# AN CHÚIRT UACHTARACH
# THE SUPREME COURT

**S:AP:IE:2022:000014**

**[2023] IESC 10**

**Dunne J.**
**Charleton J.**
**Woulfe J.**
**Hogan J.**
**Murray J.**

**BETWEEN**

**A, B AND C (A MINOR SUING BY HIS NEXT FRIEND, A)**

**APPLICANTS/RESPONDENTS**

**- AND -**

**THE MINISTER FOR FOREIGN AFFAIRS AND TRADE**

**RESPONDENT/APPELLANT**

**- AND -**

**THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Brian Murray delivered on the 9th day of May 2023**

***Introduction***

**1.** This appeal raises novel and complex questions of law. They all come back, directly or indirectly, to the meaning of s. 7(1) of the Irish Nationality and Citizenship Act 1956, as amended, ('*the 1956 Act'*). That provision states that a person is an Irish citizen '*if at the time of his or her birth either parent was an Irish citizen*'. The issue is whether the effect of this subsection is that the third applicant, C, is an Irish citizen because the husband (A) of C's genetic father (B) is an Irish citizen. It arises in a context in which, by virtue of an order of the courts of England and Wales (where A, B and C are domiciled) A and B are now C's parents, but in which A was not C's parent at the time of C's birth. Irish law provides no bespoke mechanism for the recognition of foreign court orders of this kind.

**2.** The applicants say that at the time C was born, A was an Irish citizen. They contend that A must now be recognised here as C's parent by virtue of the order of the English court in the light of the Irish rules of private international law. Accordingly, in their submission, the statutory preconditions to C's Irish citizenship are met: A is C's parent and A was an Irish citizen at the time C was born.

**3.** The respondent to the proceedings (being the appellant in this appeal, and to whom I will refer throughout this judgment as '*the Minister'*) says in response that the reference to '*parent'* in the provision is to a genetic father and the woman who gave birth to the child in question. He says that this is reflected in the language of the section insofar as (the Minister contends) it requires that in order for an Irish citizen to pass citizenship by descent that person must be *both* a citizen, *and* the child's parent, *at the time of his*

*or her birth*. Even if A is now C's parent in Irish law generally, the Minister argues, he was not C's parent at the time of C's birth and, therefore, the fact that A was an Irish citizen at the time of C's birth does not result in C being an Irish citizen.

**4.** Essentially, these conflicting interpretations of s. 7(1) reduce themselves to whether s. 7(1) refers to '*parent'* only in this narrow sense urged by the Minister or whether (as the applicants argue) it uses the term so as to include persons who become parents after the birth of a child by virtue of a court order or rule of law.

**5.** The applicants sought to bolster their argument by reference to both the Constitution and the European Convention on Human Rights ('*ECHR'*). They deployed the so-called '*double construction rule'* – the principle that if two interpretations of a statutory provision are reasonably open, one of which would render legislation contrary to the provisions of the Constitution and one of which would not, the court should adopt the '*constitutional'* interpretation of the Act. They also rely upon a similar interpretative obligation under the European Convention on Human Rights Act 2003 ('*the 2003 Act'*) and advance the claim that having regard to s. 6 of the Interpretation Act 2005, s. 7(1) should be given what they describe as an '*updated'* meaning. They say that the construction of the 1956 Act urged by the Minister would render s. 7(1) inconsistent with both the Constitution and ECHR in discriminating between (and in failing to protect the rights of) different types of constitutional families, as well as by discriminating between children based upon their parenthood, and/or between heterosexual and same-sex couples.

**6.** In this way, five distinct legal issues fall for consideration:

(i) whether the parental order made by the English court is capable of recognition in Irish law?

(ii) if so, whether A is C's '*parent'* as that term was intended to be understood in s. 7(1)?

(iii) if not, whether the section will '*bear'* the meaning urged by the applicants so as to enable the '*constitutional'* or '*ECHR compliant'* interpretation for which they argue?

(iv) if not, whether the court can or should give s. 7 an '*updated'* meaning mirroring that contended for by the applicants, having regard to s. 6 of the Interpretation Act 2005?

(v) if so, whether the interpretation urged by the Minister would, in fact, be inconsistent with the Constitution and/or ECHR for any of the reasons advanced by the applicants?

***The facts***

**7.** A, B and C are residents of, and domiciled in, England. B is a British citizen, while A is an Irish citizen from birth. A also holds British citizenship. In 2012, A and B entered into a civil partnership in the United Kingdom. They married in 2021. The effect of s. 9(6) of the Marriage (Same Sex Couples) Act 2013 (an Act of the United Kingdom parliament) is that under the law of that jurisdiction their marriage is to be treated as having subsisted since the date on which their civil partnership was formed.

**8.** C was born in England in April 2015 by way of gestational surrogacy. He was conceived using embryos created by eggs provided by an anonymous (but traceable) donor inseminated with sperm from B. The resulting embryos were transferred to the uterus of D. Subsequent to C's birth, a United Kingdom birth certificate was issued which recorded D as C's mother, and B as his father.

**9.** Then, in July 2015, A and B successfully applied to the Central Family Court in London for a parental order in respect of C pursuant to s. 54 of the Human Fertilisation and Embryology Act 2008 (also an Act of the United Kingdom parliament). At the relevant time, that provision enabled such parental orders to be made in respect of a child in favour of, *inter alia,* those in a same-sex relationship, or two persons living as partners in an enduring family relationship and not within the prohibited degrees (s. 54).[1] It applied if the child had been carried by a woman who is not one of the applicants as a result of the placing in her of an embryo or sperm and eggs, or her artificial insemination, and the gametes of at least one of the applicants were used to bring about the creation of the embryo. Before making such an order, the court had to be satisfied that the woman who carried the child had freely and with full understanding of what was involved agreed unconditionally to the making of the order. It also had to be satisfied that the order was in the child's lifelong best interests.

**10.** The order was granted on 21 July 2015. Under English law, the effect of that order was to reassign parentage of C from B and D, to A and B. The order thus operated to

[1] Section 54A also allows applications to be made in certain circumstances by one person.

extinguish D's parental rights.[2] A revised birth certificate was thereafter issued for C recording A and B as C's parents. A and B also have a second child (E). E is the genetic son of A and was born following a similar surrogacy arrangement with D, using the same donor as for C.

**11.** In early 2017, A and B applied to the Minister for a passport in respect of C. Section 7 of the Passports Act 2008 provides that before issuing a passport, the Minister must be satisfied that the relevant person is an Irish citizen. A and B contended that in the light of s. 7(1) of the 1956 Act, C was an Irish citizen because A was his parent, and by reason of A's Irish nationality. In the course of subsequent correspondence from the passport and visa office at the Irish Embassy in London, A and B were advised that the Department of Foreign Affairs and Trade intended to refuse the application for a passport for C, as (it was said) a '*parent'* for the purposes of s. 7(1) was understood to mean either the '*mother'* or '*father'* of the child. The application still not having been determined in July 2020, these proceedings were instituted. The applicants sought an order of *mandamus* directing the Minister to make a decision as to whether to issue an Irish passport in respect of C, and an order directing the Minister to issue an Irish passport in respect of C. Various ancillary declaratory reliefs were also sought, including orders that the refusal of the Minister to issue a passport in respect of C

[2] The applicants contended in the course of this appeal by reference to the decision in *H v. Adoption Agency (Declaration of Parentage Following Adoption)* [2021] 3 WLR 1147 that the English parental order operated retrospectively to the date of C's birth. This interpretation of that decision was disputed by counsel for the Minister in the course of his oral submissions. The applicants' expert witness as to English law did not expressly so depose and this was not the position they adopted in the High Court: A's replying affidavit specifically stated that he had been advised that the parental order did not have retrospective effect and that he was *not* C's parent until the order was actually made. Because the respondent was thereby deprived of the opportunity to respond to this proposition with the benefit of appropriate expert evidence, I am proceeding on the same basis as did the parties before the High Court, namely that the parental order operates as and from the date it is made. Because of the conclusion I have reached on the underlying issues, this is not a material matter.

constituted a failure on his part to exercise his functions in a manner compatible with the ECHR in the manner required of an '*organ of the State'* by s. 3(1) of the 2003 Act.

**12.** For reasons explained in a reserved judgment ([2021] IEHC 785), Barrett J. agreed with the construction of s. 7(1) urged by the applicants, finding that A was C's '*parent'* for the purposes of that provision and that, in consequence, C was an Irish citizen. He granted the applicants an order of *mandamus* directing the Minister to make a decision on the passport application, and found there was no need to grant an order of *mandamus* directing the Minister to issue an Irish passport to C as (i) unless the Minister appealed, pursuant to the order granted, a passport would issue and (ii) if the Minister did appeal the judgment, a stay would fall to be granted in any event.

**13.** This court granted the Minister leave to appeal directly against this decision ([2022] IESCDET 41). The panel noted that the question of entitlement to citizenship by descent in the context of surrogacy has not been previously considered by the court. Thereafter, the Irish Human Rights and Equality Commission ('*IHREC*') applied for, and was granted, leave to appear in the proceedings as *amicus curiae*.

***The legal and constitutional context***

**14.** Since its first citizenship legislation, the law of State has acknowledged a version of the *jus sanguinis* – the principle that citizenship may be determined or acquired by the nationality of one or both parents. The manner in which that principle has been reflected in citizenship laws since independence is relevant to an understanding of the proper interpretation of s. 7(1) as it now stands.

**15.** Article 3 of the Irish Free State Constitution of 1922 provided that every person domiciled in the area of the jurisdiction of the Irish Free State at the time of the coming into operation of the Constitution, who was born in Ireland or either of whose parents was born in Ireland or who had been ordinarily resident in the area of the jurisdiction of the Irish Free State for not less than seven years, was a citizen of that State. The mandate with which that Article concluded – *'the conditions governing the future acquisition and termination of citizenship in the Irish Free State … shall be determined by law'* – was eventually implemented by the Irish Nationality and Citizenship Act 1935. Generally, the effect of that Act was to add to the category of persons upon whom citizenship was conferred those thereafter born whose father was a citizen of the Irish Free State. It thus provided (s. 2(1)(a) and (b)) that persons who were born in the State were '*natural-born citizens',* as were (subject in some cases to particular registration requirements) certain persons whose fathers were citizens. Section 2(1)(e) and (f) accordingly extended Irish citizenship to the following[3]:

> '*(e) every person who was born outside Saorstát Éireann on or after the 6th day of December, 1922, and before the date of the passing of this Act and whose father was, on the day of such person's birth, a citizen of Saorstát Éireann, and*
>
> *(f) subject to the subsequent provisions of this section, every person who is born outside Saorstát Éireann on or after the date of the passing of this Act and*

[3] The same language then appeared in s. 2(2)(a) and (b) in addressing the position of persons born outside the State on or after the date of passing of the Act. The language in all of these provisions – '*father was, on the day of … birth'* originated in s. 1(1)(b) of the British Nationality and Status of Aliens Act 1914: '*father was, at the time of that person's birth …'*.

