Conference on Private International Law also envisages a situation where a court in the place of the child’s habitual residence may not always be the appropriate forum to decide on matters concerning the child. For example, Article 8 of the 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children* allows for a State which has jurisdiction to decide on the matter but does not want to exercise it on the grounds of *forum non conveniens*, to decline jurisdiction in favour of another more appropriate Contracting State, which will exercise jurisdiction to protect the child’s person or property if it is in their best interests.<sup>136</sup> Therefore, the place of the child’s nationality might sometimes be the appropriate jurisdiction to deal with a matter concerning the child depending on the facts of the case. It is worth noting that Article 4 provides that the Convention is not concerned either with establishment of a parent-child relationship or decisions on adoption, measures preparatory to adoption or the annulment or revocation of an adoption.

#### **(4) Constitutional Rights of the Child**

2.86 The Irish citizen, whether a child or an adult, possesses rights under Article 40.3.1° of the Constitution, which provides that:

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<sup>135</sup> Article 8 *Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility*. It is interesting to note that in the emerging child and family law of the EU, no attempt has been made to define the concept of habitual residence.

<sup>136</sup> See also Article 9. Available at [www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php). See Hutchinson and Bennett “The Hague Child Protection Convention 1996” [1998] *Fam Law* 35 and Duncan “Hague Conference on Private International Law and the Children’s Conventions” [1998] 2 *IFLJ* 3. Ireland signed this Convention on 19 June 1996. Its implementation in EU Member States has been delayed due to a dispute between the UK and Spain regarding Gibraltar.

“The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”

2.87 Article 40.3.2° mandates that:

“The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

2.88 The child also enjoys the right to be held equal before the law (Article 40.1), the right to own property (Article 43.1.1°), the right to freedom of conscience and the right to practise religion (Article 44.2.1°).<sup>137</sup> In addition to these explicit rights, the courts have held that they will also protect certain rights which are not specifically mentioned in the text of the Constitution such as the right to bodily integrity.<sup>138</sup>

2.89 There are few explicit rights of the child mentioned in the Constitution. Article 42.2 provides that the State shall endeavour to provide for free primary education while Article 42.5 refers to the ill-defined “natural and imprescriptable rights of the child” in the context of the State supplying the place of parents who have failed in their duties towards their children for physical or moral reasons. The perceived emphasis of these Articles on the rights of the family as a unit rather than on the rights of the individual members such as the child has led to criticism.<sup>139</sup> In 1993, the *Report of the Kilkenny Incest Investigation* concluded that:

“...the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the rights of parents than to the rights of children.”<sup>140</sup>

2.90 In 1996 the *Report of the Constitution Review Group* recommended that the Constitution should guarantee certain rights of the child such as the right to be registered at birth and to have a name, the right

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<sup>137</sup> The Constitution also recognises the right not to have one’s dwelling violated or forcibly entered other than in accordance with law (Article 40.5), the right to freely express one’s convictions and opinions subject to public order and morality (Article 40.6.1°.i), the right to assemble peaceably and without arms (Article 40.6.1°.ii) and the right to form associations and unions (Article 40.6.1°.iii).

<sup>138</sup> *Ryan v Attorney General* [1965] IR 294. See generally Hogan and Whyte (eds) *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed Butterworths 2003), Part 7.

<sup>139</sup> See the *Report of the Law Society’s Law Reform Committee on Rights-based Child Law: The Case for Reform* March 2006 at 51-62 and *Shannon Child Law* (Thomson Round Hall 2005) at 3.

<sup>140</sup> *Report of the Kilkenny Incest Investigation*, (Stationery Office, 1993) at 96. See also Martin *The Politics of Children’s Rights* (Cork University Press 2000).

to know and be cared for by their parents, the right to be reared with due regard for their welfare, and a requirement that in all actions concerning children, whether legislative, judicial or administrative, the best interests of the child shall be the paramount consideration.<sup>141</sup> This viewpoint found a certain amount of support amongst the members of the All-Party Oireachtas Committee on the Constitution in its *Tenth Progress Report on the Family*. It concluded that there is a need to expressly and unambiguously improve the constitutional rights of children and advocated the insertion of a new provision into Article 41 which would read that:

“All children, irrespective of birth, gender, race or religion, are equal before the law. In all cases where the welfare of the child so requires, regard shall be had to the best interests of that child.”<sup>142</sup>

2.91 In the recent Supreme Court decision in *N v Health Service Executive*<sup>143</sup> Hardiman J stated that:

“It would be quite untrue to say that the Constitution puts the rights of parents first and those of children second. It fully acknowledges the “natural and imprescriptable” rights and the human dignity, of children, but equally recognises the inescapable fact that a young child cannot exercise his or her own rights. The Constitution does not prefer parents to children. The preference the Constitution gives is this: it prefers parents to third parties, official or private, priest or social worker, as the enablers and guardians of the child’s rights. This preference has its limitations: parents cannot, for example, ignore the responsibility of educating their child. More fundamentally, the Constitution provides for the wholly exceptional situation where, for physical or moral reasons, parents fail in their duty towards their child. Then, indeed, the State must intervene and endeavour to supply the place of the parents, always with due regard to the rights of the child.”

2.92 The Commission is aware that there appears to be a growing consensus that more explicit protection concerning children should be contained in the existing constitutional text to reinforce the views expressed on this topic and that this is likely to be included in a constitutional amendment in the near future.<sup>144</sup> The Commission is also aware that the

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<sup>141</sup> (The Stationery Office 1996) at 337.

<sup>142</sup> (The Stationery Office 2006) at 124.

<sup>143</sup> [2006] IESC 60.

<sup>144</sup> The Commission notes the publication of the *Twenty Eight Amendment of the Constitution Bill 2007* by the Government on 19 February 2007. The Bill provides for the deletion of Article 42.5 of the Constitution and its replacement by a new Article

Office of the Minister of State for Children has published an outline of legislative proposals if the Constitution is amended. These include the consolidation and reform of the exiting body of legislation relating to domestic adoptions.<sup>145</sup>

**(a) Unenumerated Rights**

2.93 Whatever may occur in the future in terms of express provisions in the Constitution, the Commission notes that the rights of the child have been expressed and given substance in the courts. In *G v An Bord Uchtála*<sup>146</sup> the Supreme Court held that the child has a constitutional right to bodily

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42(A) which would make specific reference to the best interests of children. For present purposes the relevant provisions of the proposed Article 42(A) state that:

“1° The State acknowledges and affirms the natural and imprescriptable rights of all children.

2. 1° In exceptional cases, where the parents of any child for physical or moral reasons fail in their duty towards such child, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptable rights of the child.

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

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

4. Provision may be made by law that in proceedings before any court concerning the adoption, guardianship or custody of, or access to, any child, the court shall endeavour to secure the best interests of the child.”

The wording of the proposed amendment is available at [www.omc.gov.ie/](http://www.omc.gov.ie/). See also Barnardos Report on *The Case for Constitutional Change* available at [www.barnardos.ie](http://www.barnardos.ie) and the Children’s Rights Alliance Report *The Constitution and Children-A Position Paper on the Proposed Referendum on Children’s Rights* available at [www.childrensrights.ie](http://www.childrensrights.ie).

<sup>145</sup> Available at [www.omc.gov.ie/](http://www.omc.gov.ie/). See Report of the Law Society of Ireland *Adoption Law: The Case for Reform* (2000). Reform of domestic adoption law has occurred in many other jurisdictions. In England and Wales, adoption law has been reformed numerous times since 1926 with the most recent reforms implemented by the *Adoption and Children Act 2002* and the *Children and Adoption Act 2006*. In Scotland and Northern Ireland, reviews have been undertaken of their respective adoption laws. In Scotland, this has resulted in the enactment of the *Adoption and Children (Scotland) Act 2007*. In Northern Ireland, the Department of Health, Social Services and Public Safety recently published *Adopting the Future* which sets out the proposed changes to adoption law. See [www.dhsspsni.gov.uk/](http://www.dhsspsni.gov.uk/). Similarly in Australia, a number of States, such as Western Australia and Queensland are conducting adoption law reviews, while the Northern Territory has recently enacted the *Adoption of Children Act 2006*.

<sup>146</sup> [1980] IR 32 at 56.

integrity and possesses an unenumerated right to the opportunity to be reared with due regard to his or her religious, moral, intellectual, physical and social welfare. O’Higgins CJ found that the child has a right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising their full personality and dignity as a human being. In the same case, Walsh J held that:

“The child’s natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience.”

2.94 Walsh J also noted that the child had a right to its life being defended and maintained by a proper human standard in matters of food, clothing and habitation and stated that:

“It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child....”<sup>147</sup>

2.95 In addition to these rights of all children, a child born to a marital family possesses rights under the Constitution as a member of a family unit. In *In re JH (An Infant)*<sup>148</sup>, Finlay CJ defined these rights in the following way:

“(a) to belong to a unit group possessing inalienable and imprescriptable rights antecedent and superior to all positive law (Article 41, s. 1);

(b) to protection by the State of the family to which it belongs (Article 41, s.2) and;

(c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education (Article 42, s.1)”.

2.96 In *In re the Adoption (No 2) Bill 1987*<sup>149</sup> the Supreme Court found that the rights of the child are not limited to those educational rights contained in Articles 41 and 42 but also include those personal rights protected by Article 40, 43 and 44.

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<sup>147</sup> [1980] IR 32 at 69.

<sup>148</sup> [1985] IR 375 at 394.

<sup>149</sup> [1989] IR 656.

2.97 In *DG v Eastern Health Board*<sup>150</sup> Denham J stated that the child has the right to be reared with due regard to his religious, moral, intellectual, physical and social welfare; to be fed, accommodated and educated; to suitable care and treatment; to have the opportunity of working, and of realising his personality and dignity as a human being.”

2.98 In *Director of Public Prosecutions v Best*<sup>151</sup> Lynch J stated:

“Children are citizens and persons within the meaning of those terms as used in the Constitution and the law. They have added rights given to them by the Constitution and by law for their well being and protection during infancy. The persons primarily responsible for ensuring their well being and protection during infancy are their parents.”<sup>152</sup>

2.99 In *FN and EB v CO*<sup>153</sup> Finlay Geoghegan J found that children aged 13 and 14 had a personal right to their wishes being heard in any decision made about their welfare in accordance with Article 40.3 of the Constitution. She noted that:

“Section 25 [of the Guardianship of Infants Act 1964] should be construed as enacted for the purpose of inter alia, giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of a child.”

