CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 08/00

THE MINISTER FOR WELFARE AND POPULATION DEVELOPMENT	Applicant
versus	
SARA JANE FITZPATRICK	First Respondent
BENEDICT PAUL FITZPATRICK	Second Respondent
DIRK ABRAHAM JOHN UIJS [in his capacity as curator *ad litem* to the minor child]	Third Respondent

Heard on : 9 May 2000

Decided on : 31 May 2000

JUDGMENT

GOLDSTONE J:

Introduction

[1] Mr and Mrs Fitzpatrick (the respondents) are British citizens who have been living permanently in South Africa since March 1997. Mr Fitzpatrick works for a United States corporation and expects to be transferred to the United States. The respondents wish to adopt a minor child, to whom I shall refer as "the child", who was born to a South African citizen.

However, section 18(4)(f) of the Child Care Act[1] (the Act) absolutely proscribes the adoption of a child born of a South African citizen by a non-citizen or by a person who has the necessary residential qualifications for the grant of South African citizenship but has not applied for a certificate of naturalisation.[2]

[2] The respondents applied to the Cape of Good Hope High Court for an order declaring section 18(4)(f) to be inconsistent with the Constitution and therefore invalid. In the alternative they applied to be appointed as joint guardians of the child and to be awarded joint custody and

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1 Act 74 of 1983.

2 Section 18(4)(f) reads as follows:

> "A children's court to which application for an order of adoption is made in terms of subsection (2), shall not grant the application unless it is satisfied—
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> . . . .
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> (f) in the case of a child born of any person who is a South African citizen, that the applicant, except an applicant referred to in section 17(c), or one of the applicants is a South African citizen resident in the Republic, or the applicant has or the applicants have otherwise the necessary residential qualifications for the grant to him or them under the South African Citizenship Act, 1949 (Act No. 44 of 1949), of a certificate or certificates of naturalisation as a South African citizen or South African citizens and has or have made application for such a certificate or certificates".

Section 17(c) creates an exception for a married person whose spouse is the biological parent of the child.

control of the child. Mr DAJ Uijs SC, the third respondent, was appointed by the High Court as *curator ad litem* to represent the child in the proceedings. I shall refer to him as "the curator". He supported the grant of the relief sought by the respondents.

[3] In the High Court the Minister for Welfare and Population Development (the Minister) conceded that the provisions of section 18(4)(f) were unconstitutional to the extent that they proscribed the adoption of a child born of a South African citizen by persons who are not South African citizens or persons who qualify for naturalisation but have not applied therefor. However, she sought and was granted an order suspending the declaration of invalidity for a period of two years in order to allow Parliament to correct the defect in the legislation. It follows that during the period of the suspension it is not possible for the respondents to adopt the child. With the support of the Minister, the High Court appointed the respondents as the joint guardians of the child and awarded them joint custody and control of the child.

[4] In terms of the provisions of sections 167(5)[3] and 172(2)(a) and (d)[4] of the Constitution the Minister now approaches this Court for confirmation of the order of the High Court. The

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[3] Section 167(5) reads as follows:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[4] Section 172(2)reads, in relevant part, as follows:

> "(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
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> . . . .
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> (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

curator was invited by the Court to furnish it with a written report on whether the interests of the child are likely to be affected by any order this Court might make in the confirmation proceedings. In his report, the curator informed us that there would be no appearance on behalf of the respondents who are possessed of no further funds with which to pursue their opposition to the suspension of the order and accept that they will not be able to adopt the child until the period of suspension has expired. However, in the view of the curator, the child's interests would best be served by an immediate adoption order in favour of the respondents and for that reason he opposed the suspension of the order of invalidity.

[5] Having regard to the non-appearance of the respondents, the Centre for Applied Legal Studies at the University of the Witwatersrand was requested by the Court to act as an amicus curiae and to submit written argument. The amicus was invited also to make oral submissions and that was done most helpfully by Professors Unterhalter and Mosikatsana. Their assistance is much appreciated by the Court.

The Background

[6] The suitability of the respondents as parents of the child is not in dispute. However, it would be for the children's court, and not this Court, to assess an application by the respondents for the adoption of the child. I refer to the respondents' circumstances only as illustrative of why the child's best interests may be prejudiced by the current formulation of section 18(4)(f) of the Act.