*whose father was, on the day of such person's birth, a citizen of Saorstát Éireann.'*

**16.** Section 2(4) made further provision enabling persons who were not citizens by virtue of Article 3 of the Constitution, but who had been born in Ireland or '*of parents of whom at least one was born in Ireland'* to be citizens where they were or became residents of the State, or in certain circumstances where they registered as such.

**17.** Article 9.1.1 of the Constitution of Ireland, as enacted, provided that any person who was a citizen of Saorstát Éireann immediately before the coming into operation of the Constitution would become and be a citizen of Ireland. Article 9.1.2 was to the effect that the future acquisition and loss of Irish nationality and citizenship should be determined in accordance with law.

**18.** That law took the form of the 1956 Act. Section 2 of that Act as enacted provided that '*Ireland'* meant the national territory as defined in Article 2 of the Constitution as it then was (the 32 counties of the island of Ireland, its islands and territorial seas). Section 6(1) provided that every person born in Ireland so defined was an Irish citizen from birth. Section 6(2) was as follows:

'*Every person is an Irish citizen if his father or mother was an Irish citizen at the time of that person's birth* ***or becomes an Irish citizen under subsection (1)*** *or would be an Irish citizen under that subsection if alive at the passing of this Act'*.

**19.** The need for the highlighted words (the emphasis is mine) arose from the fact that ss. (1) operated retrospectively: so, a person whose father or mother was born in Ireland but who had not been a citizen at the time of the enactment of the statute became one upon its commencement. This in turn necessitated the first sentence of ss. (3):

> '*In the case of a person born before the passing of this Act, subsection (2) applies from the date of its passing. In every other case, it applies from birth'*.

**20.** Section 6(4) was as follows:

> '*A person born before the passing of this Act whose father or mother is an Irish citizen under subsection (2), or would be if alive at its passing, shall be an Irish citizen from the date of its passing'*.

**21.** Specific provision was then made for the application of the section to persons born in Northern Ireland who were not *otherwise* Irish citizens (s. 7(1)) and for persons born outside Ireland who derived citizenship from a parent who was also born outside Ireland (s. 7(2)). These involved declarations of citizenship and registration of birth, respectively.

**22.** The approach adopted by the Oireachtas to the citizenship of adopted children assumed importance in the arguments of the parties in this case, it being urged by the Minister that this reflected an understanding that the provisions of s. 6(2) as it originally stood (and now s. 7(1)) were concerned with the descent of citizenship from a person's genetic father and birth mother. Otherwise, the Minister says, a section addressing the position of adopted children would have been entirely unnecessary.

**23.** Upon the enactment of the first legislation enabling adoption – the Adoption Act 1952 – provision was made for citizenship by descent of adopted children. This mirrored the model put in place by the then governing 1935 Act. Section 25 stated:

> *'Upon an adoption order being made in a case in which the adopter (or, where the adoption is by a married couple, the husband) is an Irish citizen the child, if not already an Irish citizen, shall be an Irish citizen*'.

**24.** The strong suggestion in this text ('*upon an adoption order … '*) – that citizenship takes effect only from the date of the adoption order – was also apparent in the 1956 Act. Section 11(1) was as follows:

> *'Upon an adoption order being made, under the Adoption Act, 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'.*

**25.** The effect of the section was to broadly align the root of citizenship by descent for adopted children with the provisions of s. 6(2) of the 1956 Act and to vest citizenship in the child by reference to the citizenship of *either* spouse in the case of a joint adoption. However, (a) citizenship vested only from the point of the making of the order, and (b) the rule operated only where an adoption was effected by an Irish adoption order.[4]

**26.** Legislation enacted *after* 1987 was affected by the provisions of s. 3 of the Status of Children Act of that year. That Act, incidentally, proceeded on the basis of the general assumption that '*parentage'* was '*as traditionally understood'* (per Murray J. (as he then was) in *MR and ors. v. An tArd Chláraitheoir* ('*MR'*) [2014] IESC 60, [2014] 3 IR 533 at para. 175 and *see* the provision for testing in s. 38). Section 3(1) provided that in deducing any relationship for the purposes of any Act passed after the commencement of the section, the relationship between every person and his father and mother shall, unless the contrary intention appeared, be determined irrespective of whether his father and mother were or had been married to each other, and that all other relationships would be determined accordingly. Then, s. 3(2) stated:

> '*(2) (a) An adopted person shall, for the purposes of subsection (1) of this section, be deemed from the date of the adoption to be the child of the adopter or adopters and not the child of any other person or persons.*

[4] See Parry *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (London 1957) at p. 959. The section differed from the similar United Kingdom provision (s. 16 of the Adoption Act 1950) insofar as the latter only enabled citizenship by descent in the case of joint adoptions, through the *male* adopter (as was the case under the Adoption Act 1952 itself).

*(b) In this subsection "adopted person" means a person who has been adopted under the Adoption Acts, 1952 to 1976, or, where the person has been adopted outside the State, whose adoption is recognised by virtue of the law for the time being in force in the State.'*

**27.** Section 5 of the Status of Children Act 1987 also amended the Act of 1956, providing that references in the latter to '*father',* '*mother*' or '*parent'* includes, and shall be deemed to have always included, '*the father, mother or parent, as the case may require, who was not married to the child's other parent at the time of the child's birth or at any time during the period of ten months preceding the birth'.*

**28.** The first statutory provision expressly enabling recognition of a foreign adoption appeared in the Adoption Act 1991 (although before then, as explained shortly, certain foreign adoptions could be recognised in this jurisdiction under common law principles). Sections 2-5 of that Act deemed different categories of foreign adoptions so recognised '*to have been effected by a valid adoption order made'* on the date the order was effected or (in the case of adoptions that predated the coming into effect of that Act, on the commencement of the Act). In that way s. 11 of the 1956 Act was indirectly applied to such foreign adoptions. However, before a foreign adoption order could be recognised under the 1991 Act, it had to comply with certain requirements specified in the Act the effect of which was, in broad terms, to reflect essential features of an adoption under Irish law (see *B v. An Bord Uchtála* [1997] 1 ILRM 15 at pp. 26-27 per Murphy J.). Section 2(2) of the Adoption Act 1991 made clear that the provisions of the Act were in substitution for any rule of law providing for the

recognition of adoptions effected outside the State and, this court has held, that extinguishment of the power to recognise a foreign adoption at common law continues notwithstanding that it was not expressly repeated in the Adoption Act 2010 (*Re JB and KB (Minors)* [2018] IESC 30, [2019] 1 IR 270).

**29.** The Irish Nationality and Citizenship Act 2001 was introduced in order to give legislative effect to changes made to Articles 2 and 3 of the Constitution by the Nineteenth Amendment of the Constitution Act 1998. Following that Amendment, Article 2 included the following:

> '*It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland …'*

**30.** This resulted in amendments to s. 6 of the 1956 Act the broad effect of which was to similarly provide that birth on the island of Ireland gave rise to an '*entitlement'* to citizenship, as opposed to actually conferring citizenship. The provisions governing citizenship by descent were re-located in s. 7 of that statute. Section 7(1) effected minor changes to its predecessor provision (s. 6(2)) principally by re-ordering parts of the subsection, by changing '*father or mother'* to '*either parent'* and by removing the previous provision insofar as it referred to the father or mother acquiring citizenship under s. 6(1). I will return later to the specific wording of s. 7 as it now stands.

**31.** The Twenty-Seventh Amendment of the Constitution Act 2004 subsequently effected significant changes to Article 9 of the Constitution, including the insertion of new provisions, namely, Article 9.2.1 and 9.2.2, as follows (the highlighting is mine):

> '*Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have**, at the time of the birth of that person**, at least one parent who is an Irish citizen** or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law.*
>
> *This section shall not apply to persons born before the date of the enactment of this section.'*

**32.** The Irish Nationality and Citizenship Act 2004 was enacted following the Twenty-Seventh Amendment of the Constitution and in order to reflect the consequent amendments to Article 9 thereof. No change was made to the provisions of s. 7(1) of the 1956 Act as amended.

**33.** Finally, s. 175(d) of the Adoption Act 2010 amended s. 11 of the 1956 Act by substituting in the latter the reference to '*the Adoption Act 1952'* with the phrase *'an adoption order within the meaning of section 3 (1) of the Adoption Act 2010 or an intercountry adoption effected outside the State being recognised within the meaning of that Act*'. The effect is that the provision now reads as follows:

*'Upon an adoption order being made, under an adoption order within the meaning of section 3 (1) of the Adoption Act 2010 or an intercountry adoption effected outside the State being recognised within the meaning of that Act, 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'.*

***The Children and Family Relationships Act 2015***

**34.** In the course of oral submissions, the parties attached some significance to their respective versions of how, they contended, the Children and Family Relationships Act 2015 ('*CFRA'*) interacted with s. 7(1) of the 1956 Act. CFRA makes provision for donor-assisted human reproduction ('*DAHR*') which it defines (s. 4) as:

'*any procedure performed in the State with the objective of it resulting in the implantation of an embryo*[5] *in the womb of the woman on whose request the procedure is performed, where –*

*(a) one of the gametes*[6] *from which the embryo has been or will be formed has been provided by a donor,*

*(b) each gamete from which the embryo has been or will be formed has been provided by a donor, or*

[5] A human embryo formed by the fertilisation of a human egg by a human sperm (s. 4).
[6] Either (a) a human sperm, which is formed in the body of and provided by a man, or (b) a human egg, which is formed in the body of and provided by a woman (s. 4).

*(c) the embryo has been provided by a donor.'*

**35.** CFRA provides a detailed scheme of regulation of DAHR, including provisions (s. 19) which render the consent of a donor invalid if given in exchange for financial compensation beyond expenses of certain kinds. Central to the Act is the '*donor-conceived child'*. The definition has two aspects – (a) a child born in the State as a result of a DAHR procedure *or* (b) a child in respect of whom a person has been declared under sections 21 or 22 as his or her parent. The concept of '*parenthood'* under these two limbs of the definition needs to be considered separately.

**36.** As to the first, s. 5(1) of the Act provides that the parents of a child who is born as a result of DAHR are the mother, defined as '*the woman who gives birth to the child'* and the spouse[7], civil partner or cohabitant as the case may be of the mother, provided that the mother and these persons have consented to being the parents of the child in accordance with s. 5(8) of the Act and have complied with certain statutory registration requirements. Where there is no other party to the DAHR procedure, the mother alone is the parent.