2.100 In *North-Western Health Board v HW and CW*<sup>154</sup> the Supreme Court reaffirmed that the child has a right to bodily integrity. For many of these rights to have practical effect they are dependant upon the duties of others such as parents and the State being enforced and so cannot be viewed in isolation.<sup>155</sup>

**(b) Statutory Rights**

2.101 Children also possess rights under Irish statute law. A typical example of this is in the area of social welfare law. The statutory entitlement to child benefit of a child ordinarily resident in the State is enshrined in the

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<sup>150</sup> [1998] 1 ILRM 241 at 262.

<sup>151</sup> [2000] 2 ILRM 1.

<sup>152</sup> [2000] 2 ILRM 1 at 41.

<sup>153</sup> [2004] IEHC 60.

<sup>154</sup> [2001] 3 IR 622.

<sup>155</sup> See Mr. Justice MacMenamin “The State, the Courts and the Care of Minors at Risk” paper to the Irish Human Rights Commission and Law Society of Ireland Conference on Achieving Rights Based Child Law, Dublin, 14 October 2006.

part 4 of the *Social Welfare Consolidation Act 2005*. It is reasonable that such social welfare rights are premised on the beneficiary being actually present in the State. It has been acknowledged that such rights are dependent on a child's residential status in the state and that there are justifications for differential treatment of children adopted nationally and internationally.<sup>156</sup> Therefore many statutory rights would be meaningless to an Irish citizen child if they are resident in another jurisdiction, as occurred in the *Dowse* case.<sup>157</sup> Such entitlements would be a matter for the state in which the child resides with its parents. However in contrast to this, some statutory provisions are capable of having extra-territorial effect. It has been suggested that the *Guardianship of Infants Act 1964* is widely drawn so as to permit such an effect.<sup>158</sup> This was illustrated by MacMenamin J in the *Dowse* case when he appointed the natural mother a guardian of the child, both of whom were resident in Indonesia.

## **(5) Conclusions**

2.102 The Commission concludes that under current principles of international law, to which the State is committed in Article 29 of the Constitution of Ireland, the State has jurisdiction in exceptional cases to exercise jurisdiction to protect the interests of children who are Irish citizens even where those children are not resident in the State. But the Commission is equally of the view that any such jurisdiction should be exercised with great circumspection, having regard to the comity to be applied between States in international law. Similar considerations apply to the issue as to whether the courts should exercise any such extra-territorial jurisdiction. In addition to such general principles of international law, the Commission considers that there are considerable barriers concerning practical enforceability in a foreign jurisdiction even if exercised in a formal sense through the Courts in Ireland.

2.103 In the context of international co-operation in various matters concerning the welfare of children, including in the context of intercountry adoption, the Commission reiterates the view it has expressed on previous

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<sup>156</sup> Duncan "Conflict and Co-Operation: The Approach to Conflicts of Law in the 1993 Hague Convention on Intercountry Adoption" *Families Across Frontiers*, (Kluwer International 1996) at 588. An exception to this concerns children of persons from the European Economic Area who are entitled to claim child benefit in any EU Member State including Ireland even if their child is habitually resident in their home State. See Department of Social and Family Affairs at [www.welfare.ie/foi/euregs.html](http://www.welfare.ie/foi/euregs.html). This is of course a reciprocal arrangement.

<sup>157</sup> For example the following Acts of the Oireachtas are premised on the child being resident in the State: *Status of Children Act 1987*, *Child Care Act 1991*, *Education Act 1998*, *Education (Welfare) Act 2000*, *Equal Status Act 2000*, *Children Act 2001* and *Education for Persons with Special Educational Needs Act 2004*.

<sup>158</sup> Binchy *Irish Conflicts of Laws* (Butterworth Ireland 1988) at 323.

occasions that the State can most appropriately deal with the welfare of children in an intercountry and international setting through the available international co-operative Conventions, such as the 1993 *Hague Convention on Intercountry Adoption*.<sup>159</sup> Where the welfare of children arises outside of that setting, as in *Attorney General v Dowse*, the Commission acknowledges that a residual jurisdiction to intervene remains. But, the Commission considers that there are serious difficulties to the enforcement of any such jurisdiction where, for example, the adoptive parents decline to consent to the jurisdiction of the Irish courts. The Commission considers that solutions to such difficulties must reflect the limits of the constitutional duty of the State to protect the rights of children so far as is practicable.

2.104 The Commission therefore concludes that the constitutional obligation to protect, as far as practicable, the rights of a child of Irish citizens who adopt that child abroad is limited by the practical ability of the State to enforce any order made outside the State, in the absence of any reciprocal mechanism, such as is contained in the 1993 *Hague Convention on Intercountry Adoption*. In the context of answering the Attorney General's first question posed in his request to the Commission, we are especially conscious that the adoptive parents in the *Dowse* case in effect consented to the jurisdiction of the High Court in that case. Such consent may not be forthcoming if such a case arises in the future and this would have an impact on the practical enforceability of an order or orders made by a court particularly having regard to the principles of international law such as the comity of courts. Nonetheless, the Commission has concluded that this inherent jurisdiction to intervene should continue to be exercised if a similar case arises in the future. In that context, the Commission is also conscious that in the absence of consent to jurisdiction, the matter would be dealt with in the context of diplomatic and consular arrangements under the executive function of government in the international setting rather than as a matter of intervention from a judicial source

2.105 *The Commission provisionally acknowledges that a residual jurisdiction inherent in the State, to intervene in appropriate circumstances to protect the status and rights of an Irish citizen child resident outside the State who is the subject of an intercountry adoption order made in favour of an Irish citizen or citizens, should continue to be exercised in the future, taking into account the relevant principles of international law, including the comity between States which arises in such cases and the practical enforceability of any orders made by an Irish court.*

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<sup>159</sup> See *Report on the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, 1993* (LRC 58-1998).

## CHAPTER 3 DUTIES OF PARENTS AND THE STATE

### A Introduction

3.01 In this chapter the Commission considers the second and third aspects of the Attorney General's request to the Commission. These refer to the most effective manner of securing the performance of the constitutional and legal duties of adoptive parents who are Irish citizens in respect of their child. The Commission emphasises that this is in the context of adoptive parents and children who are not resident in the State. In Part B, the Commission examines the *Attorney General v Dowse* against the background of the 1993 *Hague Convention on Intercountry Adoption*. In Part C, the Commission considers the most effective manner of ensuring the fulfilment of the duties of the State in respect of such a child arising from Articles 40.3 and 42.5 of the Constitution and in Part D, the Commission discusses the role of the Attorney General in this regard. In Part E, the Commission expresses its conclusions on the second and third issues raised in the Attorney General's request.

### B *Attorney General v Dowse* in Context

3.02 The Commission reiterates that it has been requested by the Attorney General to address issues which concern adoptive parents and an adopted child who are not resident in Ireland. The child that the Attorney has asked the Commission to concentrate on is an adopted child who is not resident in Ireland. The child's connection with Ireland is that at least one of its adoptive parents is an Irish citizen and the child's adoption has been recognised and registered by the Adoption Board. As noted already in this Consultation Paper, this in turn may have led to the acquisition of Irish citizenship by the child.

3.03 It must also be borne in mind that this type of adoption might not necessarily be an adoption covered by the 1993 *Hague Convention on Intercountry Adoption*. In the *Dowse* case, the adoption was a domestic Indonesian adoption. The adoptive parents were citizens of two different countries but were ordinarily resident in Indonesia and so were allowed to adopt there. Indonesia, like many other predominantly Islamic countries, is not a party to the 1993 *Hague Convention on Intercountry Adoption*. For the purposes of current Irish adoption law, the adoption in the *Dowse* case was a

“foreign adoption”, since the Adoption Board has considered Indonesian adoption law to be compatible with Irish adoption law.<sup>1</sup>

3.04 As the Commission has already pointed out, the *Dowse* adoption was exceptional in the sense that it represents less than 10% of foreign adoptions registered in Ireland, whereas 70-75% of adoptions entered in the Register of Foreign Adoptions arise where the child and the adoptive parents are ordinarily resident in Ireland.<sup>2</sup> Indeed, where the entire adoptive family resides outside Ireland, a request for recognition usually comes from an adult seeking Irish citizenship because one of their adoptive parents is or was Irish. However, with increased mobility of families across national borders it is of course possible that the type of foreign adoption at issue in the *Dowse* case may become more common.

3.05 The *Dowse* case highlighted the lack of influence Ireland has over the adoption process in foreign countries whose adoptions it is asked to recognise after they have taken place. The Adoption Board has no extra-territorial powers in this regard and cannot be confident that adoptions effected in certain countries have been carried out in accordance with proper standards. The Department of Health and Children has pointed to this weakness in current adoption legislation in its report 2005 *Adoption Legislation: 2003 Consultation and Proposals for Change* that:

“The 1991 Act deals mainly with recognition of foreign adoption laws and does not concern itself with the adoption process. In reality, the Adoption Board has no way of determining whether or not the laws and proper procedures were adhered to when asked to recognise an adoption.”<sup>3</sup>

3.06 Irish citizens live in many parts of the world, adopt children and sometimes seek recognition of the adoption in Ireland. The *Dowse* case also illustrated that recognition of the adoption in Ireland proved to be beneficial to the child in the long term. It created a connection with Ireland so that the High Court could make a number of protective orders in the best interests of the child.

### **(1) Implementation of the Hague Convention**

3.07 In its *Consultation Paper on the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of*

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<sup>1</sup> Note that New Zealand also recognises Indonesian adoption orders. For example the High Court of New Zealand deemed an Indonesian adoption order to be valid and capable of recognition for the purposes of New Zealand adoption law in *T v District Court at North Shore (No 2)* [2004] NZFLR 769.

<sup>2</sup> See paragraph 1.34 above.

<sup>3</sup> (Stationery Office 2005) at 80.