[7] The respondents were married in England and four children were born of their marriage.

The eldest is 12 years and the youngest 5 years. From November 1994 to March 1997 the respondents lived in the state of Oklahoma in the United States of America. During that period they qualified to foster infant children and fostered ten infants with stays ranging from a few weeks to fifteen months. After their arrival in Cape Town, the respondents contacted and were interviewed by the Child Welfare Society of South Africa and obtained approval to act as foster parents in South Africa. The Child Welfare Society of South Africa employs social workers as defined by the Act[5] who are registered in terms of the provisions of the Social Service Professions Act.[6] In October 1997 the respondents had two-month-old twins placed with them for three weeks after which the twins were placed with their adoptive mother.

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[5] Social worker is defined as follows in section 1 of the Act:

> "[A]ny person registered as a social worker under the Social Work Act, 1978 (Act No. 110 of 1978), or deemed to be so registered, and who, save for the purposes of section 42, is in the service of a state department or provincial administration or a prescribed welfare organization".

The Social Work Act, as amended by section 24 of the Social Work Amendment Act, 102 of 1998, is now known as the Social Service Professions Act, 1978.

[6] Act 110 of 1978.

[8] In November 1997, the child, then aged two and a half months, was placed with the respondents. He had been neglected and then abandoned by his biological parents soon after his birth. In March 1998 the child was moved to another foster home. The respondents supported the move, believing that the provisions of section 18(4)(f) of the Act would preclude them from adopting the child. A month later, in April 1998, the child was returned to the respondents because he had not settled in his new foster home.

[9] A strong bond had already been forged between the respondents, their children and the child and the respondents decided to take whatever steps were necessary to adopt the child. In this endeavour the respondents were assisted by Ms Janine Kleynhans, a social worker employed by the Child Welfare Society of South Africa. The considerable effort expended by Ms Kleynhans to further the best interests of the child is commendable. Through her offices the respondents and the curator made contact with the biological parents of the child. After some initial prevarication the biological parents consented to the adoption.

[10] The curator, a senior member of the Cape Town Bar, thoroughly investigated the unusual and difficult circumstances of this case. He furnished the High Court with a full and informative report of his investigations and made helpful submissions on the legal position. I would like to express my admiration for that investigation and report and also express my gratitude for the valuable assistance he subsequently afforded this Court in a supplementary report. It emerges from the report that the biological parents are incapable of looking after the child and that this situation is unlikely to change. On the other hand, with regard to the home of the respondents,

the curator says:

> "In short, the visit at the home of the Fitzpatricks with the Fitzpatrick family was a pleasure, and to observe the family interact was to receive a rather humbling lesson in good parenting."

[11] Both Ms Kleynhans and the curator firmly support the adoption of the child by the respondents. The curator points out that there are no members of the biological family of the child who would be suitable foster parents and that most other prospective adoptive parents would wish to adopt a younger child. He states further that unless the child is adopted by the respondents, he will spend his early years in foster care and his later years in an institution.

[12] That the best interests of the child lie in his being adopted by the respondents is accepted by the Minister and the amicus curiae. I have referred to sufficient facts to indicate the background against which they do so. It remains only to mention that Mr Fitzpatrick has been able to delay his transfer back to the United States until 2003 in order to enable his wife and himself to pursue their endeavours to adopt the child.

The Issues

[13] There are two broad issues which we are required to consider. They are:

(a) whether the provisions of section 18(4)(f) are in conflict with the Constitution; and

(b) if so, the form of the order that should be made and, in particular, whether an

order of invalidity should be suspended.

I shall consider each in turn.

The Constitutionality of Section 18(4)(f) of the Act

[14] Presumably in the light of the Minister's acceptance of the unconstitutionality of the section, the High Court's judgment gives no consideration to this question. In order to confirm the order of invalidity this Court must, of course, be satisfied on that score. Counsel for the Minister submitted that the provisions of the section were inconsistent with the rights to equality (section 9 of the Constitution), human dignity (section 10 of the Constitution) and the rights of the child (section 28 of the Constitution). Counsel for the amicus curiae relied on sections 9 and 28 but not section 10.