**37.** Sections 20-23 enable retrospective recognition of parentage in certain limited circumstances. These, essentially, arise where a child is born in the State as a result of a DAHR procedure that was performed in the State or outside the State by persons authorised by the local law so to do, before the date on which s. 20 came into operation. The '*intending parent'* must have been such at the time when the DAHR procedure was performed. In those circumstances a non-genetic intending parent and the child's

[7] As originally enacted, the provision referred to '*husband'*, this being changed to '*spouse'* by the Marriage Act 2015.

mother can obtain a declaration from the District Court that the intending parent is a parent of a child conceived *via* a DAHR procedure performed in a clinic in Ireland or elsewhere prior to the commencement of CFRA. Similar declarations can be made by the Circuit Court on the application *inter alia* of the child. The effect of these provisions is that in the limited circumstances in which they operate, the '*intending parent'* may become a '*parent'* after the birth of the child without having any genetic link with the child. Section 23 provides that where a person is declared to be a parent of a child, '*from the date on which the declaration is made'* that person '*shall be deemed to be the parent, under section 5(1)(b), of the child.'*

**38.** Sections 5(3) and 5(4) then state:

> '*(3) Where a person is, under subsection (1) or (2), the parent of a child, he or she shall have all parental rights and duties in respect of the child.*
>
> *(4) In deducing any relationship for the purposes of any enactment, the relationship between every donor-conceived child and his or her parent or parents shall be determined in accordance with this section and all other relationships shall be determined accordingly.'*

**39.** The section further provides that the donor of a gamete or embryo that is used in a DAHR procedure is not by reason of donation alone the parent of a child born as a result of that procedure and has no parental rights or duties in respect of the child. Section 5(7) states that a reference in any enactment to a mother or parent of a child shall be construed as not including a woman who is the donor of a gamete or embryo

that was used in a DAHR procedure that resulted in the birth of the child and a father or parent shall be construed as not including a man who is the donor of a gamete or embryo that was used in such a procedure.

**40.** The 1956 Act is not specifically referenced in CFRA. The Minister adopted the position in oral submissions that the effect of s. 5 of CFRA is that the '*parents'* of a donor-conceived child for the purposes of s. 7(1) of the 1956 Act comprise the woman who gave birth to the child and (in a case in which the relevant declarations were made by her at the time the DAHR procedure was performed) her spouse, civil partner or cohabitant. Because the provision thus interposes these persons as '*parents'* the Minister says that if either are Irish citizens, the child is an Irish citizen. Conversely it follows from this interpretation of the Act that the Irish citizenship of a donor is not relevant to the citizenship of a child born as a result of DAHR. However, where parentage was derived from the retrospective provisions in ss. 20-23, the position of the Minister was that this was wholly prospective, and thus that a non-genetic parent whose status as such derived from these sections could not pass citizenship under s. 7(1).

**41.** These conclusions, it should be observed, do not follow in those situations in which parentage cannot be recognised under the Act, such as where the child was conceived prior to CFRA and the child was born outside the State and to a non-citizen mother.[8] Finally, it is to be noted that s. 2(2) of the Adoption (Amendment) Act 2017 repeals s. 102 of CFRA, and s. 3(b) amends the definition of '*parent'* under the Adoption Act 2010 to include '*the mother or father of the child, or a woman (other than the mother)*

[8] See Tobin *Assisted Reproductive Techniques and Irish Law* 64 Ir. Jur. 138, 143 (2020).

*who is, under section 5 of the Children and Family Relationships Act 2015, a parent of the child where that child is a donor-conceived child'.*

***The positions of the parties***

**42.** Section 7 of the 1956 Act, as amended in 2001, now provides (where relevant) as follows:

> '*(1) A person is an Irish citizen from birth if at the time of his or her birth either parent was an Irish citizen or would if alive have been an Irish citizen.*
>
> *(2) 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).*
>
> *(3) Subsection (1) shall not confer Irish citizenship on a person born outside the island of Ireland if the parent through whom he or she derives citizenship was also born outside the island of Ireland unless –*
>
> *(a) that person's birth is registered under section 27, or*
>
> *(b) the parent through whom that person derives citizenship was at the time of that person's birth abroad in the public service;*
>
> *Provided that the Irish citizenship of a person who, after 1 July, 1986, is registered under section 27 shall commence only as on and from the date of such registration.*

*(3A) A person to whom paragraph (b) of subsection (3) applies shall be deemed to have been born on the island of Ireland for the purposes of that subsection.*

*…'*

**43.** Section 27(2) provides that the birth outside the island of Ireland of a person deriving citizenship through a father or mother so born may be registered in any foreign births entry book or in the foreign births register, the custody of which is provided for in ss. 27(1) and (1A).

**44.** I outlined earlier the essential point made by the Minister: the noun '*parent[s]'* as it appears in s. 7(1) of the 1956 Act – he says – refers to a child's birth mother, and his or her genetic father. Because neither B nor C's birth mother were Irish citizens at the time C was born the Minister says, s. 7(1) does not avail C. The Minister also says that before C can be an Irish citizen by reason of the citizenship of A, A must have been C's parent '*at the time of his or her birth'* or, as it was put in oral submissions, in order to pass citizenship the Irish citizen had to be *both* a parent and a citizen at the time of birth. While these arguments are in one sense congruent, they are nonetheless potentially distinct. It is possible under the law of some jurisdictions for orders to be made vesting parentage of a child in persons who are not its genetic parents before the birth of that child[9] and, as I have explained earlier, the effect of CFRA as contended for by the Minister is that in certain circumstances a person who is a non-genetic parent at the time of the birth of a child may pass citizenship under the provisions of that Act.

[9] The applicants point to the decision in *Culliton v. Beth Israel Deaconess Medical Center* 435 Mass. 285 (2001) in which the jurisdiction of the Massachusetts courts to make such an order was recognised.

Nonetheless, on the Minister's argument in these various situations, s. 7(1) unless amended or supplemented (as he says has occurred under CFRA) would not apply: in other words to be in a position to pass citizenship, parentage at the time of birth is a necessary but not sufficient condition for the operation of s. 7(1). The person asserting parentage *also* had to be either the genetic father, or the birth mother, *except* in the case of adoptive parents, or the parents of children to whom s. 5 of CFRA applied.

**45.** It might be said that viewed thus, the temporal issue (which seems to have been the focus of the Minister's case as presented in the High Court) can be viewed as being consequential upon the more fundamental contention that '*parent[s]'* as the term is used in s. 7(1) refers to genetic father and birth mother : by definition these persons will be the child's parents at the time of birth, and the requirement (as the Minister would have it) that parenthood and birth temporally coincide both reflect that understanding and show that this is what was intended.

**46.** As I have also noted earlier, A, B and C, on the other hand, say the question is not whether A was C's parent when C was born, but whether A was an Irish citizen at that point in time. They say that because A is C's parent, and because A was an Irish citizen '*at the time of* [C's] *birth'*, C is an Irish citizen by virtue of s. 7(1). As I have earlier observed, the applicants also contend that the court should afford s. 7(1) an '*updated construction'* in accordance with s. 6 of the Interpretation Act 2005, relying upon the double construction rule and the interpretative obligation arising under s. 2 of the ECHR Act 2003.

**47.** Further, the applicants say that insofar as the Minister has refused to issue a passport in respect of C, he has failed to exercise his functions in a manner compatible with A, B and C's rights to private and family life pursuant to Articles 8 and 14 of the ECHR. They contend that the Minister has acted unlawfully having regard to the rules of private international law. While they contend that s. 7(1) should be interpreted so as to conform with the requirements of the Constitution and the ECHR, they also argue that the Minister's failure to issue a passport in respect of C constitutes a disproportionate interference with the constitutional rights of the applicants pursuant to Article 42A, 40.3, 40.1 and 41 of the Constitution. They pleaded:

> *'The refusal to categorise the First Named Applicant as a parent for the purposes of the 1956 Act constitutes a disproportionate interference with the right of the First Named Applicant to be held equal before the law, pursuant to Article 40.1, insofar as it wrongfully denies him the status of parent.'*

***The High Court decision***

**48.** Barrett J. began his judgment by noting that the Minister has a duty under s. 12(1) of the Passports Acts 2008 ('*the 2008 Act'*) to issue passports. Barrett J. held that the Minister had not discharged his consequent obligation to determine the application for a passport for C within a reasonable time, given that the application was made in early 2017 and it was approaching Christmas 2021 at the time of judgment (at which point the application had still not been determined). Therefore, he found, the Minister was in

breach of his statutory duty to make that decision. While the Minister's Notice of Appeal stresses that he had no power under s. 12 of the Passports Act but to refuse the application, it does not address this aspect of the trial judge's decision.

**49.** Insofar as the issue of status was concerned, Barrett J. described it as a fundamental principle of Irish private international law that matters relating to an individual's civil status are governed by the law of their domicile. In this instance, given that the applicants' domicile was in the United Kingdom, their status was governed by the law of the United Kingdom. It followed that the parental order granted in favour of A meant that he fell to be treated as a parent for the purposes of s. 7(1) of the 1956 Act.

**50.** From there, the judge turned to the construction of that provision. Noting the respective positions of the parties, Barrett J. was of the view that s. 7(1) was capable of bearing both the meaning contended for by the applicants, and that argued for by the Minister.[10] Therefore, he said, having regard to s. 5 of the Interpretation Act 2005, the court should adopt a purposive approach to the construction of the provision. It was his view that the policy underpinning s. 7(1) is to prevent those who become Irish citizens later in life from thereby conferring Irish citizenship on children born at a point when their parents did not hold Irish citizenship. It had, he held, nothing to do with preventing changes in parental status.

**51.** Barrett J. emphasised that s. 7 (1) provides that a person '***is*** *an Irish citizen from birth*' rather than '***was***' in the first place, followed by '*either parent* ***was*** *an Irish citizen or*

[10] In fairness to the trial judge attention should be drawn to the claim of the applicants in their written submissions in this appeal that in the High Court (as they put it) '*it was not clear that the Minister contested the claim that the word parent could encompass a parent via a parental order, setting aside the temporal issue'* and that due to the absence of any dispute on this point, it was not addressed in detail by the judge.

*would if alive have been an Irish citizen'*. This, he felt, contrasted with the language of Article 9.2 of the Constitution. It states that '*a person born in…Ireland…who does not have**, at the time of the birth of that person**, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law*'. Barrett J. was of the view that this suggested that the meaning urged upon the court by A, B and C was the correct one.

**52.** The Minister also contended that were the interpretation urged by the applicants correct, this would result in s. 7(1) operating retrospectively. Barrett J. rejected this claim. In his view, rather than altering vested legal rights, the legislation stipulated for a backdated effect. There was, Barrett J. said, no presumption that legislation would not have such an effect. Insofar as the Minister had argued that the applicants' interpretation of s. 7(1) would have rendered s. 11 of the 1956 Act otiose, Barrett J. also rejected his argument. He said that s. 11 merely makes the position of adopted children clear as opposed to leaving it within the purview of s. 7(1).