*Intercountry Adoption, 1993*<sup>4</sup> the Commission noted the difficulties which non-recognition of a foreign adoption may cause where the adopted child is resident in Ireland. It stated that good adoption practice requires that everything possible should be done to ensure that all the legal and other conditions of adoption have been met before the child is placed with the prospective adoptive parents and, in an intercountry adoption context, before the child is transferred from one country to another. The Commission was of the opinion that effective regulation requires bilateral co-operation especially prior to and at the time of the decision on placement of the child.

3.08 When the 1993 *Hague Convention on Intercountry Adoption* is incorporated into Irish law, the Adoption Board is likely to become the Adoption Authority of Ireland. It will be designated as the central adoption authority for the purposes of the Convention's operation. The 1993 Convention provides for mutual recognition and co-operation between State Parties where intercountry adoptions are concerned. Sending countries or the child's country of origin will have a responsibility to ensure that the child is capable of being adopted, that an intercountry adoption is in the child's best interests and that the natural parents have been counselled and consented to the adoption.<sup>5</sup> Receiving countries will also have a duty to ensure that adoptive parents have been assessed as to their suitability to adopt, that they have been counselled and that the child will be authorised to enter and reside permanently in the State.<sup>6</sup> In addition, Article 9 of the Convention provides that Contracting States shall take all appropriate measures to promote the development of adoption counselling and post-adoption services in their States and insofar as is permitted by the law of the State, reply to justified requests from other central authorities about a particular adoption situation. The Adoption Board has already indicated that it fully endorses the regulation of intercountry adoption by the Hague Convention and is preparing for its incorporation into Irish law when it will become the designated Central Authority.<sup>7</sup> It is thought that the forthcoming legislation to incorporate the Convention into Irish law will also provide that the Authority's membership will be drawn from relevant persons with knowledge and experience of adoption. This will include adopted people, natural parents, adoptive parents as well as those with professional expertise

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<sup>4</sup> (LRC CP 11-1997) at 22.

<sup>5</sup> Article 4 of the Convention.

<sup>6</sup> Article 5 of the Convention.

<sup>7</sup> Article 6 of the Convention. See Annual Report of the Adoption Board 2004 and the Adoption Board's Corporate Plan 2004-2007. See also *Response of An Bord Uchtála/The Adoption Board to the Minister's Discussion Document on Adoption Legislation* available at [www.adoptionboard.ie](http://www.adoptionboard.ie).

in disciplines such as social work, medicine and family law.<sup>8</sup> The Commission welcomes these developments but also notes that even with the implementation of the 1993 Convention, it will remain the case that recognition of adoptions made in non-Hague Convention States will continue to arise.

### **C Duties of Parents and the State**

3.09 If parents fail in their duties to their children for moral or physical reasons, it falls to the State to intervene and protect the rights of children in accordance with Article 42.5 of the Constitution. In doing so the State acts as guardian of the common good. Article 42.5 states that:

“In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptable rights of the child.”

3.10 If the family is present in Ireland, the State can have recourse to legislative provisions such as the *Child Care Act 1991* in order to protect individual family members such as children who may be at some risk. This places a duty on each regional division of the Health Service Executive (HSE) to promote the welfare of children in its area.<sup>9</sup> Section 3 of the 1991 Act specifically acknowledges the rights and duties of parents under the Constitution or otherwise, and that it is generally in the best interests of a child that they be brought up in their own family. When a child is found to be in immediate danger, the State has an obligation to intervene in order to protect the child.<sup>10</sup> Such intervention would entail the HSE in applying to the Court for a care order in respect of the child. This would occur before any constitutional proceedings are instituted for the purposes of applying the provisions of Article 42.5 of the Constitution, whereby the State fulfils the duties of parents owed to their children. It is only on rare occasions that such State intervention is warranted.

3.11 This was emphasised in *North Western Health Board v HW*.<sup>11</sup> The case centred on the refusal of parents of a newborn child to consent to the administration of the PKU test. This is a diagnostic screening test

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<sup>8</sup> See the 2005 Department of Health and Children *Report on Adoption Legislation: 2003 Consultation and Proposals for Change* at 99 and 105.

<sup>9</sup> Section 3 of the *Child Care Act 1991*. See Ward *The Child Care Acts* (2<sup>nd</sup> ed Thomson Round Hall 2005).

<sup>10</sup> See Shannon *Child Law* (Thomson Round Hall 2005) at chapter 4.

<sup>11</sup> [2001] 3 IR 622.

designed to prevent serious metabolic disorders from developing in childhood. The majority of the Supreme Court held that the lack of parental consent to such a procedure was valid and that the parents had not failed in their duties to the child. This stemmed from the autonomy and authority of the family as a unit recognised by Articles 41 and 42 of the Constitution which the State could not abrogate lightly. In this case, the State was not permitted to rely on Article 42.5 to step into the parental role because it was held that the parents of the child had not failed in their duty either for moral or physical reasons.

3.12 Article 42.5 of the Constitution allows for a rare intervention by the State into the life of the family, which the Constitution defines as the family based on marriage. For this to occur there must have been an effective abandonment of parental rights and duties with respect to the child.<sup>12</sup> Such an intervention was given statutory expression with the enactment of the *Adoption Act 1988*. The 1988 Act has been described as a “remedial, social statute designed to permit the adoption of children who had previously been denied the benefits of adoption”.<sup>13</sup> The 1988 Act permits the High Court to facilitate the non-consensual adoption of children born to non-marital and marital parents who have been found to have failed in the exercise of their parental duties. Such failure must constitute:

“...an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child.”<sup>14</sup>

3.13 Section 3 of the 1988 Act allows for the adoption of such a child where the High Court is satisfied that:

- The parents have failed in their duty towards the child for physical or moral reasons during the previous 12 months.
- The failure is likely to continue without interruption until the child reaches 18 years.
- The failure constitutes an abandonment on the part of the parents of all parental rights.

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<sup>12</sup> See Cawley “Abandonment and the Adoption Act 1988” [1996] 1 Family Law Journal, at 2-6.

<sup>13</sup> *Northern Area Health Board v An Bord Uchtála* [2002] 4 IR 252 at 267 (McGuinness J).

<sup>14</sup> Section 3(1)(I)(C) of the *Adoption Act 1988*. In *Northern Area Health Board v An Bord Uchtála* [2002] 4 IR 252 the term abandonment was defined by McGuinness J as meaning the non-performance of parental duties that make up the normal day to day care of the child.

- The State as guardian of the common good should supply the place of parents.<sup>15</sup>

3.14 The Long Title of the 1988 Act closely mirrors the wording of Article 42.5. The Long Title reads:

“An Act to provide, in exceptional cases, where the parents for physical or moral reasons have failed in their duty towards their children, for the supplying, by the adoption of the children, of the place of the parents and for that purpose and other purposes to amend and extend the Adoption Acts, 1952 to 1976.”

3.15 There is, thus, a constitutional presumption that the welfare of the child is best served by being a member of the child’s family, and a very high threshold exists before the State can intervene in the life of the family. In all cases where intervention is required “the fundamental principle is that the welfare of the child is paramount”.<sup>16</sup> In *In re JH (An Infant)*<sup>17</sup>, the Supreme Court found that State intervention is only justified if it is established that there are “compelling reasons” why the welfare of the child cannot be met in the custody of the parents. This was reaffirmed in *N v Health Service Executive*.<sup>18</sup> The Supreme Court decided that “exceptional circumstances” did not exist to justify allowing an infant girl to remain in the care of her pre-adoptive parents. Her natural parents had married since the placement for adoption and sought the custody of their daughter.<sup>19</sup> In this case, the Supreme Court held that placing a child for adoption did not amount to an abandonment of the child within the meaning of Article 42.5 of the Constitution.

3.16 As discussed earlier, the Commission is of the opinion that the rights and duties contained in the Constitution has extra-territorial effect and extends to Irish citizens abroad. Therefore, Irish citizen parents have responsibilities to their children which are recognised by the Constitution. Where they fail in performing these responsibilities, the State may have a

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<sup>15</sup> Section 3(1)(I) of the *Adoption Act 1988*.

<sup>16</sup> Denham J in *North Western Health Board v HW* [2001] 3 IR 622 at 722.

<sup>17</sup> [1985] IR 375.

<sup>18</sup> [2006] IESC 60.

<sup>19</sup> To the same effect see *In re J* [1966] IR 295 and *In re JH (An Infant)* [1985] IR 375 where the natural parents of children who later married successfully relied on the provisions of Articles 41 and 42 of the Constitution and regained custody of their child placed for adoption. The principle that a child’s welfare is generally best served by being a member of its natural family unless there are compelling reasons to suggest otherwise was affirmed in common law by the House of Lords decision in *Re G (Children) (FC)* [2006] UKHL 43. See in particular the views of Lord Nicholls of Birkenhead at paragraph 2 and Baroness Hale of Richmond at paragraph 44.

residual role insofar as is practicable to ensure that such duties are fulfilled and that the rights of the child are protected. In *Attorney General v Dowse*<sup>20</sup>, the High Court did this by making an array of orders which were to the benefit of the Irish citizen child. The State was aware of the child's situation and by virtue of the registration of the child's adoption in Ireland, this provided a further connection with the State, because the intervention of the High Court in Ireland was required to remove the adoption registration from the Register of Foreign Adoptions. As to the enforcement of parental responsibilities where the parents are Irish citizens abroad, any residual duty of the State to ensure performance of these responsibilities must take practical as well as private and public international law considerations, into account. While Irish law may have extra-territorial effect for example in the criminal law sphere when certain crimes have been committed abroad, these would usually be prosecuted in Ireland only where there has been a failure to prosecute in the jurisdiction in which they were committed. For example an Irish citizen may be prosecuted in the State for murder or manslaughter committed anywhere in the world.<sup>21</sup> Therefore, ensuring the performance of parental duties and the protection of the rights of the child is generally a matter for the authorities of the State in which the child and parents are habitually resident.