[15] We are concerned in this case with the rights of both the respondents as prospective adoptive parents on the one hand, and the rights of the child, on the other. The equality attack relies primarily on unfair discrimination against prospective adoptive parents and indirectly against the children concerned; the human dignity attack is based on the effect of the impugned provision on the prospective adoptive parents, whilst the reliance on section 28 is concerned solely with the rights of children.

[16] I have reached the firm view that section 18(4)(f) of the Act, to the extent that it absolutely proscribes adoption of a South African born child by non-South Africans, is inconsistent with the provisions of section 28 of the Constitution. The section reads as follows:

"28 (1) Every child has the right—

(a) to a name and nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that—

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

[17] Section 28(1) is not exhaustive of children's rights. Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain

meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1). This interpretation is consistent with the manner in which section 28(2) was applied by this Court in *Fraser v Naude and Others*.[7]

[7] 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC). In that case a parent was denied the right to re-open adoption proceedings finalised almost three years earlier. In refusing an application for leave to appeal from the SCA, Chaskalson P, with the unanimous approval of the members of the Court, applied section 28(2) and its standard of the "child's best interests" as a discrete principle.

[18] In 1948 the Appellate Division first gave paramountcy to the standard of the "best interests of the child".[8] It held that in deciding which party should have the custody of children on divorce the "children's best interests must undoubtedly be the main consideration."[9] The decision ran counter to the traditional approach in terms of which the "innocent spouse" in divorce proceedings was granted custody of the children. Since then the "best interests" standard has been applied in a number of different circumstances.[10] However, the "best interests" standard appropriately has never been given exhaustive content in either South African law or in comparative international or foreign law.[11] It is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular

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8 *Fletcher v Fletcher* 1948 (1) SA 130 (A).

9 Id at 134. The Court, however, did not articulate what would constitute the best interests of a child nor did it set out any particular criteria to be considered.

10 In *B v S* 1995 (3) SA 571 (A) the court recognised that access would always be available to the biological father of an illegitimate child if such access were in the child's "best interests". In *K v K* 1999 (4) SA 691(C), the court held that in the "best interests" of the particular child, his circumstances dictated that the court of habitual residence, in this instance the United States of America, would be best suited to make orders in respect of his future custody. In *S v Howells* 1999 (1) SACR 675 (C), the court considered the "best interests" of the appellant's children in determining her sentence but found that the interests of society outweighed the children's interests.

11 Article 3(1) of the Convention on the Rights of the Child provides that:

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

Article 4(1) of the African Charter on the Rights and Welfare of the Child similarly provides that:

> "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."

J Wolf, commenting on the Convention on the Rights of the Child, writes that, unlike phrases traditionally used to formulate rights, "there is another, which still is very vague and which may even become the subject of considerable dispute, namely the phrase 'in the best interest of the child'". Wolf "The Concept of the 'Best Interest' in Terms of the UN Convention on the Rights of the Child" in *The Ideologies of Children's Rights* Freeman and Veerman (Martinus Nijhoff Publishers, Dordrecht 1992) at 125. G Van Bueren, also writing on the Convention on the Rights of the Child and the "best interests" standard, states that "[t]he list of factors competing for the core of best interests is almost endless and will depend on each particular factual situation." *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, Dordrecht 1995) at 47.

child.[12]

[19] The facts of the instant case clearly illustrate that the best interests of a child born to South African parents may well lie in such child being adopted by non-South African adoptive parents. It is not difficult to find other illustrations. South African parents may die leaving close non-South African relations in a foreign country. It might well be in the best interests of such an orphaned child to be adopted by those relations. Moreover, South African nationality is no guarantee that adoptive parents will continue to reside within the jurisdiction of South African social welfare services. What is more, the protection conferred by section 18(4)(f) does not extend to children, orphaned or abandoned in South Africa, but born of non-South African parents.