**53.** Barrett J. noted that what he described as '*constitutional points'* had been made in the case. However, counsel for the applicants had adopted the position that the submissions as regards the Constitution were of relevance only to the meaning of '*parent'* as that word appears in s. 7(1). Because the court had concluded that A was the parent of C for the purposes of s. 7(1), Barrett J. did not treat with the arguments insofar as they were grounded in the Constitution.

**54.** The trial judge then addressed the provisions of the 2003 Act. He noted s. 2(1) of the Act, which provides:

'*In interpreting and applying any statutory provision or rule of law, a court shall, [1]* ***in so far as is possible****, and [2]* ***subject to the rules of law relating to such interpretation and application,*** *do so in a manner compatible with the State's obligations under the Convention provisions.'*

(Trial judge's emphasis, and numbering).

**55.** The judge was of the view that the decision of the European Court of Human Rights ('*ECtHR*') in *Mennesson v. France* (*Application No. 65192/11*) and the Advisory Opinion (*Request No. P-16-2018-001*) issued following that decision was of particular importance. That decision and advisory opinion, Barrett J. held, indicated that the State is under an obligation to provide some means of recognition of a relationship through surrogacy and that this recognition must include a means by which a child may access such a parent's nationality. Barrett J. held that it followed from this that there was what he described as a *'necessity for Ireland to provide a means of recognition of a relationship which gives rise to an entitlement on the part of … C to have access to the Irish nationality of … A, his father'.*

***The recognition of the parental order***

**56.** Irrespective of the merits of the respective positions of the parties as to the construction of s. 7, there is a threshold question that necessarily arises. Without recognition in some form by Irish law of the English parental order, A cannot even arguably be characterised as C's parent for the purposes of s. 7(1), irrespective of whether the correct meaning of

the provision is as contended for by the Minister or whether it should be interpreted as urged by the applicants.

**57.** The trial judge despatched the issue of whether the English parental order fell to be recognised here summarily – this was not surprising in a context in which the Minister did not engage with the issue (seemingly) neither accepting nor disputing that the order is entitled to recognition in this jurisdiction (this was the position also adopted by the Minister before this court). The High Court judgment on this issue, reads as follows (at para. 6):

> '*It is a fundamental principle of Irish private international law that matters relating to a person's civil status are governed by the law of that person's domicile (see W v. W [1993] 2 I.R. 476 (at p.493), Binchy, W., Irish Conflicts of Laws (1998), p.45, and Fawcett and Carruthers (eds) Cheshire, North & Fawcett: Private International Law, 15th ed., p.145). Here, all of the applicants are domiciled in England. As a consequence, the parental status of the two adult parties falls to be determined by English law, and here the Parental Order comes into play. As Mr A has sworn (and his averment in this regard is echoed by the expert evidence of an English solicitor that is before the court) "On foot of the said Parental Order the parental rights of [the birth mother]...were extinguished and a revised birth certificate was issued in respect of the Third Named Applicant. Pursuant to the said revised birth certificate and as a matter of UK law...[Mr B] and I are the parents of...[Master C]". It follows that Mr A (who is the relevant parent for the purposes of s.7(1)) falls to be recognized and*

*treated as a parent for the purposes of s.7(1) of the Irish Nationality and Citizenship Act 1956.*'

**58.** It will be noted that there are, here, two conclusions – that the English order was recognised in Ireland, and that A fell '*to be recognised and treated as a parent for the purposes of s.7(1)'.* While the judge appears to have assumed that one automatically followed from the other, they are not the same thing. Depending on the meaning of the word '*parent'* in s. 7(1) it was entirely possible that A was C's parent under Irish law for some purposes, but not for others. Indeed, it is firmly established that, as a matter of private international law, recognition of a status conferred by foreign law is not automatically effective for every purpose; '*the recognition of a foreign status is one thing, and the recognition of all its incidents another'* (Morris *Conflict of Laws*, Ninth Ed. 2017 at para. 4-002). Thus, it is clear that while a court must be slow to refuse recognition to a foreign adoption on the ground of public policy merely because the requirements for adoption in foreign law differ from those in the *lex fori*, public policy may sometimes require that a particular result of a foreign adoption should not be given effect to (Dicey, Morris and Collins *The Conflict of Laws Volume II* **(**16th Ed. 2022) at para. 21.27), approved in *Adoption Authority of Ireland v. C and D and the Attorney General* [2023] IESC 6 at para. 50 per O'Donnell C.J.).

**59.** As to the first of these questions, while I agree with the ultimate conclusion reached in this regard by the trial judge, the position under private international law is a little more complex than his short summary might suggest. In particular, it might be said that a form of legal parentage that is at present unknown to the law in this State could not be recognised here for any purpose even if provided for under the law of the place of

domicile of the persons in question. It is important in understanding some of the analysis that follows here on other issues, to identify and resolve that question.

**60.** The argument that a parental order granted following surrogacy arrangements of the kind in issue in this case could only be recognised in Ireland if Irish law facilitated a broadly similar type of arrangement depends on the proposition that this was the position at common law in regard to the recognition of foreign adoption orders. Parental orders of the kind recognised by English law, and adoption as understood in both this jurisdiction and in the United Kingdom are different: the purpose of a parental order – as it was described by Theis J. in *B v. C (Surrogacy: Adoption)* [2015] EWFC 12 – is '*to create legal parentage around an already concluded lineage connection'.* Nonetheless, there is an obvious analogy between the two legal processes: both operate to vest parental rights in non-biological parents as a matter of law, and to that end each enables the extinguishment of all of the rights of the birth mother and, for that matter, of the genetic mother. Parental orders, the applicants' expert witness as to English law said in her report, are '*procedurally and conceptually similar to an adoption application'* and are '*effectively adoption orders made in surrogacy cases'.* And insofar as the law in this jurisdiction is concerned, and unlike the position with respect to foreign adoption orders, there is in this jurisdiction no bespoke mechanism or procedure for the recognition of foreign orders vesting legal parentage that are *not* adoption orders within the meaning of the relevant Irish legislation.

**61.** Noting that since 1991 in Ireland the process for the recognition of foreign adoption orders has been statutory, the four conditions viewed by the common law as essential to such recognition were identified by Munby P. in *In re N (A Child)* [2016] EWHC

(Fam.) 3085 by reference to the decision of the English Court of Appeal in *In re Valentine's Settlement* [1965] Ch. 831, as follows (at para. 74):

> *'The second point relates to what exactly it was that In re Valentine's Settlement identified as being necessary if English law is to recognise a foreign adoption. On a straight-forward reading of the judgments there are, as it seems to me, four, and only four, strands in the majority's reasoning: first, the adoptive parents must have been domiciled in the foreign country at the time of the foreign adoption; second, there must be proof of the relevant foreign law, demonstrating that the child has been legally adopted in accordance with the requirements of the foreign law;* ***third, the foreign adoption must in substance have the same essential characteristics as an English adoption;*** *and, fourth, there must be no reason in public policy for refusing recognition. The first, second and fourth of these require no elaboration. The third is not spelt out explicitly but is, as it seems to me, implicit in Lord Denning MR's description, in the passage quoted in para 67 above, of what the foreign court is doing when it makes an adoption order. It was subsequently made explicit in the judgment of Johnson J in In re G (Foreign Adoption: Consent) [1995] 2 FLR 534, where he refused recognition of a Paraguayan "simple" adoption which, in contrast to a Paraguayan "full" adoption, maintained a link between the child and his or her biological parent and was, in certain circumstances, revocable.'*
>
> (Emphasis added.)

**62.** While the first, second and fourth of these conditions are uncontroversial, the third – effectively a reciprocity principle – is to my mind puzzling and is out of synchronisation with the general approach adopted in private international law to the recognition of a status derived from the *lex domicilii* of the parties to a legal relationship. The detailed analysis conducted by Munby P. in *In re N (A Child)* shows that this requirement has been embedded in decisions of the High Court in that jurisdiction and will remain the law (as Munby P. put it at para. 130 of his judgment) unless and until the Court of Appeal there decrees otherwise. Nonetheless, the governing principle is this:

> ' *... it has long been settled that questions affecting status are determined by the law of the domicile of the propositus and that, broadly speaking, such questions are those affecting family relations and family property ... the following are some of the matters that are to a greater or lesser extent governed by personal law: the essential validity of a marriage; the effect of marriage on the proprietary rights of husband and wife; jurisdiction in divorce and nullity of marriage, though only to a limited degree; legitimacy, legitimation and adoption; wills of movables, intestate succession in movables and inheritance by a dependant'*.
>
> Cheshire and North *Private International Law* (15th Ed. 2017) at p. 145.

**63.** In this jurisdiction, it was well established that a foreign divorce order would be recognised if the parties to the original marriage were at the time of the divorce domiciled in the relevant jurisdiction, notwithstanding the fact that divorce *a vinculo* was not then possible in Irish law (*Gaffney v. Gaffney* [1975] IR 133). This court has recently determined that a potentially polygamous marriage permitted by the law of

another jurisdiction in which the parties were, at the time of contracting that marriage, domiciled would be recognised here, even though such a marriage was different in quite a fundamental respect from marriage as envisaged by Irish law (*HAH v. SAA and ors* [2017] IESC 40, [2017] 1 IR 372). This reflects long standing common law principle: for example, legitimation in accordance with the law of the place of the father's domicile was recognised at a time when legitimation was not enabled by the law here (*Re Goodman's Trusts* (1881) 17 Ch.D. 266 and *see* for an instance of that principle in Ireland *Moffett v. Moffett* [1920] 1 IR 57). It appears that the principle even extends to the recognition of decrees of prodigality enabled by the law of other jurisdictions (*Baindail v. Baindail* [1946] P. 122). Indeed in its authoritative report, the Law Reform Commission (*Report on the Recognition of Foreign Adoption Decrees*, LRC-29 1989) cited with approval the suggestion that because the mere fact that adoption was not part of the law in Ireland the courts should deny recognition to the status, as '*a complete non-sequitur'* (at p. 50).[11] The recent decision of this court in *Adoption Authority of Ireland v. C and D and the Attorney General* confirms and restates the predominance of the law of the place of domicile in the regulation of status.

**64.** None of that, of course, is to say that Irish law *must* recognise a status where to do so would undermine a fundamental tenet of public policy. In *HAH v. SAA* – to take that example – it was made clear that the courts would not recognise a second marriage formed by a party to a polygamous marriage for this very reason. Indeed, it has been said that in the specific context of the recognition of foreign adoption orders, public policy has a particularly important role to play for the very reason that adoption orders may vary from jurisdiction to jurisdiction (Morris *Some Recent Developments in the*

[11] Citing G. Jones '*Adoption in the Conflict of Laws'* (1956) 5 ICLQ 207, 209.

*English Private International Law of Adoption*, Feschrift for F.A. Mann (1977) 241, 249).