3.17 *The Commission provisionally acknowledges that the duty of the State to secure the performance of the constitutional and legal duties of adoptive parents who are Irish citizens resident abroad is limited by reference to practicability within the meaning of the Constitution of Ireland and private and public international law considerations.*

#### **D Role of the Office of the Attorney General**

3.18 In the *Dowse* case the family was not present in Ireland. As the Commission has noted and approved<sup>22</sup>, it is within the inherent jurisdiction of the High Court to make orders in respect of an Irish citizen child resident in another State. The Attorney General took the unusual but necessary step of instituting proceedings in the High Court to compel the adoptive parents to carry out their parental duties. MacMenamin J phrased this action as being attributable to the Attorney General's "constitutional or legal capacity to protect the interests of [the adopted child]...who is an Irish citizen".<sup>23</sup>

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<sup>20</sup> [2006] IEHC 64, [2007] 1 ILRM 81.

<sup>21</sup> Section 9 of the *Offences Against the Person Act 1861* as adapted by the *Offences Against the Person Act 1861 (section 9) Adaptation Order 1973* (SI No 356 of 1973).

<sup>22</sup> See paragraph 2.105 above.

<sup>23</sup> [2007] 1 ILRM 81 at 84.

3.19 The adoptive parents also instituted proceedings to remove the registration of the child's adoption from the Register of Foreign Adoptions.<sup>24</sup> Section 7(3)(a) of the *Adoption Act 1991* provides that the Attorney General may be made a notice party to such proceedings. Section 7(3)(b) of the 1991 Act also provides that the Attorney General, of his own motion or if requested by the Court, may make submissions to the Court without being added as a party to the proceedings. This is not unusual where an issue of legal status in the context of family law arises.<sup>25</sup> For instance, the Attorney General must be a party to proceedings where a declaration of parentage is sought<sup>26</sup> or where the validity of a foreign divorce, annulment or legal separation is at issue.<sup>27</sup>

3.20 Article 30 of the Constitution of Ireland states that the Attorney General is legal adviser to the Government and shall also exercise any such functions as may be conferred or imposed on him by law. Section 6 of the *Ministers and Secretaries Act 1924* also refers to the Attorney's role in "the assertion and protection of public rights". The Attorney General can thus be described as a guardian of the public interest and one aspect of this relates to the protection of the Constitution and the vindication of constitutional rights of the citizen.<sup>28</sup> This was expressed by McCarthy J in *Attorney General v Hamilton (No.1)* when he stated that:

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<sup>24</sup> In accordance with section 7(1) of the *Adoption Act 1991*.

<sup>25</sup> One of the main functions of family law is concerned with the definition and alteration of legal status within a family. See Lowe and Douglas Bromley's *Family Law* (9<sup>th</sup> ed Butterworth's 1998) at 2.

<sup>26</sup> Section 35 of the *Status of Children Act 1987*.

<sup>27</sup> Section 29(5) of the *Family Law Act 1995*. Section 29(8) of the 1995 Act provides that, if the Attorney applies to do so and is joined to the proceedings, the declaration will be binding on the State. Section 29(4) of the 1995 Act provides that the Court has jurisdiction to add the Attorney of its own motion and ought to do so "in cases where it may be anticipated that a fundamental change in or development of the law is to be argued it would be appropriate for a court to give notice to the Attorney General", see Denham J in *GMcG v DW (No.2) (Joinder of Attorney General)* [2000] 4 IR 1 at 9. See Hogan and Whyte *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed Butterworths 2003) at 593.

<sup>28</sup> See Hogan and Whyte *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed Butterworths 2003) at 589 and Casey *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutions* (Round Hall Sweet & Maxwell 1996). The Constitution Review Group notes that the Attorney's role as "guardian of the public interest" derives from section 6 of the *Ministers and Secretaries Act 1924* which refers to "the assertion and protection of public rights" as one of his duties. See *Report of the Constitution Review Group* (The Stationery Office 1996) at 125.

“the nature of the office of the Attorney General charges him with the duty to enforce the Constitution...in the protection of the unprotected ....”<sup>29</sup>

3.21 In light of the exceptional nature of the *Dowse* case, Commission considers that the Attorney General as a law officer of the State, is mandated to protect the rights of the citizen. This can be done by the commencement of proceedings in an Irish court or in a foreign court if the citizen child is not resident in Ireland and the circumstances warrant it.

3.22 In the Commission’s view, it is thus entirely appropriate that the Attorney General should institute proceedings in an Irish court with respect to a citizen child where a situation such as the *Dowse* case comes to the attention of the Irish authorities. The Commission is equally of the view that it would not be practical to place a general duty on the Attorney General to protect the rights of Irish citizen children living outside the State whether they are adopted or biological children. It would, in the Commission’s view, be unfair to place unreasonable investigative burdens on the State to ensure that Irish citizens are performing their parental duties in accordance with the Constitution and Irish law. A relatively small country such as Ireland cannot be expected to police the daily lives of Irish citizens around the world.<sup>30</sup> Such duties become a matter for the jurisdiction in which the Irish citizens are habitually resident and with which they have a tangible connection by virtue of their day to day lives there. If a child has a greater degree of attachment to a country in which they and the Irish citizen parent reside, it could be argued that in accordance with the comity of the courts and respect between nations that it would be inappropriate for the State to interfere. It must also be remembered that a child might have dual citizenship and interference by the Irish authorities might be frowned upon by the other country and create tensions in diplomatic relations.<sup>31</sup> The Commission is thus of the view that the duty which the Attorney General has is only likely to be activated when a particular case such as the circumstances of the *Dowse* case comes to the notice of the Irish authorities.

3.23 The duty of the State in vindicating the rights of citizens is limited out of necessity. It is explicit in Article 40.3.1° of the Constitution that the

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<sup>29</sup> [1993] 2 IR 250 at 282.

<sup>30</sup> It has been estimated that approximately 3 million Irish citizens live abroad, almost 1.2 million of whom were born in Ireland. See Report of the Task Force on Policy regarding Emigrants *Ireland and the Irish Abroad* (2002). Available at <http://foreignaffairs.gov.ie/home/index.aspx>.

<sup>31</sup> See Duncan “Nationality and the Protection of Children Across Frontiers-The Case of Intercountry Adoption” paper delivered at the 3<sup>rd</sup> European Conference on Nationality: Nationality and the Child, Strasbourg, 11-12 October 2004. Available at [www.coe.int/](http://www.coe.int/)

State's duty is to do this so far as is "practicable", while Article 40.3.2° refers to the State protecting the rights of citizens "as best it may". McCracken J has stated extra-judicially that such phrases "...make it quite clear that there may be circumstances in which individual fundamental rights will not be enforced".<sup>32</sup> In his judgment in *North Western Health Board v HW*<sup>33</sup>, Mc Cracken J referred to the judgment of Henchy J in *Hanrahan v Merck Sharp & Dohme*<sup>34</sup> noting that the duty of the State under Article 40.3.2° of the Constitution to protect, defend and vindicate the personal rights of the citizen is not unlimited or universal. In *Attorney General v X*<sup>35</sup>, McCarthy J equated the word "practicable" with what can be done in practice. Finlay CJ noted that the phrase directs a court to refrain from making orders which are futile, impractical or ineffective.<sup>36</sup>

3.24 Whenever a particular case of injustice abroad becomes known to the State, it may have an obligation to investigate the case and to determine how the State can protect its citizens by offering consular assistance and diplomatic protection to them. In practice this is done by the Irish diplomatic corps in exercise of the executive power of the State. Indeed the mission statement of the Department of Foreign Affairs includes the commitment "to protect its citizens abroad".<sup>37</sup>

3.25 In the Commission's view, there is no legal right to such protection. Rather it comes from the exercise by the State of its executive power on behalf of its citizens, taking into account the general principles of international law which deal with the exercise of diplomatic and consular services in the territory of another sovereign State. This aspect of executive power is in turn governed by relevant international Conventions, to which

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<sup>32</sup> McCracken "The Irish Constitution - An Overview" in Sarkin and Binchy (eds) *Human Rights: The Citizen and the State - South African and Irish Perspectives* (Round Hall Sweet & Maxwell 2001) at 52.

<sup>33</sup> [2001] 3 IR 622 at 632.

<sup>34</sup> [1988] ILRM 629 at 636. See also *North Western Health Board v HW* [2001] 3 IR 622 at 716, Denham J.

<sup>35</sup> [1992] 1 IR 1 at 23.

<sup>36</sup> In *Lennon v Ganly and Fitzgerald* [1981] ILRM 84 at 86, the plaintiff sought an interlocutory injunction preventing the defendants (who were the President and Secretary of the IRFU and others) from using the word "Irish" as they toured South Africa. In refusing the relief sought, O'Hanlon J stated that: "If such an order were made the court would have no machinery to enforce its own order while the parties affected by it were outside the jurisdiction of the Irish courts. It would, in my opinion, be contrary to legal principle for the court to make an order where it has no means of supervising the enforcement of the order, and calling in aid if need be the executive arm of the State to secure obedience to its decree".

<sup>37</sup> See <http://foreignaffairs.gov.ie/home/index.aspx>.

the State is a party and the domestic aspects of which were incorporated into Irish law by the *Diplomatic Relations and Immunities Act 1967*, as amended.

## **E Practical Considerations**

3.26 In the Commission's approach to answering the second and third issues raised in the Attorney General's request, we have taken into account a number of practical considerations. First, the fact that a child and its parents are not present in Ireland might make the enforcement of Irish court orders quite difficult. In the *Dowse* case, the adoptive parents consented to the jurisdiction of the High Court and were active participants in the case through their legal representatives. They abided by the financial orders made against them in the interests of the child. Were a similar case to arise in future, there would be no guarantee that a court of a foreign jurisdiction would readily enforce an Irish judgment of a family law nature. In a European context, maintenance orders would be enforceable. The *Maintenance Orders Act 1974* allows for the reciprocal enforcement of maintenance orders made by a court either in Ireland or the three jurisdictions of the UK, namely England and Wales, Scotland and Northern Ireland. The *Jurisdiction of Courts and Enforcement of Judgments Act 1998* incorporated the 1968 *Brussels Convention* and the *Lugano Convention* providing for the recognition and enforcement of judgments of a civil and commercial nature in the EU. The 1998 Act has since been superseded by the 2001 "Brussels I" Regulation.<sup>38</sup> The *Maintenance Act 1994* incorporates the *Rome Convention* and the *New York Convention* into Irish law.<sup>39</sup> The *Rome Convention* operates throughout the EU together with the *Brussels I Regulation*. It establishes a central authority in every Member State to carry out duties in the enforcement of maintenance orders in other Member States. The *New York Convention* also includes countries outside of Europe.

