

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA
THE HON MISS JUSTICE SIMMONS JA**

PARISH COURT CIVIL NO COA2023PCCV00019

**IN THE MATTER OF an application for an
adoption order in respect of a child named
SNF known to the Adoption Board as Case
No 12/20 Southern**

AND

**IN THE MATTER of the Children (Adoption
of) Act**

**Mrs Alexis Robinson and Joshua Page instructed by Myers, Fletcher & Gordon
for the appellant**

**Jovan Bowes instructed by the Director of State Proceedings for the Child
Protection and Family Services Agency**

27, 29 May 2025 and 30 October 2026

**Appeal – Family law – Adoption – Adoption by a relative – Proposed adopter
who is a Jamaican citizen living overseas – Requirements for an adoption order
– Meaning of domicile – Requirement for the Adoption Board to place the child
into the custody of the proposed adopter for a probationary period – The best
interests of the child – Whether the proposed adopter needed a licence to
transfer the child abroad – The Children (Adoption of) Act, sections 9, 10, 23
and 24**

STRAW JA

Introduction

[1] This was an appeal against the decision of His Honour Mr Alwayne Smith, Parish Court Judge for the parish of Saint Elizabeth (‘the learned judge’), made on 4 July 2023,

refusing to grant an adoption order having considered the appellant's application for adoption.

[2] On 27 May 2025, this court heard submissions on the appeal and on 29 May 2025 the following orders were made:

- "1. The appeal is allowed.
2. The order of His Honour Mr Alwayne Smith made on 4 July 2023, is set aside.
3. The application for the adoption order is granted.
4. For the avoidance of doubt, the applicant is allowed to transfer [SNF] outside the island.
5. No order as to costs."

[3] A promise was made to provide written reasons for our decision. This judgment is a fulfilment of that promise.

Background

[4] The appellant, TAM, is a dual citizen of Jamaica and the United States of America ('the USA'), having been born and raised in Jamaica and thereafter pursuing tertiary education and gaining employment in the USA.

[5] On 12 May 2022, she applied under the Children (Adoption of) Act ('the CAA') for an adoption order in respect of her then six-year-old paternal niece SNF (also referred to herein as 'the child'). The application was supported by several documents including the consent of both biological parents to the adoption, an adoption assessment report, and, belatedly, three home visit reports. These documents (except for the adoption assessment report) were entered into evidence before the learned judge at the hearing held on 4 July 2023, on which occasion, the appellant, the child's biological parents and the adoption officer all gave sworn testimony. The adoption was also approved and supported by the Adoption Board ('the Board').

Summary of the oral evidence before the learned judge

[6] It was the appellant's evidence that she was a Professor of Special Education who resided in the USA and had been so resident for 22 years. She explained her Jamaican nationality in that she grew up in Jamaica and attended primary and secondary schools, as well as Teacher's College in Jamaica before migrating to the USA to pursue further studies. To this end, she pursued undergraduate and postgraduate studies, ultimately earning her PhD. She was then pursued by a university to join the faculty. The university offered to sponsor her US residency.

[7] The appellant stated that since migrating, she returned to Jamaica on average three to four times annually, remaining for usually three to four months. The primary period during which she would visit was usually between May and August when the school was on break. She spoke of her asset holdings in Jamaica, including a house and bank accounts. She expressed that she considered herself to have two permanent places of abode, both her residence in Jamaica and that in the USA. Nevertheless, she considered Jamaica as her home and the place of her identity. She explained her understanding of the effect of the adoption order, being that she would assume parental rights and responsibilities for SNF in all capacities, and stated that she was prepared for that. It was her intention that if the order were granted, SNF would reside with her in the USA and return to Jamaica for holidays.

[8] She testified that SNF lived under her care and possession whenever she visited Jamaica and that the longest period in which SNF was under her care was three months. However, at no time was she instructed by the Board to take SNF under her care and possession for a particular period.

[9] The evidence of both biological parents confirmed their willing consent to the adoption order being made, as well as their understanding of the effect of the order. They both expressed having financial challenges and their belief that the appellant could provide better care and financial support for their child. They also testified to the

appellant's continuous provision of financial support to their daughter, from even before she was born.

[10] The adoption officer, Ms Vanessa Hill, explained her role in the adoption process and the steps she took to facilitate the application up to the point of the hearing. Crucially, she gave evidence that the Board never delivered the child into the appellant's care for a probationary period and stated that it was not done because she did not understand it to be a legal requirement before applying for the adoption order.