**65.** I do not see any immediately obvious public policy engaged in this case insofar as *recognition* in principle of the English order is concerned: the parental order was based upon surrogacy arrangements entered into under English law which were not '*commercial'* arrangements (this being the issue which has given rise to the greatest controversy in this area[12]). Nothing has been identified in the arrangements between A, B and D that would contravene Irish public policy so as to preclude recognition in principle of the ensuing order of the English court, and the Minister did not contend that there was any feature of the legal relationships that would require that the parental order not be so recognised.

**66.** The issue that does arise here, however, is whether there should be layered on top of any potential public policy objection an additional requirement that a foreign status or legal relationship must, as a condition of recognition in this jurisdiction, correspond to the essential characteristics of a similar legal construct enabled by Irish law. This was flagged – it must be said somewhat tentatively – by counsel for the Minister, who noted the prospect (as he put it) that a status cannot be recognised here because the status does not exist here.

[12] Section 54(8) of the UK 2008 Act requires that a court, before making a parental order, be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been paid to the surrogate mother. This is similar to s. 19 of the Children and Family Relationships Act 2015 in this jurisdiction. That said, payments exceeding reasonable expenses have been retrospectively authorised by the courts and, generally, the approach adopted there has been to withhold an order in cases in which it is otherwise in the interests of the child to make one only in the '*clearest case of the abuse of public policy'* (see *Re L(A Minor)* [2010] EWHC 3146). It is to be noted that the '*Surrogacy Agreement'* between A, B and D records that it is not legally binding under the law of the United Kingdom.

**67.** The decision cited by Munby P. – *In re Valentine's Settlement* – is of some relevance in this jurisdiction, as it afforded in part the basis for the eventual recognition of foreign adoptions by the High Court in *MF v. An Bord Uchtála* [1991] ILRM 399. Before then, as it happens, the High Court had been asked to recognise a foreign adoption order in *In re Tamburrini* [1944] IR 508, in which a *habeas corpus* application was taken by the natural mother of a child and her Scottish husband (by whom the child had been adopted in accordance with Scottish law) seeking custody of the infant from its maternal grandparents, with whom he had resided for seven years. The application was dealt with – and refused – on the basis that the child's religious and moral welfare was best served by leaving the child with his grandparents. The fact of the adoption order was given little weight by the court which viewed the application as hinging on the rights of the natural mother, Maguire P. going so far as to observe that the adoptive father's rights '*can not be placed on the same plane as a real parent's*.'

**68.** In *In re Valentine's Settlement* the question presented itself in proceedings arising from a summons issued by trustees of an English settled fund as to the devolution of that estate, whether an adoption order made in South Africa in favour of a husband and wife domiciled in (what was then) Southern Rhodesia should be recognised by the English courts. If recognised, the effect would have been to give the adopted children the status of children under the relevant settlement. The majority of the Court of Appeal (Lord Denning MR and Danckwerts LJ, Salmon LJ dissenting) found that the order could not be recognised, because at the time the adoption order was made, the adoptive parents were not domiciled in South Africa.

**69.** While Lord Denning referenced the '*comity of nations'* as one basis for the recognition of a foreign adoption order, stating that the English courts should '*recognise a jurisdiction which mutatis mutandis they claim for themselves'* I do not read the case as establishing a requirement that English law itself have enabled adoption domestically as a precondition to the recognition of the foreign adoption. Instead, the rationale of the judgment was rooted in a more fundamental principle, reflecting the generally applicable principles governing the recognition of status under the law of the place of domicile. Noting that the effect of an adoption order is to create a new status in the child and its adoptive parents, he continued (at p. 842):

> '*Apart from international comity, we reach the same result on principle .... Now it has long been settled that questions affecting status are determined by the law of the domicile. This new status of parent and child, in order to be recognised everywhere, must be validly created by the law of the domicile of the adopting parent ... If you find that a legitimate relationship of parent and child has been validly created by the law of the parents' domicile at the time the relationship is created, then the status so created should be universally recognised throughout the civilised world, provided always that there is nothing contrary to public policy in so recognising it .... But it is an essential feature of this principle that the parents should be domiciled in the country at the time: for no provision of the law of a foreign country will be regarded in the English courts as effective to create the status of a parent in a person not domiciled in that country at the time ....'*

**70.** While Lord Denning MR additionally required that the *child* be ordinarily resident in the country where the order was made (the courts of that place having pre-eminent jurisdiction over the child) Danckwerts LJ was less certain about the latter requirement. He only reluctantly accepted the precondition that the parents be domiciled in the place of the making of the order, and was of the view that the English law on adoption was simply irrelevant: the relevant Acts, he said, '*do not decide or, indeed, affect the position of the adopted children in the present case'* (at p. 845) and he repeated (at p. 847) that he did not believe '*statutory provisions relating to the effect of adoptions made under procedure provided by an English statute can affect an adoption made pursuant to the law of some other country.'* I think it clear that Danckwerts LJ did not expressly adopt the requirement articulated by Lord Denning that before it could be recognised in England an adoption had to conform to adoption as enabled by English law and, that being so, I do not see how such a requirement can be deduced as forming any part of the ratio decidendi of the case. However – and the decision in *Re Valentine's Settlement* makes this clear also – the mere fact that the foreign adoption order was recognised so that the adopted children had the status of children, did not necessarily mean that they had the same rights and benefits as a natural born child: that depended on the particular English law in issue (at p. 839).

**71.** The approval of *In re Valentine's Settlement* in *MF v. An Bord Uchtála* did not depend on any difference between the adoption law of the forum and that of the court which made the order (it was made in Manchester). The decision proceeded on the basis that an adoption would be recognised here if at the time of the adoption the adopter was domiciled in the State in which the order was made. Although a High Court decision, it provides reliable authority for the proposition that – subject to the intervention of an

identified public policy – the courts in this jurisdiction will recognise orders creating or sundering parental rights where made in a State in which the affected parties are domiciled, even if such an order is not known to the law here. Suggestions to the contrary in the English case law do not appear to me to necessarily follow from the authority to which they have been related, are not consistent with the usual approach adopted to the recognition of a status conferred by the law of the place of domicile of the affected persons and should not be viewed as part of the law here. That being so, no reason has been identified in this case *not* to conclude that the parental order is capable of recognition in Ireland.

***Construing section 7(1)***

**72.** However, the fact that a foreign parental order may be recognised in Ireland does not, automatically, mean that whenever the term '*parent'* is used in a statute, persons recognised under a foreign law as enjoying the status of '*parent'* come within the intendment of the legislation. Whether or not they do depends on the proper construction of the relevant provision. And in construing s. 7(1) there are two separate (but overlapping) issues of construction that arise here: (a) whether s. 7(1) is a provision operative only where the persons who are said to be the '*parent[s]'* of the child enjoyed that status at the time the child was born; and (b) whether the provision is limited (as the Minister contends) to the genetic father and birth mother of the child *save* (as in the case of DAHR) where legislation otherwise provides.

**73.** In answering these questions, it is to be remembered that the cases – considered most recently in the decision of this court in *Heather Hill Management Company CLG and anor. v. An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313 – have put beyond doubt that language, context and purpose are potentially in play in *every* exercise in statutory interpretation, none ever operating to the complete exclusion of the other. The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words.

**74.** Prior to advances in medical sciences in the late twentieth century enabling *in vitro* fertilisation, it was a medical and scientific fact that the woman who gave birth to a child was that child's mother: *mater semper certa est*. Until those developments, neither science nor medicine admitted of the possibility that a woman other than the birth mother was the genetic mother of the child: the law thus proceeded on the basis that the woman who gave birth to a child is in fact the mother of the child and (it has been said) that that is '*the ordinary and natural meaning'* of the term (*MR* at para. 175 per Murray J.) or, as it has been described, the meaning at common law (*R(McConnell and anor.) v. Registrar General for England and Wales* [2020] 2 All ER 813 at para. 149).

**75.** While the common law recognised only genetic paternity, that paternity was affected by a legal presumption that the husband of a woman who gives birth during a subsisting marriage is the father of her child. That presumption can now be rebutted, and indeed by statute if spouses are living apart following separation and a child is born to the wife more than ten months afterwards, the presumption does not apply. The man who provides the genetic material from which the child is formed is, as a matter of law, the father – even if his identity is not known. This defines the starting point for the interpretation of the noun '*father*' where it appears in legislation.

**76.** Noting all of the foregoing, it seems to me that construing the 1956 Act, as amended, without regard to the double construction rule or cognate rules of construction required by the 2003 Act, the ordinary rules of interpretation would dictate that s. 7(1), when referring to '*parent'* referred to the genetic father and the woman who gave birth to the child[13] and in particular did not contemplate non-biological legal parentage. This follows from the following four considerations.

**77.** First, this was, at the time of the 1956 Act, the ordinary and usual meaning of the terms '*mother'*, '*father'* and '*parent'*, and it is that meaning and the consequent blood relationship between '*parent'* and child that underlay the concept of citizenship by descent to which both the 1935 and 1956 Acts sought to give effect: *jus sanguinis*. To that extent, the issue bears more than a passing resemblance to that presenting itself in *MR* where the court construed the word '*mother'* as it appears in the Civil Registration

[13] I should stress that the question of whether the reference to '*parent'* includes the genetic mother is not before the Court. While I refer throughout the judgment to the provision as including the '*birth mother'* this merely reflects the arguments advanced by the Minister. Those references should not be understood as a finding that the provision is exclusively concerned with the '*birth mother'* to the exclusion of the genetic mother.

Act 2004 as referring to birth mother and *X v. Minister for Justice and Equality* [2020] IESC 30, [2021] 1 ILRM 411 where the court considered the meaning of the word *'child'* as used in s. 56 of the International Protection Act 2015, holding that the natural and ordinary meaning of the words '*child of a sponsor'* in that section was a biological child of such a sponsor. While, consequent upon the provisions of the Interpretation Act 2005 this included an adopted child, the court in its judgment suggested that it did not include surrogate children or the children of a partner or spouse of the sponsor who were not the biological children of the sponsor. This was as a result of the statutory regime under consideration: the word '*child',* the court said, is capable of meaning different things in different contexts (at para. 108).

**78.** Undoubtedly, the Irish Nationality and Citizenship Act 2001, was enacted in a different environment from that prevailing at the time of the State's first citizenship legislation and, of course, it changed the language of s. 6(2) as it appeared in the 1956 Act as enacted – from '*father or mother'* – to '*parent*'. However, I can discern nothing in that Act to suggest that it was intended to introduce a different meaning for these terms altogether: indeed the noun '*parents'* was used in a not dissimilar context in both Article 3 of the Free State Constitution, and the 1935 Act. As evident from those provisions as quoted by me earlier, the language used in them reflected the assumption as to the meaning of the words '*father',* '*mother'* and '*parent'* that one would have expected at that time.