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<sup>38</sup> *Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*. See also *Council Regulation No. 805/2004 creating a European Enforcement Order for Uncontested Claims* which provides that maintenance orders may be automatically enforced in another Member State without the need for judicial intervention. In December 2005, the EC Commission published a proposed Council Regulation on jurisdiction, applicable law, recognition and the enforcement of decisions and co-operation in matters relating to maintenance obligations (COM (2005) 649 final). Ireland has declared its intention to opt into and be bound by the Regulation. See Bateman "Law Society Brussels Briefing" (2006) *International Family Law Journal* at 108.

<sup>39</sup> The *Convention on the Law Applicable to Contractual Obligations* (the Rome Convention) is available at [www.rome-convention.org](http://www.rome-convention.org). The 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention) is available at [www.uncitral.org/uncitral/en/index.html](http://www.uncitral.org/uncitral/en/index.html). See Shannon (ed) *Law Society of Ireland Family Law* (2<sup>nd</sup> ed Oxford University Press 2003) at 53-54.

3.27 A second major practical difficulty is that there is no certainty that financial orders will be complied with especially if the respondents have no property within the State. In the *Dowse* case, the adoptive parents abided by the orders made in the interests of the child. If there is property in the State, the court can be reasonably sure that any order made will be capable of enforcement. Private international law considerations, such as comity of the courts and *forum non conveniens*, would also suggest that the court of the jurisdiction where the child is resident is the most appropriate court to deal with the welfare of the child.<sup>40</sup> If the foreign court refuses to deal with the child's circumstances, it is proper that a court should exercise jurisdiction based on the Irish nationality of the child and its adoptive parent. Since the adoption of the child in the *Dowse* case was registered in Ireland by his adoptive parents, then it was entirely appropriate that an Irish court was involved.

3.28 If a case similar to the *Dowse* case were to arise in future, it is also possible that the Attorney General might have to institute proceedings in the foreign jurisdiction where the child resides. In the *Dowse* case, it was initially thought that it might have been necessary to seek leave from an Indonesian court to remove the child from Indonesia to Ireland. However, it was decided that it would not be in the child's interests to inflict further trauma on him by removing him from his native country. In addition, the sensibilities of the other jurisdiction must be considered in such cases including the maintenance of friendly diplomatic relations. Article 29.1 of the Constitution supports this view in that it provides that:

“Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality”.

3.29 The Commission is thus of the view that Article 29 indicates that Ireland should not intervene in situations concerning Irish citizens in their place of residence except in exceptional circumstances.<sup>41</sup> In that respect, the Commission's provisional conclusion on the second and third issues raised in the Attorney General's request is that it was entirely appropriate in the exceptional circumstances of the *Dowse* case for the State to intervene.

3.30 *The Commission provisionally recommends that, in exceptional cases which come to the attention of the State as occurred in Attorney General v Dowse, the Attorney General is the most appropriate officer of the*

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<sup>40</sup> The private international law term of *forum conveniens* refers to the practice of courts when they decline to exercise jurisdiction in a case because there is a court in another jurisdiction which is more appropriate to hear the case.

<sup>41</sup> See also Biehler *International Law in Practice: An Irish Perspective* (Thomson Round Hall 2005) at chapter 3 and see generally Brownlie *Principles of Public International Law* (6<sup>th</sup> ed Oxford University Press 2003).

*State to initiate proceedings in the High Court of Ireland to secure the performance of the constitutional and legal duties of Irish citizens as parents of an adopted child resident outside the State and to ensure the fulfilment of the duties of the State in respect of such a child arising from Articles 40.3 and 42.5 of the Constitution. The Commission also provisionally recommends that the Attorney General is also the appropriate officer to initiate any similar proceedings in the court of another jurisdiction, taking into account relevant principles of international law.*



## CHAPTER 4 RELATED ISSUES

### A Introduction

4.01 In this chapter the Commission discusses a number of related issues arising from the Attorney General's request. While it was not within the Commission's terms of reference to engage in a wide ranging review of adoption law, certain procedural and other aspects of adoption law have come to the attention of the Commission while preparing this Consultation Paper and these are discussed in this chapter. In Part B, the Commission considers the question of proof regarding foreign adoption documentation. In Part C, the Commission discusses some aspects of pre-adoption and post adoption arrangements and research issues.

### B Proof of Foreign Adoption Documentation

#### (1) *Provisions of the Adoption Act 1991 as amended*

4.02 Section 9 of the *Adoption Act 1991*, as amended by section 16 of the *Adoption Act 1998*, deals with proof of adoptions made outside the State.<sup>1</sup> It requires that a document which has been authenticated and purports to be a copy of the document by which an adoption outside the State was made shall, without further proof, be deemed to be a true copy of the document unless the contrary is shown and shall be admissible as evidence of the adoption. Section 6(4) of the 1991 Act states that a person who applies to register a foreign adoption shall furnish the Adoption Board with such information it may reasonably require and the information shall be in such form (if any) as may be specified by the Board. Section 9(4) of the 1991 Act provides that where an adoption is made in a place outside the State, it shall be presumed, until the contrary is shown, that it was made in accordance with the law of that place.

4.03 Section 6(2)(a)(ii) of the 1991 Act states that the Board shall make an entry in the Register of Foreign Adoptions (once it complies with sections 2 to 5 as appropriate) unless the relevant circumstances have

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<sup>1</sup> See Appendix for these statutory provisions.

changed to the extent that it would not be proper to register, having regard to section 13 of the 1952 Act and section 10 of the 1991 Act.<sup>2</sup>

4.04 These provisions clearly provide for a presumption that documents presented to the Adoption Board are valid and that the procedures leading to the adoption order were valid. This is of course subject to rebutting evidence to the contrary. An inability to present such rebutting evidence would be in breach of constitutional fair procedures.<sup>3</sup> Nonetheless, the 1991 Act requires that the Board must place a good deal of faith in the documents presented to it, a matter highlighted in Seanad Éireann when the 1991 Act was being debated.<sup>4</sup>

4.05 It is clear that the 1991 Act does not mandate recognition in all cases and that it envisages that it would not always be appropriate to recognise certain foreign adoptions where there are doubts as to the validity of the adoption or some evidence suggests that proper procedures have not been adhered to in the foreign country. The 1991 Act also envisages non-recognition of an adoption on the grounds of public policy.<sup>5</sup> For example if money has changed hands in consideration of the adoption, then this is a ground to refuse recognition. In its *Report on the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993* the Commission noted that there are exceptions to automatic recognition, even in the case of adoptions made under the 1993 Hague Convention. Such exceptions might exist when it becomes clear that an adoption has involved serious abuses, such as the

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<sup>2</sup> This refusal to recognise an adoption applies only to an adoption made under section 5(1)(iii)(II) of the *Adoption Act 1991* which refers to an adoption made after 1 April 1992 in favour of persons ordinarily resident in the State on the date of the adoption. Section 13 of the *Adoption Act 1952* provides that the Adoption Board shall not make an adoption order, unless it is satisfied that the applicant is of good moral character, has sufficient means to support the child and is a suitable person to have parental rights and duties in respect of the child. Section 10 of the *Adoption Act 1991* is concerned with the marriage of married applicants. The Board has stated that the circumstances which might prevent it from registering an adoption might be that the person is not suitable due to a bigamous marriage or a conviction for child abuse. See Coulter “Dowse case should not detract from good effects of foreign adoption” *Irish Times* 3 March 2006 at 16.

<sup>3</sup> See *Report on the Recognition of Foreign Adoption Decrees* (LRC 29-1989) at 22 criticising the 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions in this respect. The 1993 Hague Convention on Intercountry Adoptions has superseded the 1965 Convention.

<sup>4</sup> Volume 128 Seanad Éireann Debates (15 May 1991) (Senator Upton).

<sup>5</sup> The public policy proviso was recommended by the Commission in *Report on the Recognition of Foreign Adoption Decrees* (LRC 29-1989) at 32.

abduction of a child or where the human rights of natural parents have been violated.<sup>6</sup>

4.06 Section 9(3)(a) of the *Adoption Act 1991* states that the Minister for Health and Children may make Regulations relating to the proof of adoptions effected outside the State. It is also envisaged that these Regulations may differ depending on where the adoption was effected or because different classes of adoption are involved.

4.07 When a request for recognition of a foreign adoption under the 1991 Act is made to the Adoption Board, an assessment is made regarding the compatibility of the foreign adoption law with Irish adoption law. Adoptive parents are obliged to swear an affidavit that they are domiciled or habitually resident or ordinarily resident in the foreign jurisdiction and that no payment was made in consideration for the adoption of the child. They must also complete a residency questionnaire outlining factual details of their residency in the foreign country.

4.08 As stated previously, there is little that the State can do in practice if an Irish citizen resident outside the State adopts a child. However, it should be noted that in January 2006, the Adoption Board sent a circular via the Department of Foreign Affairs to all Irish diplomatic and consular offices abroad. It stated that Embassy or Consular officials may be approached to supply references regarding the suitability of prospective Irish adopters or statements to the effect that the adoption will be automatically recognised in Ireland. The Adoption Board advised caution in this regard and advised embassies to contact the Board prior to issuing such letters. In the UK, the Department of Education and Skills which has responsibility for all adoption law matters in the UK, points out that British citizens living outside the UK sometimes adopt children in the country of their habitual residence and occasionally the authorities in the country require a statement from the UK Government. The Department of Education and Skills, the Home Office and the Foreign and Commonwealth Office have produced a “No Objection” letter which can be provided to British citizens for this purpose. Before such a letter can be issued, the adopters must swear a statement to the effect that they have sought independent legal advice on the question of their habitual residence and the advice has confirmed that they are no longer habitually resident in the UK.<sup>7</sup>

## **(2) 1961 Hague Apostille Convention**

4.09 In 2005, the Special Commission on the Practical Operation of the 1993 *Hague Convention on Intercountry Adoption* stressed the usefulness of

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<sup>6</sup> LRC 58-1998 at 42-43.