Summary of the documentary evidence before the learned judge

[11] Three home visits were made by the adoption officer at the appellant's home in Saint Elizabeth. The first visit was on 13 October 2022, the second on 23 February 2023, and the third on 6 April 2023. The reports of these visits noted, among other things, that the child was supervised by the appellant when the appellant was in Jamaica, but remained with her mother when the appellant was away. Positive observations were made about the home environment, the child's health, nutrition, cognitive and social development, and recreational activities. The child was noted to have a very close relationship with the appellant, that appeared natural and unforced. The child also appeared to have a secure attachment to the appellant. It was also noted that the appellant was attentive to the child's needs and that the child loved being doted on. The home environment was noted to be a safe one in which the child would be properly cared for. It was also observed that the appellant took a keen interest in assisting with the child's academic development.

[12] An adoption assessment was done by Ms Donna Merrill, a licensed independent clinical social worker in the USA. Ms Merrill's report was addressed to the Adoption Coordinator of the Child Development Agency. Although it was not admitted into evidence as an exhibit, it was among the documents supporting the application for adoption and that were before the learned judge.

[13] Ms Merrill reported that she visited the appellant's home in the USA and interviewed the appellant. Aside from her observations of the appellant's living space (a three-bedroom home), which she noted as very clean and well-kept, her report was largely based on information provided to her by the appellant. It was her finding that the appellant's adoption plan was well thought out and had the child's best interests in mind. Further, that the appellant's knowledge and experience in the field of child development would serve to enhance the future desired for the child. It was her recommendation that the plan be implemented as soon as possible, to minimise the reported negative effects on the child when separated from the appellant.

The learned judge's reasons

[14] In a well-reasoned judgment, the learned judge examined the provisions of the CAA together with its rules and regulations. He noted in particular section 9 and concluded that the requirements of the provision were not satisfied as the application was not made in the prescribed manner and the appellant was not domiciled in Jamaica. He stated that the requirements did not afford any discretion and were mandatory.

[15] On the question of whether the application was made in the prescribed manner, the learned judge noted the requirement of the CAA for the Board to place the child into the care of the proposed adopter for a probationary period of either three or six months and that it is within three months after the expiration of the probationary period that an application may be made to the court for an adoption order. Further, that the Board has a responsibility to inspect the premises which are intended to be the permanent residence of the proposed adopter. In this instance, the evidence demonstrated that none of those requirements were met. The learned judge placed particular emphasis on the issue of the probationary period and noted that as the probationary period was not satisfied, the appellant was not qualified to seek an adoption order. That is, the appellant lacked the standing to make the application.

[16] On the question of the appellant's domicile, the learned judge stated at para. [42] of his reasons:

"... I do not accept that [the appellant] is domiciled in Jamaica. Whilst her commitment to return for summer holidays is noted, this does not equate to her living in Jamaica. Further, I do not find that the evidence discloses a substantial connection to the Island, but rather, Jamaica is where [the appellant] visits on special occasions, such as summer holidays. This view is strengthened by her evidence that she intends to take the child to the USA, which will be the child's primary permanent place of residence. [The appellant's] evidence is that the child will only return to Jamaica for summer holidays (what I consider as a special occasion). This is against the background that [the appellant] asserts that she has 2 primary places of permanent abode – Jamaica and the USA. This does not make sense, and lead [sic] to the contradictory nature of her evidence in this regard. Further, her evidence in this regard is not supported by her brother, nor the Children's Officer, Ms. Hill. They expressed that [the appellant] does not permanently reside in Jamaica, but the USA."

[17] Added to these findings, it was the position of the learned judge that the appellant ought to have applied for a licence to transfer the child abroad in keeping with section 24 of the CAA.

[18] The learned judge determined that he could not ignore the salient provision of section 10(5) of the CAA which he asserted put it beyond doubt that, "an adoption order shall not be made unless the applicant and the child reside in the island". He stated further that section 10(6) of the CAA makes provision for applicants who are not ordinarily resident in Jamaica (but treat Jamaica as their home) to succeed in an application for adoption, in which event the probationary period is six months. This was not satisfied by the appellant. Ultimately, the learned judge concluded that he was barred by sections 9(1) and 10(5) of the CAA from granting the application.