**79.** Second, the conjunction in s. 7(1) between '*birth*', '*parent*' and the latter's citizenship more naturally suggests that these would temporally coincide than that they would not, and that – of course – would have been the case if '*parent'* was given its traditional

meaning. Having regard to the provisions of s. 6(3) of the 1956 Act as enacted and as now reflected in s. 7(1) itself (that citizenship by descent '*applies from birth'*), it is difficult to impute any other meaning: if citizenship by descent '*applies from birth'* it must follow that the conditions for the grant of such citizenship apply at the time of birth. Yet, it is the end point of the applicants' construction that those conditions may not come into being until many years *after* birth, when the Irish citizen acquires a legal status of parentage.[14] Indeed in *Minister of Citizenship and Immigration v. Nanakmeet Kaur Kandola* [2014] FCA 85 ('*Kandola'*), the majority of the Federal Court of Canada arrived at precisely the conclusion urged by the Minister when a similar issue arose from s. 3(1)(b) of the Canadian Citizenship Act which enabled citizenship by descent for a child born outside the jurisdiction where '*at the time of his birth one of his parents … was a citizen'*. One of the points made by Noël JA was simple : '*[b]ecause citizenship conferred by virtue of paragraph 3(1)(b) crystallizes at the moment of birth, the only events that can impact on this grant are those which precede in time the moment of birth'* (at para. 65).

**80.** Third, the fact that the Oireachtas made specific provision first in the Adoption Act 1952, and thereafter in s. 11 of the 1956 Act for the position of adopted children is entirely inconsistent with the view that s. 7(1) was intended to capture those whose status as '*parent[s]'* could be derived from a legal rule or order (as opposed to a biological connection with the child). If the applicants' argument was well placed,

[14] As the Minister observes, it has been decided in England that a parental order can be made in respect of a person who is an adult, see *X v. Y (Parental Order, Adult)* [2022] EWFC 26.

these provisions would have been entirely unnecessary: adoptive parents would for the purposes of s. 7(1) have been '*parent[s]*'. [15]

**81.** Fourth, and finally, there is nothing in the subsequent amendments to the provision that would lead me to conclude that the Oireachtas intended to alter that basic structure, and indeed the very fact that in 2010 it *both* re-enacted s. 11 *and* expressly extended the scope of that provision to foreign adoptions which were recognised in Irish law would all strongly suggest that it did not.

**82.** IHREC in its submissions – quite correctly – accepted that the interpretation of s. 7 urged by the Minister seems, at first, the most obvious one. I think the position goes considerably further. In short, everything around this aspect of the legislation suggests the legislative assumption that, in 1956, one might have expected – that the parents of a child were its genetic father and birth mother, that those persons would be the child's parents at the time of his or her birth, that in order to pass citizenship one of them had to be an Irish citizen at the time of that birth, and that where the child was adopted (and thus not the biological child of both parents) specific provision should be made to extend the right to the citizenship of an Irish citizen adoptive parent, to that child.

[15] The dissent in *Kandola* it might be noted, attached dispositive significance to the fact that s. 3(1)(b) of the Canadian Citizenship Act expressly *excluded* adoptive parents from the definition of '*parent'* under the relevant provision, thereby (it was said) implying that other forms of legal parentage were included (judgment of Mainville JA at para. 100-101). That ambiguity heavily influenced the conclusion of the Quebec Superior Court in *Caron and anor. v. Attorney General of Canada* [2020] QCCS 2700 that s. 3(1)(b) required the application of a construction compliant with the Canadian Charter of Rights and Freedoms (see the judgment of Bachand JSC at para. 15-17). A construction that required a biological link with the parents, it was held, would both discriminate between children based on the mode of their conception and between same-sex couples in breach of the Charter. The 1956 Act, by contrast, operates on the basis that adoptive parents are already excluded from s. 7(1), and proceeds to make express provision for them accordingly elsewhere in the Act.

**83.** Bearing these four factors in mind, I must respectfully disagree with the trial judge's analysis of these provisions. He concluded, it will be recalled, that the Oireachtas was concerned in enacting s. 7(1) to ensure that citizenship by descent could not pass from a parent who acquired Irish citizenship *after* the child was born. Why, exactly, the Oireachtas was anxious to avoid this mischief is not clear to me: it seems far more likely that it was operating on the basis of the belief that the identity of the parents was a fact fixed at the point of birth, and it would be most surprising had the Oireachtas thought otherwise. The tenses used in the provision do not appear to me to affect the analysis one way or the other: the words '*is an Irish citizen from birth'* indicate that the child following his or her birth has the status of an Irish citizen subject to satisfying the prior requirement that '*at the time of his or her birth either parent was an Irish citizen'*.

**84.** I also agree with the Minister when he argues that the trial judge failed to have sufficient regard to the importance and true meaning of the words '*from birth'* and '*at the time of his or her birth'* when construing the section. I cannot see any reason why these words were intended to mean anything other than what they at first glance suggest – that all conditions for the acquisition of citizenship are present (whether or not, in the case of the *identity* or for that matter *citizenship* of the father are known) at the time of the birth of the child.

**85.** And the conclusion that s. 11 was enacted solely in order to provide clarity for adopted children both represents a deviation from the usual presumption that the Oireachtas does not legislate in vain and ignores the fact that under s. 11 adopted children were expressly treated differently from children who obtained citizenship by descent from a biological parent insofar as the citizenship of the adopted child runs only from the date

of adoption. Section 11, as the Minister puts it in his submissions, does more than merely make clear the position of adopted children; it provides for a separate and distinct citizenship regime for adopted children that is different from that applicable to children born to an Irish parent or parents. The significance of the section is that it shows a belief on the part of the Oireachtas that without the making of such express provision, adopted children would not otherwise obtain citizenship by descent from an Irish citizen adoptive parent. That assumption, had the applicants' construction of the provision been correct, would have been false.

**86.** There is, moreover, an even more arresting incongruity arising from s. 11. On the applicants' case (and before the statutory facility in 1991 for the passing of citizenship by descent in the case of foreign adoption orders) Irish citizen parents by virtue of a *foreign* adoption order recognised here would themselves have qualified as '*parent[s]'* under s. 7(1) with the children adopted pursuant to those arrangements acquiring an entitlement to citizenship as of their birth, while for the child adopted pursuant to an Irish adoption order citizenship was vested only from the point of the adoption. The conclusion that A was C's parent on the facts of this case would result in a similar discordance.

**87.** I also have difficulties with the trial judge's treatment of Article 9.2.1 of the Constitution. That provision, he said, '*is concerned with persons born in Ireland'* and was therefore '*not strictly relevant'* to the case at hand. However, he felt that it gave some support to the applicants' arguments insofar as it showed that the Oireachtas could, with the use of different language, have achieved the effect for which the Minister contends here. The Article, to repeat, refers to '*a person born in ... Ireland ...*

*who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen.*'

**88.** I would incline to a different conclusion. Article 9.2.1 and s. 7(1) are concerned with different and temporally distinct issues, as indeed the trial judge correctly suggested. Article 9.2.1 is concerned with the conditions attaching to citizenship by birth and it applies only to births occurring after it comes into operation. Section 7(1) is focussed on citizenship by descent. The conclusion that the People in adopting the Twenty-Seventh Amendment in 2004 made clear in the context to which that provision was addressed, that which did not require express explanation half a century earlier and in a provision directed to a different issue seems to me to be considerably more plausible than the view that Article 9.2.1 supports the contention that the Oireachtas intended s. 7(1) to bear an entirely different effect from that suggested by its plain meaning.

**89.** None of this, I must emphasise, means that the Oireachtas is precluded from granting a more generous version of citizenship by descent than the language of Article 9.2.1 would suggest, nor does it preclude the court from concluding that this is what it has in fact done. But as a guide to interpretation, Article 9.2.1 is considerably more sympathetic to the Minister's argument, than it is to the applicants'.

***The double construction rule and legal parentage***

**90.** As counsel for the applicants put it in the course of his oral submissions, the double construction rule is central to their case. It operates where '*two or more constructions*

*are reasonably open'* (*McDonald v. Bord na gCon (No.2)* [1965] IR 217 at p. 239 per Walsh J.), requires that '*an interpretation favouring the validity of an Act should be given in cases of doubt'* (*East Donegal Co-operative Ltd v. The Attorney General* [1970] IR 317 at p. 341 (again per Walsh J.)), or '*where there is an ambiguity or a choice between two constructions'* (*Re The Employment Equality Bill, 1996* [1997] IESC 6, [1997] 2 IR 321 at p. 369 per Hamilton C.J.). In this case, two problems arise from the application of the double construction rule in the manner asserted by the applicants.

**91.** For the reasons to which I have referred, the application of the rule so as to enable persons who were not '*parent[s]'* at the time of the birth of the child in question to pass citizenship by descent involves not merely a contortion of the language used in the provision, but a fundamental distortion of the scheme put in place by the 1956 Act for the passing of citizenship by descent. The former may not be in itself fatal to the application of the rule: it seems clear that the fact that an interpretation is artificial or results in the imposition on the Oireachtas of an intent that it never actually entertained does not of itself preclude the application of this unusual principle of construction. That, it might be said, is the whole point to the rule. O'Donnell J. (as he then was) said as much in the context of an argument around the Civil Liability Act 1961 in *Defender Ltd. v. HSBC France and ors.* [2020] IESC 37, [2021] 1 IR 516 at para. 79:

> '*under the double construction rule, the intention of the Oireachtas as discerned from the 1961 Act may indeed have been that the 1961 Act would receive the interpretation which it is now considered would give rise to unconstitutionality.*

*In such circumstances, a court adopts what might be described as an artificial interpretation if it is nevertheless available and possible on the statutory language and will avoid unconstitutionality.'*

**92.** But the real problem is more fundamental. It is one thing to save a legislative provision from invalidity by, for example, implying fair procedures (as in *Dellway and ors. v. National Asset Management Agency and ors.* [2011] IESC 14, [2011] 4 IR 1) or by reading down a provision so as to limit its apparent scope (as happened in *Re National Irish Bank Ltd. No. 1* [1999] IESC 18, [1999] 3 IR 145), but quite another to use the rule to fundamentally re-orientate the structure and direction of a legislative scheme by changing an essential feature of that regime. The point is well made by McKechnie J. in the context of the interpretative obligation arising under the ECHR Act 2003: the obligation, he said, should *not* be operated where the application of the rule would result in the replacement of a section with a new provision which is '*fundamentally at variance with a key or core feature of the statutory provision'* or which involves '*the destruction of a scheme or its replacement with a remodelled one'* (*Foy v. An tArd-Chláraitheoir* [2007] IEHC 470, [2012] 2 IR 1 at para. 76). The same principle should govern the double construction rule: indeed there is here a firm analogy with the '*severance'* cases: the courts will run a line through unconstitutional language in an Act, but only if what is left is not at variance with the legislative policy (see *Maher v. Attorney General* [1973] IR 140 at p.147 per FitzGerald C.J.). The double construction rule allows the adjustment of a single statutory provision so as to align it with constitutional requirements, it does not thereby permit the imposition of an entirely new legislative regime.