<sup>7</sup> See [www.dfes.gov.uk/intercountryadoption/citizens.shtml](http://www.dfes.gov.uk/intercountryadoption/citizens.shtml).

linking the application of the 1993 *Hague Convention on Intercountry Adoption* to the 1961 *Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, commonly known as the Apostille Convention. The Special Commission stated that:

“In the light of the high number of public documents included in a typical adoption procedure, the Special Commission recommends that States Parties to the Adoption Convention but not the Apostille Convention, consider the possibility of becoming a party to the latter.”<sup>8</sup>

4.10 The aim of the 1961 Apostille Convention is to provide for the “simplification of the series of formalities which complicated the utilisation of public documents outside of the country from which they emanated”.<sup>9</sup> The main formality removed by the Convention was the need for “legalisation”, that is formal authentication of documents by diplomatic consular personnel.<sup>10</sup> The Convention reduces this formality of legalisation by the delivery of a certificate in a prescribed form known as an “apostille” by the authorities of the states from which the document originates. In effect, an apostille is a certificate which confirms the validity of the public documents to which it is attached. However, as the Special Commission point out, the effects of the apostille are limited to attestation of the authenticity of the signature, the capacity in which the person signing the document has acted and the identity of the seal or stamp which it bears.

4.11 In its 1995 *Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*<sup>11</sup>, the Commission recommended that Ireland become a party to the 1961 Apostille Convention and this recommendation was implemented by the *Rules of the Superior Courts (Proof of Foreign, Diplomatic, Consular and Public Documents) 1999*.<sup>12</sup> The Convention has been ratified by over 90 different

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<sup>8</sup> See *Report and Conclusions of the Second Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption (17-23 September 2005)* at 31. Available at [www.hcch.net/upload/wop/adop2005\\_rpt-e.pdf](http://www.hcch.net/upload/wop/adop2005_rpt-e.pdf).

<sup>9</sup> It should be noted that the Hague Conference is also spearheading the development of an electronic apostille (e-apostille). See press release at [www.hcch.net/upload/e-app\\_press.pdf](http://www.hcch.net/upload/e-app_press.pdf) and information about the Hague Conference Apostille Convention at [www.hcch.net/index\\_en.php?act=text.display&tid=37](http://www.hcch.net/index_en.php?act=text.display&tid=37).

<sup>10</sup> Legalisation can be defined as the process which certifies the authenticity of the signature which a document bears, the capacity in which the person signing the documents has acted and also, the identity of the seal or stamp which the document bears. See *Commission Report on The Hague Convention abolishing the requirement of Legalisation for Foreign Public Documents* (LRC 48-1995).

<sup>11</sup> LRC 48-1995.

<sup>12</sup> SI No 3 of 1999.

countries including all of the EU Member States. The Commission considers that countries which are not a party to the Apostille Convention, and where intercountry adoptions are often made, could be persuaded to ratify the Convention and apply it in the context of adoption documentation. Countries which are a party to the Apostille Convention could also be persuaded to issue an “apostille” which would prove the validity of the authority granting an intercountry adoption order, if they do not already do so. For example, in 2003 the New Zealand Ministry of Justice issued 28 apostilles in respect of adoption orders, whose validity needed to be established in another country. In early 2007, Denmark ratified the Apostille Convention and requires that all adoption documentation emanating from Denmark, which is to be presented in another jurisdiction which has also ratified the Convention, must have an apostille attached to them. The Commission accepts that such an arrangement would have no practical effect on countries not a party to either Convention but whose adoptions the Adoption Board is requested to recognise. Nonetheless, the Commission considers that suitable guidelines, based on the type of formalities in the Apostille Convention should be prepared by the Adoption Board to ensure that foreign adoptions meet certain basic evidential criteria, regardless of their origin.

4.12 *The Commission provisionally recommends that the Adoption Board should prepare guidelines regarding the validity of adoption documentation from foreign countries, especially those which are not a party to the 1993 Hague Convention on Intercountry Adoption. Such guidelines could be based on the form of proof set out in the 1961 Hague “Apostille” Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.*

### **(3) Countries from which Adoptions are Recognised**

4.13 Since the enactment of the *Adoption Act 1991* the Adoption Board has recognised adoptions from approximately 70 different countries. About one third of these countries are other EU Member States, British Commonwealth or former British Commonwealth countries and countries where the common law operates. Adoptions made in these countries are very similar to Irish adoptions, thus making recognition much easier since the foreign adoption law is comparable to Irish adoption law. The remaining countries include Asian, African, Eastern European and South American States.

Article 23 of the 1993 *Hague Convention on Intercountry Adoption* operates on the basis of mutual co-operation and provides for the automatic recognition of an adoption made in accordance with the Convention in all other Contracting States.<sup>13</sup> However Article 24 of the Convention states that

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<sup>13</sup> Article 23(1).

the recognition of an adoption may be refused in a Contracting State if the adoption is manifestly contrary to its public policy while taking account of the best interests of the child. Any such refusal would only apply in very limited circumstances. It is clear that non-recognition is not an effective means of ensuring that proper standards are maintained in the adoption process and that by the time the question of recognition is raised, the child may have established de facto ties within the adoptive family. It has been noted that the question of recognition often arises long after the adoption has taken place, perhaps in a succession case when the adopted child is an adult.<sup>14</sup>

4.14 Article 23 of the 1993 Convention provides that when an adoption is made by the competent authority it must issue a certificate which will act as evidence that the adoption has been made in accordance with the Convention. Since the Convention is concerned with the regulatory process of intercountry adoption amongst Contracting States, this offers reassurance that adoptions are valid. The Central Authority of each state has the opportunity to contact its counterparts in other states if any question arises as to the validity of an adoption. If any reason exists as to why the adoption should not be automatically recognised, Article 24 of the Convention permits non-recognition on the grounds that the adoption is manifestly contrary to public policy taking into account the best interests of the child.

4.15 When the 1993 Convention is ratified by Ireland, adoptions made in Contracting States will be recognised in addition to those countries with which Ireland signs bilateral treaties regarding intercountry adoption. Such treaties will be permitted in accordance with Article 39 of the Convention provided that they are done in the spirit of the Hague Convention. In addition to these intercountry adoptions, it is likely that persons will seek recognition of adoptions by the Adoption Board which were not made in a Convention state. In the Commission's view, a certain amount of caution must be exercised when deciding whether to recognise an adoption arising from such non-Hague Convention States. This should especially be the case when the adoption was made in a country whose adoption law the Board has not been asked to consider previously.

4.16 The Commission is of the view that, in regard to such countries, the Adoption Board should have at its disposal a set of best practice guidelines regarding the validity of adoption documentation of other countries. If there is a counterpart body similar to the Adoption Board in the foreign country, contact could be made with it so as to ensure that the adoption is valid. Modern technology would facilitate such co-operation and

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<sup>14</sup> Duncan "Conflict and Co-Operation. The Approach to Conflicts of Law in the 1993 Hague Convention on Intercountry Adoption" in Lowe and Douglas (eds) *Families Across Frontiers* (Martinus Nijhoff 1996) 577 at 584-585.

help to create channels of communication between the Board and its counterparts in other jurisdictions. There may be situations where this is impossible because the administrative structures of the foreign country are not sufficiently developed. In such situations it is likely that the foreign adoption should not be recognised. This is permitted on the grounds of public policy if the foreign adoption or adoption law of the foreign country is not acceptable having regard to Irish standards of adoption law.

4.17 The Commission acknowledges that this would not facilitate the acquisition of Irish citizenship by the adopted child of Irish citizens living outside the State. However, as stated previously if this arises an application can be made to the Minister for Justice, Equality and Law Reform so that the adopted child can become a naturalised Irish citizen. If there are concerns as to the guardianship rights of the child if the child and their adoptive parents return to Ireland, a number of measures could be taken to prevent any undue hardship. Section 8(1) of the *Guardianship of Infants Act 1964* allows for a person to apply to court to be appointed a guardian of a child. The Commission is also conscious that the Office of the Minister of State for Children is preparing legislation which will introduce the concept of “special guardianship”.<sup>15</sup> This will allow persons to be appointed guardians in respect of a child when it is considered that an adoption order is inappropriate. This is primarily designed to give long term foster carers better guardianship rights regarding children whose own parents are married. For example, it would avoid the practical difficulties which they face when trying to seek a passport for the child or regarding consent to medical treatments on behalf of a young child. The Adoption Board’s *Annual Report 2004* states that it is not uncommon for foreign children whose adoptions are not capable of recognition to be the subject of a domestic Irish adoption order in accordance with the *Adoption Act 1952* or the *Adoption Act 1988*.<sup>16</sup>

4.18 *The Commission provisionally recommends that the Adoption Board maintain best practice standards when deciding whether to recognise an adoption effected in a country which is not a party to the 1993 Hague Convention on Intercountry Adoption or has not signed a bilateral intercountry adoption agreement with Ireland.*

4.19 The Commission also considers that the Adoption Board should have appropriate, independent, legal advice at its disposal to advise it on complex private international law and foreign adoption law matters. This is particularly important when it must decide whether the adoption law of a

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<sup>15</sup> See *Report on Adoption Legislation: 2003 Consultation and Proposals for Change 2003*, at 75-76.

<sup>16</sup> The Annual Report 2004 shows that in 2004 there were 23 applications for an adoption order under the *Adoption Act 1952* in respect of children from Guatemala, India and Philippines. See Report at 69.

foreign country is compatible with Irish adoption law. It is also very important that the adoption laws of foreign countries are continually monitored to ensure that they remain compatible with Irish adoption law. The Commission is aware that this will be provided for when the Board is transformed into the Adoption Authority.