[20] The provisions of section 18(4)(f) are too blunt and all-embracing to the extent that they provide that under no circumstances may a child born to a South African citizen be adopted by non-South African citizens. To that extent they do not give paramountcy to the best interests of children and are inconsistent with the provisions of section 28(2) of the Constitution and hence

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12 This exercise has been engaged in by South African courts. For example, *McCall v McCall* 1994 (3) SA 201 (C) at 205, in the context of the custody of a child, set out a list of criteria which should be taken into account in determining the best interests of the child. That list has been accepted as a guide in custody cases in a number of High Court decisions. See *K v K* above n 10 at 709C-J; *Bethell v Bland and Others* 1996 (2) SA 194 (W) at 208F-209D; *Ex parte Critchfield and Another* 1999 (3) SA 132 (W) at 142B-E.

invalid. The Minister, correctly, has not sought, either in the High Court or in this Court, to attempt to justify the limitation of section 28(2) and the provisions of section 36 of the Constitution do not fall to be considered. No grounds of justification were advanced in the affidavits, nor can we discern any.

[21] Having found the provisions of section 18(4)(f) inconsistent to the extent indicated it becomes unnecessary to consider whether they are also inconsistent with the rights of prospective adoptive parents which might be protected by the provisions of sections 9 and 10 of the Constitution. It follows that the order of invalidity made by the High Court should be confirmed.

The Suspension of the Order of Invalidity

[22] The interests of the respondents to have the order of invalidity take immediate effect are obvious. They wish to have finality with regard to the adoption of the child. Mr Fitzpatrick is to be transferred to the United States of America and it is in the interests of the respondents and the child that the status of the child be determined finally before they leave South Africa. Furthermore, as emphasized by the curator, should either or both of the respondents die prior to the adoption of the child, the latter's prospective rights of inheritance would be prejudiced. Both the Minister and the amicus curiae accepted that it is in the best interests of the child and the respondents for the order to have immediate effect.

[23] The Minister and the amicus curiae expressed concern that were section 18(4)(f) to be

struck down with immediate effect, there would be inadequate regulation and infrastructure for adoptions of children born of any South African citizen by prospective parents who are non-citizens. The Minister and the amicus curiae articulated three specific problems that could result:

(a) the inability of the Department of Welfare and Population Development (the Department) to facilitate thorough background investigations of non-citizens;

(b) insufficient legislative protection against trafficking in children; and

(c) inadequate provision to give effect to the principle of subsidiarity.[13]

[24] The problem concerning background investigations stems from the understandable difficulties of verifying information provided by applicants from abroad and the lack of resources the Department is able to commit thereto. The Minister suggested that the suspension of the order of invalidity would allow for adequate training of officials in conducting such investigations and establishing contact with foreign monitoring organisations, both governmental and non-governmental.

[25] With regard to the second concern, the Minister suggested that if the order of invalidity was not suspended there would be inadequate safeguards against child trafficking. The Minister cited the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 (the Hague Convention) to highlight the international concern given

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13 Subsidiarity refers to the principle that intercountry adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth. See the text accompanying n 19 below.

to child trafficking. The objects of that convention, according to Article 1 are:

> "(a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;
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> (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
>
> (c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention."

[26] The Hague Convention contains detailed legal, administrative and procedural provisions to ensure that its objects are fulfilled. For example, it requires that a Contracting State should designate a "Central Authority to discharge the duties which are imposed by the Convention".[14] An adoption is only to take place with the intervention of the "receiving State".[15] Provision is made subject to safeguards for the accreditation by Contracting States of non-governmental organisations to assist in achieving the objects of the Convention.[16] The submission of the Minister was that a redrafted section 18(4)(f) should contain the kind of safeguards and standards

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14 Article 6(1).

15 Articles 5, 14, 15 and 17.

16 Articles 10, 11 and 12.

found in the Hague Convention. South Africa has not signed or ratified that convention and the Minister did not indicate that Government intended to do so.

[27] The third concern was addressed to the absence of any recognition of the principle of subsidiarity. It was submitted that with regard to adoptions by non-citizens insufficient weight would be given to a child's religious and cultural background. The Minister then referred to the provisions of the Convention on the Rights of the Child (the Children's Convention)[17] which recognises that:

> "inter-country adoption may be considered as an alternative means of the child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin".[18]

Similarly, the Minister referred to the Hague Convention which also recognises that intercountry adoption is an alternative form of child care. Such adoption may take place under the convention only after the "possibilities for placement of the child within the State of origin have been given due consideration", and it has been determined that "an intercountry adoption is in the child's best interests".[19]

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17 South Africa ratified this convention on 16 June 1995.