**93.** The meaning of s. 7(1) as I have explained it earlier is clear and coherent both in its own terms and within the context of the legislation as a whole. As I have explained, it uses the term '*parent'* in its biological or genetic sense, and was not intended to include persons whose status as parents derives solely from legal provision and/or court order nor, for that matter, does it extend to *de facto* or social parent/child relations. In this way, it envisages persons from whom Irish citizenship shall be derived as enjoying the status of '*parent'* at the time of the child's birth. Within the structure so established, citizenship operates and is objectively discernible (whether or not actually discerned) from a specific and identified point in time. That reflects not merely the operative language in s. 7(1) ('*at the time of his or her birth either parent was an Irish citizen'*), but also the fact that the subsection, in making provision for posthumous children clearly so assumed ('*or would if alive have been an Irish citizen'*). As the Minister argued in the course of his counsel's oral submissions, it is implicit in the requirement that citizenship shall not be so conferred on a person born outside the island of Ireland by a person also so born unless the former's birth is registered under s. 27 in the foreign birth register ('*a person deriving citizenship through a father or mother ...'*).

**94.** The interposition of a new regime under which parenthood is purely legal and in which citizenship operates from birth, but only after an event that occurs some time after the birth[16], sits most uneasily with this structure. That difficulty is not resolved by pointing, as the applicants do, to the fact that it may only be upon the making of a declaration of parentage under the Status of Children Act that the fact that a child has an Irish citizen genetic father is evident: in that situation the child was always an Irish citizen, the effect

[16] Including, as the Minister notes in his submissions, after the child has reached its majority, *X v. Y (Parental Order, Adult)* [2022] EWFC 26.

of the declaration of parentage being to establish that this was the case. That (and the converse situation where it subsequently emerges that the Irish citizen man believed to have been the father of a child is not in fact his father) is entirely different from the construct for which the applicants contend, which is one in which the child at birth is *not* a citizen, but acquires that status by descent after – and potentially some time after – he or she is born.

**95.** And even more basically, the assumption contended for by the Minister and also mirrored in the language of s. 7(1) is the only possible explanation for s. 11. To now change this *via* the double construction rule would fundamentally alter that entire scheme, in particular rendering s. 11 at best otiose and, at worst, a provision which creates an entirely unexplained and unjustified discrimination between adopted children and children the status of whose parents derive from a foreign parental order with the latter obtaining citizenship from birth and the former doing so only from the date of the adoption order or, in the case of a foreign adoption, its recognition. The applicants' case thus involves not merely changing the meaning of an individual provision in a fundamental respect, but also the interposition into the provisions governing citizenship by descent of a circumstance that was clearly never envisaged by them. That would not be an appropriate application of what remains no more than a rule of statutory interpretation.

**96.** All of this reflects the logic of the decision in *MR v. An tArd Chláraitheoir*. There, the court was concerned with the question of whether the term '*mother'* in the Civil Registration Act 2004 referred to the birth mother (as the court found to be the case) or

the genetic mother (as the applicant had contended). Rejecting a contention that the court should afford the provision an '*updated'* meaning, O'Donnell J. observed:

> '*On the assumption for this aspect, that the legislation whether in 1880 or in 2004 identified the person giving birth as the mother, then to interpret the legislation to make the person providing the ovum and therefore the DNA as the mother rather than the birth mother would be to alter and reverse the original meaning of the legislation, rather than merely interpreting it to apply not only to the original situation but also to a circumstance not envisaged at the time.'*

**97.** None of this, I should add, is affected by the provisions of CFRA: all s. 5 of that Act shows is that the Oireachtas could, where it felt it appropriate so to do, expressly align parenthood as envisaged by that Act with other legislative provisions.

***Section 6 of the Interpretation Act***

**98.** I have noted earlier that the applicants also relied on the provisions of s. 6 of the Interpretation Act 2005. It reads thus:

> *'In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant*

*matters, which have occurred since the date of the passing of that Act or the making of that statutory instrument, but only in so far as its text, purpose and context permit'.*

**99.** Having regard to the conclusion I have reached as to the application of the double construction rule, it must follow that s. 6 is of no application here. The proviso to the provision – '*but only in so far as its text, purpose and context permit'* – necessarily limits the operation of the provision to those cases in which the '*updated'* construction can be accommodated within not only the language of the provision in question, but also its object and background. It is because of these same considerations of purpose and context I have concluded that s. 7(1) will not '*bear'* the construction suggested by the application of the double construction rule. If the application of the double construction rule is precluded because it would involve a distortion of a legislative scheme, it is difficult to see how s. 6 could be used to obtain the same effect. That being so, s. 6 of the Interpretation Act must, for the same reason, be similarly of no avail to the applicants.

***The constitutional issues***

**100.** Because I have concluded that s. 7(1) will not bear the construction urged by the applicants as being necessary to save it from constitutional validity, and in circumstances in which no relief was sought declaring the section to be invalid having regard to the provisions of the Constitution, the issue as to whether it is in fact invalid for the reasons urged by the applicants does not arise. However, in order to understand

some of the arguments made around the declaratory orders which the court was urged to consider making, it is important to note some features of that case.

**101.** The end point of the applicants' argument is that by reason of the order of an English court and because A, B and C are domiciled in England, C is an Irish citizen in circumstances in which an arguably like-positioned couple domiciled in Ireland could not pass citizenship in this way. That is a consequence of the fact that Irish law does not enable orders of parentage following surrogacy of the kind contemplated by the United Kingdom Human Fertilisation and Embryology Act 2008 to be made here.

**102.** It might appear curious that Article 40.1 of the Constitution could be deployed so as to require the Oireachtas to put C in a better position than what is on one view, a similarly situated resident of the State. Self-evidently, parent-child relationships that derive from Irish statute law differ from those which derive from foreign statute law: the difference arises by reason of the legal origin and incidents of that status and the consequent potential for significant divergences between the circumstances in which parenthood can arise in this jurisdiction as compared with other jurisdictions. This is particularly the case given that the applicable recognition principle is as broad as I found it to be, and all the more so because of the limited reach of public policy as a ground for non-recognition of a status conferred by the law of the place of domicile. As both judgments delivered in *Adoption Authority of Ireland v. C and D and the Attorney General* [2023] IESC 7 recently stressed, the law of domicile has a '*paramount controlling influence over the creation of status'*, public policy has a limited role in private international law in protecting fundamental policy interests and values, and it is only a public policy that is '*very clear and strong'* that would justify the denial of a status conferred by the law

of the place of domicile (see O'Donnell C.J. at paras. 50-52 and 88, and Hogan J. at paras. 33 and 41).

**103.** To conclude that by enabling citizenship by descent by law from '*parent'* to '*child'*, the Oireachtas has thereby precluded itself from denying citizenship by descent to any parent-child relationship recognised by private international law rules, would be to decide that this restrictive concept of public policy defines the outer limits of the State's power to regulate the grant of citizenship by descent in the case of Irish citizens domiciled abroad. Or to put it another way, if this argument were well placed in the circumstances presenting themselves here –a legal relationship of parent and child following surrogacy arising from the English court order which it is not possible for similarly positioned persons to obtain in Ireland – it must follow that the Oireachtas is constitutionally *required* to allow citizenship by descent within this parent/child relationship because the legislature in another jurisdiction has enabled orders of this kind. The only exception to this principle would arise where it could be said that to either recognise the foreign relationship generally, or to do so for the purposes of enabling the passing of citizenship by descent, would be contrary to public policy. It is, of course, necessarily the applicants' case that there is no such public policy barrier to full or partial recognition.

**104.** That outcome would present at least the prospect of an impairment of the State's sovereignty contemplated by Article 5 of the Constitution (see *AP v. Minister for Justice and Equality* [2018] IECA 112, at para.10 per Hogan J.). It might also be said that it would involve the use of a principle of equality to obtain treatment for those domiciled abroad that is more favourable than that extended to those who actually live here. It is

not hard to see how that might be characterised as illogical and unfair. Given that it is possible to change the recognition principles by statute so as to limit recognition to those parental orders that have an analogue in Irish law (which is what happened in relation to the recognition of foreign adoptions), I have some considerable difficulty in understanding why the Oireachtas would be required to extend an incident of a relationship facilitated by a foreign law (citizenship) which is not available to similarly positioned persons domiciled within this jurisdiction.

**105.** I emphasise this because of the argument advanced by IHREC. The only way of avoiding that potential illogicality and unfairness is by moving the argument one step further and saying that, in fact, the applicants' case takes them to the conclusion that the Constitution requires that parental orders of this kind should also be available to persons domiciled in Ireland or, at least, that citizenship by descent must be allowed for those who would be entitled to obtain such parental orders if they were facilitated by the law here. This, effectively, is what IHREC urge.

***The reliefs claimed***

**106.** That argument falls to be put in the context of the reliefs claimed in the action. I have outlined these earlier. The applicants sought orders of *mandamus* requiring a decision as to whether to issue an Irish passport and directing the issue of such a passport, together with the following declarations:

'*A declaration … that the failure of the Respondent to issue an Irish passport in respect of the Third Named Applicant constitutes a disproportionate interference with the Applicants' rights pursuant to Article 40.1, Article 40.3 and Article 42A of the Constitution.*

*A declaration … that the failure of the Respondent to issue an Irish passport in respect of the Third Named Applicant constitutes a failure contrary to the provisions of section 3 of the European Convention on Human Rights Act 2003 on the part of the Respondent to perform his functions in a manner compatible with the European Convention on Human Rights … and in particular that it constitutes a disproportionate interference with the Applicants' rights pursuant to Article 8 and Article 14 of the ECHR.'*

**107.** I do not see how in the action as constituted against only the Minister the court could grant the constitutional relief sought here; the end point of the order would be to decide that the Minister must exercise his powers to grant citizenship to a person who has not met the statutory conditions for that status and that can only be true if s. 7(1) is invalidly under-inclusive. To grant that relief would, accordingly, involve deciding that the section was contrary to the Constitution.

**108.** For the reasons I have just outlined, I am not convinced that C has a constitutional right to a passport in circumstances in which an arguably like-positioned child domiciled in Ireland has no such entitlement. Whether or not that is so, and as I have also earlier observed, the applicants did not challenge the validity of s. 7(1) having regard to the Constitution. Their original submissions to this court were, in this regard, emphatic:

they had never challenged the constitutionality of s. 7 – they said – '*because ... it is possible for the Court to adopt the constitutionally compliant interpretation'*.