4.20 *The Commission provisionally recommends that the Adoption Board should have appropriate, independent, legal advice at its disposal when considering the compatibility of foreign adoption law with Irish adoption law for the purposes of recognising foreign or intercountry adoptions.*

## **C Pre-Adoption and Post-Adoption Research**

4.21 In the last decade, Ireland has changed dramatically from being a country of emigration to one of large scale immigration. As discussed earlier, Irish nationality is not a pre-requisite for a child to be placed for adoption. The *Adoption Act 1952* simply requires that a child “resides” in Ireland.<sup>17</sup> In preparing this Consultation Paper, the Commission has examined adoptions connected with Ireland which have some foreign element. As a result, it has come to the attention of the Commission that a small number of women who are not Irish citizens place their children for adoption in Ireland each year. There are no official statistics compiled by the Adoption Board in this regard but the Commission understands that it is not an insignificant figure. It is a cause for concern that such women may place their children for adoption for reasons relating to their immigration status in Ireland. If they are illegally resident in Ireland and need to work but have no family support in the country, they may consider adoption of their children as the only option available to them. Irish adoption law provides that the consent to adoption must be a full, free and informed one. While the courts have stated that the understandable and ordinary worries of a natural mother in this regard are not enough to later invalidate her consent to adoption, it is surely the case that the unique circumstances of these foreign women whose decision could be overborne by their status as an illegal immigrant, place them in a particularly different and difficult category.<sup>18</sup>

4.22 The Commission understands that there are no specific guidelines in place concerning such a pre-adoption scenario. The Commission also understands that social workers in the various Health Service Executive regions must organise the provision of interpreters if the natural mother does

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<sup>17</sup> Section 10(a) of the *Adoption Act 1991*.

<sup>18</sup> For analysis of the case law regarding the natural mother’s consent to adoption, see Shatter *Family Law* (4<sup>th</sup> ed Butterworth 1997) 453-473.

not understand English and this can sometimes be quite difficult to organise. In addition, there are no adoption information booklets and forms available in different foreign languages which could be given to natural mothers. The Commission notes that a number of public bodies such as the Department of Justice, Equality and Law Reform, the Health and Safety Authority and the Courts Service publish information leaflets in a number of different languages.

4.23 The Commission considers that it would be entirely appropriate that research be undertaken regarding such pre-adoption scenarios and the reasons why these women decide to place their children for adoption. The Commission also provisionally recommends that consideration should be given to providing adoption information in an appropriate written form which is translated into different languages. It is also important that research be conducted into the outcomes of intercountry adoption where foreign children are adopted and brought to live in Ireland.<sup>19</sup> The Commission understands that the Adoption Board has already commissioned the Children's Research Centre, Trinity College Dublin to undertake such a study and welcomes this development.<sup>20</sup>

4.24 In the meantime, the Commission provisionally recommends that guidelines be drafted by the Adoption Board which would give guidance to social workers as to how pre-adoptive counselling and supports should be administered with particular reference to natural mothers who are not Irish citizens and do not understand the English language.

*4.25 The Commission provisionally recommends that consideration should be given by the Adoption Board to the provision of information concerning adoption in an appropriate written form in different languages other than English. The Commission also provisionally recommends that guidelines be drafted by the Adoption Board which would give guidance as to how pre-adoptive counselling and supports should be administered with particular reference to natural mothers who are not Irish citizens and do not understand the English language.*

4.26 In its 1998 *Report on the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993*, the Commission recommended that the *Child Care Act 1991* should be amended to place a statutory duty on health boards and accredited intercountry adoption agencies established under the Convention, to provide post-adoption services such as counselling for both

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<sup>19</sup> See Richardson "Current Issues in Adoption Policy and Practice" [2003] 2 IJFL 14 at 17.

<sup>20</sup> The study is entitled *Study of Intercountry Adoption Outcomes in Ireland since 1980 Phase 1* and is due to be published in 2007. See [www.tcd.ie/childrensresearchcentre](http://www.tcd.ie/childrensresearchcentre).

domestic and intercountry adoptions.<sup>21</sup> In the Commission's discussions with interested parties while preparing this Consultation Paper, they have stressed the need for an independent post-adoption service which would be available to adoptive families to provide them with advice and support if they require it. This can particularly be the case when a child is adopted from abroad, where a number of unique socio-cultural issues may arise as the child matures. Therefore, the Commission takes this opportunity to reiterate its previous recommendation that post-adoption services be made available in this country on an established basis.

*4.27 The Commission reiterates its previous recommendation that post-adoption services including counselling be made available on an established basis for both domestic and intercountry adoptions.*

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<sup>21</sup> (LRC 58-1998) at 52.

## **CHAPTER 5      SUMMARY OF PROVISIONAL RECOMMENDATIONS**

5.01      The provisional recommendations of the Commission may be summarised as follows:

### **Chapter 1      Intercountry Adoption**

5.02      The Commission reiterates its previous recommendation that the 1993 *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption* be ratified by Ireland and incorporated into Irish law. The Commission welcomes the Government's proposed legislation to do so. [Paragraph 1.22].

### **Chapter 2      Status and Rights of the Child**

5.03      The Commission provisionally recommends that there should be no change to the citizenship rights of a child resident outside the State who is the subject of an intercountry adoption order made in favour of an Irish citizen or citizens. [Paragraph 2.61].

5.04      The Commission provisionally acknowledges that a residual jurisdiction inherent in the State, to intervene in appropriate circumstances to protect the status and rights of an Irish citizen child resident outside the State who is the subject of an intercountry adoption order made in favour of an Irish citizen or citizens, should continue to be exercised in the future, taking into account the relevant principles of international law, including the comity between States which arises in such cases and the practical enforceability of any orders made by an Irish court. [Paragraph 2.105].

### **Chapter 3      Duties of Parents and the State**

5.05      The Commission provisionally acknowledges that the duty of the State to secure the performance of the constitutional and legal duties of adoptive parents who are Irish citizens resident abroad is limited by reference to practicability within the meaning of the Constitution of Ireland and private and public international law considerations. [Paragraph 3.17].

5.06      The Commission provisionally recommends that, in exceptional cases which come to the attention of the State as occurred in *Attorney General v Dowse*, the Attorney General is the most appropriate officer of the State to initiate proceedings in the High Court of Ireland to secure the

performance of the constitutional and legal duties of Irish citizens as parents of an adopted child resident outside the State and to ensure the fulfilment of the duties of the State in respect of such a child arising from Articles 40.3 and 42.5 of the Constitution. The Commission also provisionally recommends that the Attorney General is also the appropriate officer to initiate any similar proceedings in the court of another jurisdiction, taking into account relevant principles of international law. [Paragraph 3.30].

#### **Chapter 4      Related Issues**

5.07      The Commission provisionally recommends that the Adoption Board should prepare guidelines regarding the validity of adoption documentation from foreign countries, especially those which are not a party to the 1993 *Hague Convention on Intercountry Adoption*. Such guidelines could be based on the form of proof set out in the 1961 *Hague "Apostille" Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*. [Paragraph 4.12].

5.08      The Commission provisionally recommends that the Adoption Board maintain best practice standards when deciding whether to recognise an adoption effected in a country which is not a party to the 1993 *Hague Convention on Intercountry Adoption* or has not signed a bilateral intercountry adoption agreement with Ireland. [Paragraph 4.18].

5.09      The Commission provisionally recommends that the Adoption Board should have appropriate, independent, legal advice at its disposal when considering the compatibility of foreign adoption law with Irish adoption law for the purposes of recognising foreign or intercountry adoptions. [Paragraph 4.20].

5.10      The Commission provisionally recommends that consideration should be given by the Adoption Board to the provision of information concerning adoption in an appropriate written form in different languages other than English. The Commission also provisionally recommends that guidelines be drafted by the Adoption Board which would give guidance as to how pre-adoptive counselling and supports should be administered with particular reference to natural mothers who are not Irish citizens and do not understand the English language. [Paragraph 4.25].

5.11      The Commission reiterates its previous recommendation that post-adoption services including counselling be made available on an established basis for both domestic and intercountry adoptions. [Paragraph 4.27].

**Arrangement of Sections**

Section

1. Definitions.
2. Foreign Adoptions effected in place of domicile of adopters.
3. Foreign Adoptions effected in place of habitual residence of adopters.
4. Foreign Adoptions effected in place where adopters ordinarily resident.
- 4A Where adopters' domicile or residence is elsewhere than place of effecting foreign adoption.
5. Foreign adoptions where adopters ordinarily resident in State.
6. Register of Foreign Adoptions.
7. Directions of the High Court in relation to entries in the Register of Foreign Adoptions.
8. Assessment by health and registered adoption societies.
9. Proof of adoptions effected outside the State.
10. Eligibility to be granted an adoption order.

**Definitions**

1. "adoption order" means an order under section 9 of the *Adoption Act 1952*.

"the Board" means An Bord Uchtála;

"the Court" means the High Court;

"foreign adoption" means an adoption of a child who at the date on which the adoption was effected was under the age of 21 years or, if the adoption was effected after the commencement of this Act, 18 years, which was effected outside the State by a person or persons under and in accordance with the law of the place where it was effected and in relation to which the following conditions are satisfied:

(a) the consent to the adoption of every person whose consent to the adoption was, under the law of the place where the adoption was effected, required to be obtained or dispensed with was obtained or dispensed with under that law either-

(i) at the time the adoption was effected, or

(ii) at a subsequent time when, if the adoption which was initially granted did not have the effect in that place of terminating a pre-existing legal parent-child relationship, it was converted into an adoption having that effect by virtue of such consent being obtained or dispensed with under that law (the date on which the adoption was initially granted being construed for the purposes of this Act as the time the adoption was effected),

(b) the adoption has, for so long as it is in force, substantially the same legal effect as respects the guardianship of the child in the place where it was effected as an adoption effected by an adoption order,

(c) the law of the place where the adoption was effected required an enquiry to be carried out, as far as was practicable, into the adopters, the child and the parents or guardian,

(d) the adoption was effected for the purpose of promoting the interests and welfare of the child,

(e) the adopters have not received, made or given or caused to be made or given any payment or other reward (other than any payment reasonably and properly made in connection with the making of the arrangements for the adoption) in consideration of the adoption or agreed to do so.<sup>1</sup>

“the Minister” means the Minister for Health and Children;

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<sup>1</sup> This is the definition of a foreign adoption in section 1 of the *Adoption Act 1991* as amended by section 10 of the *Adoption Act 1998*.