Grounds of appeal

[19] Dissatisfied with these findings of the learned judge, the appellant, in an amended notice of appeal filed on 7 October 2024, raised the following grounds of appeal before this court:

- "A. The learned Parish Court Judge erred in finding that the Appellant was not domiciled in Jamaica.
- B. The learned Parish Court Judge erred in finding that the Appellant was precluded from making an application for an adoption order under **section 10(5) of the CAA** since **section 10(6)** makes provisions for an application for an adoption order to be made by a person who is domiciled, although not ordinarily resident, in Jamaica.
- C. The learned Parish Court Judge erred in his construction of **section 10(6) of the CAA** and **section 6(a) of the Regulations** in ruling that all applicants who desire to adopt a child must be residents in Jamaica.
- D. The learned Parish Court Judge erred in holding that the Appellant's application was not made in the prescribed manner since the probationary period outlined in **section 6 of the CAA** exclusively applies to circumstances where adoption arrangements are made by the adoption board.
- E. The learned Parish Court Judge erred in adopting an overly literal and restrictive interpretation of **section 6 of the CAA**, rather than a purposive construction, resulting in an order that undermines the welfare of the child, contrary to **section 14 of the CAA** and the principles set out in **Re B (An Infant)**.
- F. The learned Parish Court Judge erred in holding that the Appellant should have made an application for a licence to transfer [SNF] abroad since the Supreme Court decision of **Re The Children (Adoption of) Act** outlined that a licence is not needed if the applicant is a relative of the child, even if the applicant resides outside of Jamaica." (Emphasis as in the original)

Affidavit evidence on appeal

[20] Affidavit evidence was filed on behalf of the appellant by her attorneys. By this evidence, the appellant reiterated her ties to Jamaica and expressed surprise at the

decision of the learned judge. She stated her view that the matter needed urgent resolution in the best interest of the child's emotional well-being and stability. The appellant expressed concern that the child had become obese due to lack of supervision of her diet. A medical report exhibited noted that the child was just over 3 feet tall and weighed 125 pounds. The doctor made recommendations for dietary changes and regular exercise. The appellant also stated that although she has provided consistent financial support for the child over the years, these resources have been misused by her parents. Concern was also raised about the child's academic performance, on the premise that the child is falling behind academically, which the appellant believed was a direct result of her living situation. The appellant asked the court, therefore, to grant the orders sought on appeal.

Submissions

[21] As there was no opposing party or contest being made to this appeal, the only submissions made before the court were those made on behalf of the appellant.

[22] Counsel for the appellant, Ms Robinson, took issue firstly with the learned judge's finding that the appellant was not domiciled in Jamaica. Counsel cited several authorities to demonstrate that place of residence alone does not determine a person's domicile and that the learned judge failed to consider the crucial element of the appellant's intention. Counsel asserted that if the appellant's intention were considered, it would have been apparent that the appellant always intended to make her permanent home in Jamaica. In essence, counsel asserted that the learned judge conflated the concepts of residence and domicile. Reference was made to the cases of **Lord v Colvin** (1854) 61 ER 697, **Jopp v Wood** (1865) 46 ER 1057, **Mark v Mark** [2005] 2 FLR 1193 and **Re X (Adoption Application: Gateway Requirements)** [2014] 1 FLR 1281 ('**Re X**').

[23] Counsel also contended that the learned judge erred in relying on the appellant's stated intention for the child to reside primarily in the USA as supporting his finding that the appellant was domiciled in the USA. Counsel pointed to the overall factual

circumstances that necessitated the decision for the child to reside in the USA and also which supported the fact of the appellant being domiciled in Jamaica.

[24] As for whether the application was made in the prescribed manner, counsel for the appellant submitted that the requirement of section 6 of the CAA for the child to be delivered into the care and possession of the adopter for a specified period of time was not intended to be of general application. Rather, it was limited to circumstances where the Board makes the arrangements for the adoption. Contrast was made with section 23 of the CAA to support the contention that Parliament acknowledged that adoption arrangements are not facilitated exclusively through the Board but can be made through other channels. In this case, the adoption arrangements were facilitated through family relations and by mutual consent. Section 6 was, therefore, inapplicable and would not serve its intended purpose of facilitating familiarity between the proposed adopter and child with a view to determining whether the adoption should proceed. Reliance was placed on the case of **Re B (An infant)** [1963] 3 WLR 471 to argue that the statutory requirements should not be interpreted strictly where there would be an absurd result or the purpose of the legislation would be subverted. In this case, the interpretation applied by the learned judge was not in the best interest of the child.