**109.** Thereafter IHREC was joined as a notice party to the appeal, and delivered its submissions. These presented an extremely helpful summary of national and international materials supporting IHREC's assertion that the absence of legal regulation of the practice of surrogacy leaves a large number of families and children in a legal limbo, and represents a failure by the State to have due regard for the rights of individuals. It also stressed the significant difficulty caused to those seeking to use surrogacy, including married heterosexual couples who face problems in conceiving a child of their own as well as married same-sex couples. In that connection, IHREC advanced – again with the assistance of helpful authorities – constitutional and ECHR arguments mirroring those advanced by the applicants in the course of their submissions regarding the double construction rule.

**110.** In particular, IHREC referred to the family rights of the applicants, their right to marital privacy and their consequent entitlement to exercise spousal autonomy and to determine the composition of their family. It asserted that a child born through surrogacy is as entitled as any other child to '*the recognition and protection of their familial relationships'*. It says that any failure to recognise the parent-child relationship in the context of surrogacy is liable to adversely impact those details of family and personal life which the Constitution recognises as vital to the human person. That adverse impact, it contends, includes a denial of citizenship. A denial to a surrogate child of the citizenship of the non-genetic parent has a stigmatizing effect and undermines the bonds between them. That is not, it is argued, in the best interests of the

child. It is, it is said, difficult to envisage a legitimate or proportionate basis on which the State could constitutionally introduce legislation seeking to draw a distinction in respect of children born through surrogacy in the context of citizenship. All of this, it should be said, provided the court with a most helpful perspective on the case, and with information that was useful in understanding the overall context within which it fell to resolved.

**111.** On this basis, however, IHREC goes somewhat further than the applicants. It says not merely that the double construction rule and interpretative obligation arising from s. 2 of the 2003 Act requires that s. 7(1) (which it also contends is ambiguous) be interpreted in the manner contended for by the applicants, but it also draws attention to jurisprudence which, it says, enables the grant of a declaration of unconstitutionality even though this was not considered by the High Court nor expressly addressed by the parties. On that basis, IHREC says that the Court should:

> '*consider making a Declaration to the effect that by failing to provide for a legislative route to birth right citizenship to a child born following surrogacy whose non-genetic parent is an Irish citizen the State has breached the rights of the third Respondent under Articles 40.1, 40.3, 41 and 42A of the Constitution'*.

**112.** Two points should be made about this. The applicants have not sought to amend their pleadings to seek relief of this kind nor have they sought a declaration that s. 7(1) was invalid having regard to the Constitution and they have taken no step to have the Attorney General named as a respondent to the action. Whatever about the jurisdiction

of the court to consider constitutional issues when they were not considered in the lower courts, this court has made it clear that it cannot grant relief at the instance of IHREC, or any other *amicus curia*, when the applicant has not itself sought that relief: (*Dowdall v. Director of Public Prosecutions and ors.* [2022] IESC 36, [2022] 2 ILRM 245 at paras. 46-54 of the judgment of O'Donnell C.J.). Here, the applicants in their final set of submissions (delivered shortly before the hearing and in response to those of IHREC) reiterated that they did not seek declarations of incompatibility or of unconstitutionality but then said that following IHREC's submission if the court did not accept their interpretation of s. 7(1) '*it would be appropriate for this Court to proceed to grant declarations of unconstitutionality and/or invalidity'*. But even before this court, no application was made to amend the proceedings, or to join to the action the parties required by law to make that case. There has never been any version of law or procedure that would have enabled the grant of this relief at IHREC's instigation.

**113.** Second, the relief strays outside the case. The applicants substantially based their claim on their domicile abroad and their status as parents under English law and their contention that as a result of that status C should enjoy citizenship by descent. The relief sought by IHREC seems to be directed to persons who are resident here as well as those who are domiciled abroad. While I have noted earlier that this is, at least on one view, the logical end point of the applicants' case it goes further than the case they actually made. But more fundamentally – and self-evidently – this argument invites the court to step into a significant policy debate, an exercise which could on no version be embarked upon without allowing the State the opportunity to adduce evidence relevant to the issues underlying the regulation of surrogacy – commercial or altruistic – and the legal

recognition of the parental status of those who commission surrogacy arrangements. It is impossible to see how this can be done at this stage of these proceedings.

***The ECHR***

**114.** Insofar as the ECHR Act 2003 is concerned, the performative obligation provided for in s. 3 of that Act is expressly stated to be subject to any Act of the Oireachtas and, therefore, relief of this kind clearly cannot be granted unless the applicants can contend that the Act must be interpreted so as to allow the Minister to acknowledge citizenship by descent based upon foreign legal parentage. For reasons I have explained, that argument is not tenable. As I have noted, the applicants did not seek a declaration of incompatibility under s. 5(1) of the 2003 Act in respect of the provision. The Convention, therefore, simply does not arise.

***The EU law issue***

**115.** It is to be noted that at all times the Minister has adopted the position that pursuant to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibilities and Measures for the Protection of Children, the parental responsibility of the applicants in these proceedings would be entitled to recognition and enforcement in this jurisdiction. The applicants did not pray European law in aid in their pleadings, and the application of EU law does not appear to have featured in the arguments in the High Court. However, in his submissions to this court the Minister properly drew attention to the decision of the

CJEU in *VMA v. Stolichna obshtina, rayon 'Pancharevo'* Case C-490/20 14 December 2021 ('*VMA*'). The judgment was delivered after the decision of Barrett J., and concerned a same-sex couple – a Bulgarian citizen and a citizen of the United Kingdom. They resided in Spain with their daughter, and their names appeared on the child's birth certificate as its parents. They sought a birth certificate in Bulgaria similarly recording them as the child's parents. This was refused by the Bulgarian authorities, the decision was challenged and the Bulgarian court referred a number of questions to the CJEU. The parties each agreed that the key holding of the decision was at para. 68 of the judgment:

> *'A child, being a minor, whose status as a Union citizen is not established and whose birth certificate, issued by the competent authorities of a Member State, designates as her parents two persons of the same sex, one of whom is a Union citizen, must be considered, by all Member States, a direct descendant of that Union citizen within the meaning of Directive 2004/38 for the purposes of the exercise of the rights conferred in Article 21(1) TFEU and the secondary legislation relating thereto.*

**116.** This conclusion was based upon Articles 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the EU Charter of Fundamental Rights , read in conjunction with Article 4(3) of Directive 2004/38. The consequence was that a Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the

host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States. But as the law presently stands neither this decision, nor EU law in general, impose any obligations on the State in connection with the extension of Irish citizenship (see *AP v. The Minister for Justice and Equality* [2019] IESC 47, [2019] 3 IR 317 at para. 79 (Clarke C.J.)). That being so, the case does not advance the applicants' position in this action. The potentially difficult issues around the implications of the withdrawal of the United Kingdom from the European Union do not, therefore, arise.

***Conclusion***

**117.** The essential reasons for the conclusion I explain in this judgment are as follows:

(i) The parental order of the English court upon which the applicants rely is capable of being recognised in principle by the private international law of the State. The fact that Irish law does not allow for such orders to be made in this jurisdiction is not, in this case, relevant to that conclusion. However, that such an order is recognised by Irish common law rules for some purposes does not mean that the applicants are '*parent[s]'* as that word appears in all legislative provisions in this jurisdiction. Each statute in which that word appears must be interpreted according to its own language, context and objective.

(ii) Section 7(1) of the 1956 Act, when it uses the term '*parent'*, refers to the genetic father of the child and includes the birth mother of the child (it is not necessary in this case to decide whether it also includes the child's genetic mother).

(iii) Even if one or all of the constitutional arguments advanced by the applicants in this case were well placed, it would not be possible to construe s. 7(1) so as to render A, C's '*parent'* as that term is used in that provision. Not only does this construction sit most uncomfortably with the language used in s. 7(1), but to construe the provision in this way would radically alter the legislative scheme from that enacted, which envisaged citizenship by descent passing through persons who were parents at the time of the birth of the child as and from the point of his or her birth.

(iv) Noting that the constitutional argument suggested by the applicants is one according to which C would be entitled to Irish citizenship in circumstances in which an arguably like-positioned person domiciled in Ireland would not be entitled to such citizenship, the court is not in any event free to consider granting the applicants' orders striking down the provisions of s. 7(1) of the 1956 Act as invalid having regard to the provisions of the Constitution for any of the reasons suggested in this case. Such declaratory relief was not sought in these proceedings, the parties required by law to meet that case were not before the court and the issue was not agitated before the High Court. Nor – for similar reasons – is the court free to grant a declaration of incompatibility pursuant to s. 5(1) of the 2003 Act.

(v) The relief suggested by IHREC – a declaratory order that by failing to provide for a legislative route to birth right citizenship to a child born following surrogacy whose non-genetic parent is an Irish citizen, the State has breached

C's rights under Articles 40.1, 40.3, 41 and 42A of the Constitution – may well ultimately reflect the logic of the applicants' complaint in this action. It certainly avoids the possible overbreadth that would follow from an interpretation of s. 7(1) that extended the section to all legal parents according to the law of domicile of an Irish citizen save and insofar as recognition was precluded by public policy. However, in order to even consider an application for relief of this kind (which was not sought by the applicants themselves), the court would have to join the appropriate parties and would have to allow the State the opportunity to adduce evidence addressing the reasons it has not adopted this course of action. This cannot be done at the instigation of a notice party at this stage of these proceedings.

**118.** It is with not without some reluctance that the court concludes that C is denied an important legal status in circumstances where A is according to the law of his place of domicile his father, where other children with Irish citizen fathers obtain that facility, and indeed where E, C's brother, would appear to be one of the children so entitled. This, however, is what the law provides: it does so in a context in which the relationship between A and C arises not directly under Irish law but under the law of another jurisdiction and in which Irish law does not extend to citizens domiciled here an equivalent facility to have parentage declared by a court in similar circumstances. The question of whether the law *must* afford such a facility is outside the scope of these proceedings.

**119.** But I would take the liberty of observing that *were* Irish law to empower courts to make parental orders of the kind made in England in this case and under the type of

conditions provided for in that jurisdiction, significant issues would arise under Article 40.1 of the Constitution were the Oireachtas to deprive the children of parents so decreed of a right of citizenship enjoyed within other families. To do so would be to effect a differential treatment between seemingly like positioned persons at three levels – between the citizen through whom the citizenship can pass and the citizen through whom it cannot, between the child who benefits from the citizenship and the child who does not, and between the family unit within which that right can be transmitted and that within which it cannot. If there is a justification for such differential treatment, it is not self-evident and it was never identified by the respondent in the course of argument in this case. And *if* such orders were to be enabled under Irish law and citizenship extended by descent within the relationships thus established, the denial of citizenship to children of Irish citizens domiciled in another jurisdiction who have been determined to enjoy parentage under a legal regime similar to that applicable here would also require a clear and rational justification. In this regard also it is not immediately obvious what that justification would be.

**120.** For these reasons, this appeal is allowed to the extent that the trial judge decided that A was C's parent as that term appears in s. 7(1) of the 1956 Act.