“place” means a country (other than the State) or any of the following jurisdictions, that is to say, England and Wales, Scotland, Northern Ireland, the Isle of Man and the Channel Islands or, in relation to a country that has in matters of adoption two or more systems of law applying in different territorial units, any of the territorial units;

“the Principal Act” means the *Adoption Act 1952*;

“the Register” means the Register of Foreign Adoptions established under section 6 of this Act.

### **Foreign Adoptions effected in place of domicile of adopters**

2(1) A foreign adoption (whether effected before or after the commencement of this Act) effected in, or recognised under the law of, a place in which either or both of the adopters were domiciled on the date on which the adoption was effected shall be deemed, unless such deeming would be contrary to public policy, to have been effected by a valid adoption order made on that date.

(2) This section and sections 3 to 5 of this Act are in substitution for any rule of law providing for the recognition of adoptions effected outside the State.<sup>2</sup>

### **Foreign Adoptions effected in place of habitual residence of adopters**

3. A foreign adoption (whether effected before or after the commencement of this Act) effected in, or recognised under the law of, a place in which either or both of the adopters were habitually resident on the date on which the adoption was effected shall be deemed, unless such deeming would be contrary to public policy, to have been effected by a valid adoption order made-

- (a) on that date, or
- (b) on such commencement,

whichever is the latter.<sup>3</sup>

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<sup>2</sup> Section 2 of the *Adoption Act 1991* as amended by section 11 of the *Adoption Act 1998*.

<sup>3</sup> Section 3 of the *Adoption Act 1991*.

### **Foreign Adoptions effected in place where adopters ordinarily resident**

4. A foreign adoption (whether effected before or after the commencement of this Act) effected in, or recognised under the law of, a place in which either or both of the adopters were ordinarily resident for a period of not less than one year ending on the date on which the adoption was effected shall be deemed, unless such deeming would be contrary to public policy, to have been effected by a valid adoption order made-

(a) on that date, or

(b) on such commencement,

whichever is the later.<sup>4</sup>

### **Where adopters' domicile or residence is elsewhere than place of effecting foreign adoption**

4A. A foreign adoption (whether effected before or after the commencement of this section) effected in a place in which neither of the adopters was domiciled, habitually resident or ordinarily resident on the date on which the adoption was effected, but not recognised under the law of the place in which either or both of the adopters were on that date domiciled, habitually resident or ordinarily resident, as the case may be, solely because the law of that place did not provide for the recognition of adoptions effected outside that place, shall be deemed, unless such deeming would be contrary to public policy, to have been effected by a valid adoption order made on that date or on such commencement, whichever is the later.<sup>5</sup>

### **Foreign Adoptions where adopters ordinarily resident in State**

5(1) A foreign adoption (whether effected before or after the commencement of this Act), other than an adoption specified in sections 2, 3, 4 or 4A of this Act, shall be deemed, unless such deeming would be contrary to public policy, to have been effected by a valid adoption order made-

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<sup>4</sup> Section 4 of the *Adoption Act 1991*.

<sup>5</sup> Section 4A of the *Adoption Act 1998* as inserted by section 12(1) of the *Adoption Act 1998*.

(a) on the date on which the adoption was effected, or

(b) on such commencement,

whichever is the later, if, but only if-

(i) the adopters are persons coming within the classes of persons in whose favour an adoption order may, by virtue of section 10 of this Act, be made,

(ii) the adopters were ordinarily resident in the State on the date on which the adoption was effected....<sup>6</sup>

### **Register of Foreign Adoptions**

6(1) The Board shall establish and maintain a register (to be known as the Register of Foreign Adoptions).<sup>7</sup>

(2)(a) If, on application to the Board in that behalf, in relation to an adoption effected outside the State, being an application made by the person who was the subject of the adoption or a person by whom a person was adopted pursuant to the adoption or any other person having an interest in the matter, the Board is satisfied that-

(i) the adoption is a foreign adoption to which any of sections 2 to 4A of this Act applies, or

(ii) the adoption is a foreign adoption to which section 5 of this Act applies,

then, unless (in a case to which clause (II) of section 5(1)(iii) of this Act applies) the Board is satisfied that the relevant circumstances have so changed since the date of the declaration under that clause that it would not be proper, having regard to section 13 of the Principal Act and section 10 of this Act, an entry shall be made in the Register with respect to the adoption.

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<sup>6</sup> Section 5 of the *Adoption Act 1991* as amended by section 13 of the *Adoption Act 1998*.

<sup>7</sup> Note that section 6 of the *Adoption Act 1991* as amended is substantially replicated in section 33 of the *Civil Registration Act 2004*. However this section has not yet come into operation.

(b) If the Court so directs under section 7 of this Act, an entry shall be made in the Register concerning a specified foreign adoption.

(3) An entry in the Register shall be in such form and contain such particulars as may be prescribed by rules made under section 5 of the Principal Act.

(4) A person making an application to the Board under this section shall furnish the Board with such information as the Board may reasonably require and the information shall be in such form (if any) as may be specified by the Board.

(5) An error in an entry in the Register may be corrected and, if the Court so directs, a specified correction shall be made in the Register.

(6) A document purporting to be a copy, and to be certified by an officer of the Board to be a true copy, of an entry in the Register-

(a) shall be evidence of the fact that the adoption to which it relates is a foreign adoption and is deemed by this Act to have been effected by a valid adoption order made on the date specified in the copy, and

(b) shall be issued by the Board, to any person on application by him to it in that behalf and on payment by him to it of such fees as may be specified by the Board with the consent of the Minister,

and any requirement of the law for the production of a certificate of birth shall be satisfied by the production of such a document.

(7) Section 20 of the Principal Act shall apply to an application under subsection (2) of this section as it applies to an application for an adoption order with the modification that the Board shall refer any question in relation to public policy arising on such an application to the High Court for determination and with any other necessary modification.”<sup>8</sup>

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<sup>8</sup> Section 6 of the *Adoption Act 1991* is amended by section 14 of the *Adoption Act 1998*. Section 20 of the Principal *Adoption Act 1952* provides that the Adoption 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.

## **Directions of High Court in relation to entries in the Register of Foreign Adoptions**

7(1) If, on application to the Court in that behalf by a person who may make an application to the Board under section (6)(2) of this Act, the Court is satisfied that an entry should be made in the Register with respect to an adoption or that an entry in the Register with respect to an adoption should be cancelled or that a correction should be made in an entry in the Register, the Court may by order, as appropriate-

- (a) direct the Board to procure the making of a specified entry in the Register,
- (b) subject to subsection (1A), direct the Board to procure the cancellation of the entry concerned in the Register, or
- (c) direct the Board to make a specified correction in the Register.<sup>9</sup>

(1A) The Court shall not give a direction under paragraph (b) of subsection (1) by reason of the fact that an adoption has been set aside, revoked, terminated, annulled or otherwise rendered void under and in accordance with the law of the place where it was effected unless the Court is satisfied that it would be in the best interests of the person who was the subject of the adoption.

(1B) Where the Court gives a direction under paragraph (b) of subsection (1), it may make such orders in respect of the person who was the subject of the adoption as appear to the Court to be necessary in the circumstances and in the best interests of the person, including orders relating to the guardianship, custody, maintenance and citizenship of the person, and any such order shall, notwithstanding anything in any other Act, apply and be carried out to the extent necessary to give effect to the order.

(2) If the Court refuses to give a direction under paragraph (a) of subsection (1) of this section or gives a direction under paragraph (b) of that subsection, the adoption concerned shall be deemed not to have been effected by a valid adoption order.

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<sup>9</sup> Note that section 7 of the *Adoption Act 1991* as amended has been substantially replicated in section 34 of the *Civil Registration Act 2004*. However this section has not yet come into operation.

(3)(a) The Court may direct that notice of an application under the said subsection (1) shall be given by the person making the application to such other persons (including the Attorney General and the Board) as it may determine and may, of its own motion or on application to it in that behalf by the person concerned or a party to the proceedings in relation to the application under the said subsection (1), add any person as a party to those proceedings.

(b) The Attorney General, of his own motion or if so requested by the Court, may, without being added as party to proceedings in relation to an application under the said subsection (1) make submissions to the Court in relation to the application.

(4) Proceedings under this section shall, if the Court so determines, be heard otherwise than in public.<sup>10</sup>

#### **Assessment by health and registered adoption societies**

8. [Not reproduced here].

#### **Proof of adoptions effected outside the State**

9(1)(a) A document, duly authenticated, which purports to be a copy of the document by which an adoption outside the State was effected shall without further proof be deemed to be a true copy of the document unless the contrary is shown and shall be admissible as evidence of the adoption.

(b) Documents, duly authenticated, which purport to be copies of the documents by which an adoption outside the State was effected shall without further proof be deemed to be true copies of the documents unless the contrary is shown and shall be admissible as evidence of the adoption.

(2) A document purporting to be a copy of a document or of one of the documents by which an adoption outside the State is effected shall, for the purposes of this section, be regarded as being duly authenticated if it purports-

(a) to bear the seal of the court or other authority or the person or persons by which or by whom it was issued or executed, or

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<sup>10</sup> Section 7 of the *Adoption Act 1991* as amended by section 15 of the *Adoption Act 1998*.

(b) to be certified-

(i) by a person in his capacity as a judge or officer of that court or in his capacity as that authority or as a member or officer of that authority, or

(ii) by the person or persons by whom it was issued or executed.

(3)(a) The Minister may by regulations make provision in relation to the proof of adoptions effected outside the State and the regulations may make different provision as respects different places and different classes of adoptions.

(b) Provisions of regulations under this subsection may be in addition to or in substitution for the provisions of subsections (1) and (2) of this section and may amend those provisions.

(3A) Every regulation made by the Minister under this section shall be laid before each House of the Oireachtas as soon as practicable after it is made and, if a resolution annulling the regulation is passed by either House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

(4) Where an adoption is effected in a place outside the State, it shall be presumed, until the contrary is shown, that it was effected under and in accordance with the law of that place.<sup>11</sup>

#### **Eligibility to be granted an adoption order**

10. [Not reproduced here].

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<sup>11</sup> Section 9 of the *Adoption Act 1991* as amended by section 16 of the *Adoption Act 1998*.