[25] Further, in relation to section 10(5) of the CAA which precludes the making of an adoption order unless the applicant and child reside in Jamaica, counsel for the appellant pointed to section 10(6) of the CAA as being a clear exception to this requirement and which was applicable in this case.

[26] Counsel for the appellant also took issue with the learned judge's finding that the appellant required a licence to remove the child from the jurisdiction, citing the case of **Re The Children (Adoption of) Act** [2015] JMSC Civ 185 to state that a licence was not necessary in this case.

[27] In all the circumstances, the court was asked to overturn the decision of the learned judge.

Discussion

[28] Based on the grounds of appeal, there were three issues for the court's consideration:

- (1) Whether the learned judge erred in finding that the appellant was not domiciled in Jamaica and thereby precluded from making an application for adoption based on the CAA and its regulations (grounds A, B, and C);
- (2) Whether the learned judge erred in finding that the appellant failed to satisfy the gateway requirements set out in section 6 of the CAA and in so doing undermined the welfare of the child (grounds D and E); and
- (3) Whether the learned judge erred in finding that the appellant needed a licence to transfer the child out of the jurisdiction (ground F).

[29] In addressing these issues, I am mindful of the applicable principles for review by the appellate court. As these issues concern both the learned judge's findings of facts and law, the principles expressed in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, and **Thomas v Thomas** [1947] 1 All ER 582 and explained in **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 ('**Rayon Sinclair**') are relevant. In **Rayon Sinclair**, Brooks JA (as he then was) detailed the law relating to the treatment by an appellate court of findings of fact, as follows:

"[9] In [**Clarence Royes v Carlton Campbell and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered 3 November 2005] Smith JA set out the principles that should guide an appellate court in considering findings of fact by the court at first instance. The other members of the panel agreed with the principles which he set out at pages 21-23 of his judgment:

'...The authorities seem to establish the following principles:

1. The approach which an appellate court must adopt when dealing with an appeal where the

issues involved findings of fact based on the oral evidence of witnesses is not in doubt. The appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was 'plainly wrong'. - See **Watt v Thomas** (supra), **Industrial Chemical Company (Jamaica) Limited** (supra); **Clifton Carnegie v Ivy Foster** SCCA No. 133/98 delivered December 20, 1999 among others.

2. ...

3. In an appeal where the issues involve findings of primary facts based mainly on documentary evidence the trial judge will have little if any advantage over the appellate court. Accordingly, the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with the finding of the trial judge - See Rule 1. 16(4)

4. Where the issues on appeal involve findings of primary facts based partly on the view the trial judge formed of the oral evidence and partly on an analysis of documents, the approach of the appellate court will depend upon the extent to which the trial judge has an advantage over the appellate court. The greater the advantage of the trial judge the more reluctant the appellate court should be to interfere.

5. Where the trial judge's acceptance of the evidence of A over the contrasted evidence of B is due to inferences from other conclusions reached by the judge rather than from an unfavourable view of B's veracity, an appellate court may examine the grounds of these other conclusions and the inferences drawn from them. If the appellate court is convinced that these inferences are erroneous and that the rejection of B's evidence was due to an error, it may interfere with the trial judge's decision – See Viscount Simon's speech in **Watt v Thomas** (supra)."

[30] These principles for review are particularly relevant to issue one, which I will now consider.

Issue (1) – Whether the learned judge erred in finding that the appellant was not domiciled in Jamaica and thereby precluded from making an application for adoption based on the CAA and its regulations (grounds A, B, and C)

[31] Section 9(1) of the CAA provides that the Court may, subject to its provisions, make an adoption order upon an application made in the prescribed manner by a person domiciled in the island.

[32] Sections 10(5) and (6) of the CAA provide:

“(5) Subject to subsection (6), an adoption order shall not be made unless the applicant and the child reside in the Island.

(6) An adoption order may be made on the application of a person who, although domiciled in Jamaica, is not ordinarily resident in Jamaica; so, however, that in relation to such an application the provisions of this Act shall be modified by the substitution in subsections (1), (2) and (3) of section 6 of the words ‘period of six months’ for the words ‘period of three months’.”