18 Article 21(b).

19 Article 4(b).

[28] With these three concerns in mind the Minister and the amicus curiae recommended that the order of invalidity be suspended for two years to enable the necessary legislation and infrastructure to be put in place. The Minister stated that child care legislation was presently under review by the South African Law Commission which has appointed a project committee to review the Act and prepare comprehensive child care legislation.

[29] These are legitimate concerns. In my opinion, however, the decision as to whether an order of invalidity of section 18(4)(f) should be suspended must depend upon the extent to which the remaining provisions of the Act are capable of meeting the concerns of the Minister and the amicus curiae. It is to that topic that I now turn.

[30] In terms of the Act every magistrate is a commissioner of child welfare (commissioner) and every additional and assistant magistrate is an assistant commissioner.[20] These trained judicial officers preside over children's courts[21] which are the sole authority empowered to grant orders of adoption.[22] No adoption order may be made before the consideration of a prescribed report from a social worker.[23] In considering any application for adoption, the children's court is obliged to have regard to the religious and cultural background of the child "and of his [or her]

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20 Section 6(1).

21 Section 7(1).

22 Section 18(1)(a).

23 Section 18(1)(b).

parents as against that of" the adoptive parent or parents.[24] A children's court may not grant an adoption unless it is satisfied, inter alia, that:

[24] Section 18(3) read with section 40.

(a) the applicants are possessed of adequate means to maintain and educate the child;[25]

(b) the applicant or applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child;[26]

(c) that the proposed adoption will serve the interests and conduce to the welfare of the child;[27]

(d) subject to the exceptions contained in section 19 and in section 18(4)(d), that the consent to the adoption has been given by the parents of the child.[28]

Save for exceptions not now relevant,[29] no person may "give, undertake to give, receive or contract to receive any consideration, in cash or kind, in respect of the adoption of a child."[30] A

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25 Section 18(4)(a).

26 Section 18(4)(b).

27 Section 18(4)(c).

28 Section 18(4)(d).

29 In terms of the Social Service Professions Act 110 of 1978.

30 Section 24(1).

contravention of this provision is a criminal offence.[31]

[31] Section 24(2).

[31] According to the Act, it is the children's courts that are charged with overseeing the well-being of children, examining the qualifications of applicants for adoption and granting adoption orders. The provisions of the Act creating children's courts and establishing overall guidelines advancing the welfare of the child offer a coherent policy of child and family welfare. If appropriately and conscientiously applied by children's courts the main provisions of the Act would meet the most serious of the concerns of the Minister and the amicus curiae. The provisions of section 24 of the Act are designed to deter the practice of child trafficking, making the exchange of consideration in an adoption a criminal offence. Until the safeguards and standards envisaged by the Minister are introduced, children's courts are able to prevent the feared abuses in the cases of citizens and non-citizens alike.[32]

[32] The concerns that underlie the principle of subsidiarity are met by the requirement in section 40 of the Act that courts are to take into consideration the religious and cultural background of the child, on the one hand, and the adoptive parents, on the other.[33]

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32 Although not a concern raised by the Minister, I would point out that the provisions of section 18(4)(f) would not prevent child trafficking or undesirable intercountry adoptions where the adoptive parents happen to be South African citizens who live abroad.

33 Although no express provision is made for the principle of subsidiarity in our law, courts would nevertheless be obliged to take the principle into account when assessing the 'best interests of the child', as it is enshrined in international law, and specifically article 21(b) of the Children's Convention. This obligation flows from the imperative in section 39(1)(b) of the Constitution that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law".

[33] Finally, the other provisions of the Act address the problems surrounding the verification of background information from foreign applicants for adoption. A social worker unable to verify facts relating to the foreign applicant's background would be required to bring that to the attention of the children's court. Consequently, if the children's court is not satisfied with the verification of any information relevant to the adoption, the application would necessarily have to be denied. In that event the court would not be able to satisfy itself on the matters referred to in paragraph 30 above and, in terms of section 18 of the Act, would be obliged to refuse the order. A related concern is that without bilateral agreements between South Africa and the foreign state, there could not be effective post-adoption monitoring in respect of intercountry adoptions. This may be correct but again, that state of affairs exists even with section 18(4)(f) when South African adoptive parents emigrate. Furthermore, it could take many years to negotiate bilateral agreements with all of the relevant foreign governments. The absence alone of such agreements, in my opinion, is not a justification for suspending the order of invalidity.[34]

[34] It is not a reason advanced by the Minister or supported in argument by the Minister's counsel.

[34] It follows, in my opinion, that if non-South African citizens apply for the adoption of a child born to a South African citizen, the provisions of the Act enable the children's court to prevent the abuses and meet the concerns expressed by the Minister and the amicus curiae. The fact that they have been so fully and helpfully canvassed in this Court and the terms of this judgment will effectively alert the judicial officers concerned with applications for adoption to these matters. This judgment and especially paragraphs 30-33 should be brought to the attention of all commissioners and assistant commissioners of the children's courts and all social workers engaged in adoption matters.[35] In effect, until the amended legislation, administrative infrastructure and international agreements envisaged by the Minister are in place, foreign applicants will have a greater burden in meeting the requirements of the Act than they will have thereafter. They will have to rely on their own efforts and resources in placing all relevant information before the children's court.

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35 See above n 5 and accompanying text.

[35] The High Court, in deciding to suspend the order of invalidity, found that the considerations which induced this Court to order suspension of its order in the *Fraser* case[36] were analogous. I do not agree. In that case this Court held that dispensing with the consent to adoption of the father of an illegitimate child was unconstitutional and invalid. The effect of striking down that provision would have the consequence that the consent of both parents of such a child would be necessary, save in cases covered by section 19 of the Act. Mahomed DP pointed out that , for example, the consent of a father of a child born in consequence of the rape of the mother or of an incestuous relationship would be able to assert that his consent should first be procured before an adoption order could be granted.[37] The learned Judge held that Parliament might find that result gravely objectionable. Reference was also made to the position of a father of a child conceived in consequence of a "very casual relationship" on the one hand, and that of a father to an informal but enduring relationship, on the other. The matters which needed to be catered for by relevant amending legislation were not met at all by the existing legislation. In particular there were no legislative provisions which regulated the circumstances in which an illegitimate father might not be entitled to be consulted with regard to the adoption of his child. It was held to be in "the interests of justice and good government"[38] that proper legislation should govern the rights of parents of children born out of a relationship between them which has not been formalized by marriage. Those considerations led this Court to suspend the order of invalidity for a period of two years to enable Parliament to correct the defect in the Act.

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36 *Fraser v Children's Court, Pretoria North and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

37 Id at para 48.

38 Id at para 51.

[36] In this case, by contrast, as explained above, there are legislative safeguards in place. Moreover, the best interests of the child and similarly situated children will be prejudiced by such a suspension. Their status will be suspended with obviously detrimental consequences. On balance, for the reasons that I have furnished, the public interest, "the interests of justice and good government"[39] will not be served by an order suspending the declaration of invalidity.

[37] It follows that the order of invalidity granted by the High Court in terms of section 172(1)(a) of the Constitution should be confirmed. However, the ancillary order that the High Court made under subparagraph (b)(ii) of that section, suspending the operation of the order of invalidity, is not warranted and should be set aside. It was agreed by the parties to the appeal that there should be no order as to costs.

Order

1. The order declaring section 18(4)(f) of the Child Care Act to be inconsistent with the Constitution and invalid to the extent that it constitutes an absolute proscription of the adoption of a child born of a South African citizen by persons who are not South African citizens or persons who qualify for naturalisation but have not applied for citizenship is confirmed.
2. The order of suspension of the order of invalidity for a period of two years is set aside.

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[39] See above n 38 and accompanying text.

3. The Minister for Welfare and Population Development is requested to ensure that this judgment is brought to the attention of all commissioners and assistant commissioners of the children's court and social workers in the employ of the Department.

4. There is no order as to costs.

Chaskalson P, Langa DP, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Cameron AJ concur in the judgment of Goldstone J.

GOLDSTONE J

For the Applicant:	RF Van Rooyen instructed by the State Attorney, Cape Town.
Amicus Curiae:	D Unterhalter and T Mosikatsana on behalf of the Centre for Applied Legal Studies.