[33] These provisions demonstrate that if the appellant is neither domiciled nor ordinarily resident in Jamaica, she has no standing to obtain the adoption order. The learned judge was correct to conclude that the appellant was not ordinarily resident in Jamaica. This was supported by the evidence. The appellant primarily resides abroad and had done so for the 22 years prior to the court hearing on 4 July 2023. She indicated that this is for professional purposes.

[34] As far as the issue of domicile was concerned, it was my view that the learned judge erred in his assessment, as the unchallenged evidence of the appellant has to be considered in its totality. There is support for this view expressed in **Mark v Mark**. The factual circumstances of that case were substantially different from the case at bar, but it held that domicile of choice was a question of fact, not of law, requiring the combination

and coincidence of residence in a country and a *bona fide* intention to make a home in the country permanently or indefinitely.

[35] Concerning the appellant, her evidence was that she was born and raised in Jamaica and that her nationalities are both Jamaican and American. After attending Bethlehem Teachers College in Saint Elizabeth, she migrated to the USA for further studies. She completed undergraduate studies, then her master's and doctoral degrees. When her studies were completed, she was asked by a university to be a part of the faculty in 2013. They also offered to sponsor her US residency as part of the process. At the time of the hearing before the learned judge, she had been with the university for six years. However, throughout her studies and employment in the USA, she returned to Jamaica, on average, three to four times per year. Over the five years prior to the hearing, her primary period of visit was between May and August yearly, as this is when "the school is on break". At the time of the hearing in July 2023, she was on vacation leave with the intention to return to the USA at the end of August.

[36] The appellant has a home in Constitution District, Balaclava, Saint Elizabeth and is the legal title owner. She considers this to be her home and poignantly stated that there is her "identity", "[t]here is the place that made [her] who [she is] today". Her family lives there, including SNF. She expressed further that "the people who [she] feel[s] committed and loyal to live [t]here including [her] sibling and parents". Her evidence also was that she has bank accounts in the jurisdiction and contributes to the National Housing Trust. She stated further that she did not consider her visits to be temporary in nature because of her family and SNF. The appellant also expressed that she has two permanent places of abode, one in Jamaica and one in the USA.

[37] While the learned judge determined the appellant was not ordinarily resident in Jamaica as required by section 10(5) of the CAA, he failed to properly consider whether she was domiciled in Jamaica as required by section 10(6).

[38] The learned judge, at paras. [36] and [37] of his reasons, referred to two definitions of the word "domicile". At para. [36] he referred to the Oxford Dictionary definition as "the country that a person treats as their home, or lives in and has a substantial connection with". Further, he referred to the definition of the word in the Immigration Restriction (Commonwealth Citizens) Act where the definition reads in part:

"[T]he place in which a person has his present home or in which he resides or to which he returns as his place of present permanent abode and not for a mere special or temporary purpose ..."

[39] It did appear, however, that the learned judge conflated "domicile" with "residence" as he went on to reference section 10(5) of the CAA at para. [38] of his judgment, which speaks to the applicant and child residing in the island. He concluded that the adopter and child must be permanent residents of Jamaica for an adoption order to be made. The learned judge stated at para. [38]:

"Further, **s 10(5) of the CAA** makes is [sic] very clear: '*an adoption order shall not be made unless the applicant and the child reside in the island*'. Similarly, the Act does not define the word 'reside'. Using the same guidance on statutory interpretation, the natural and ordinary meaning of this word, using the dictionary, means, '*to live, to have as your home, to have as your residence...*'" (Bold and italics as in the original)

[40] He repeated a similar finding at para. [43]:

"... from all the evidence, I find that [the Appellant] does not permanently reside in Jamaica and neither does she intend to adopt the child to permanently reside in Jamaica. ..."

[41] When one considered the entirety of the CAA, this reasoning could not be sustained. Firstly, domicile and residence are not necessarily the same. Section 10(6) of the CAA allows for exceptions to be established as regards permanent residence in Jamaica. An adoption order may be made if the applicant is domiciled in Jamaica but not ordinarily resident.

[42] In **Re X**, where the UK Adoption Act was being considered, the court had to determine whether the applicant was domiciled in the UK or habitually resident for a year prior to making the application as the statute required. At para. 12, Theis J stated that there was no issue about that on the facts of the case. She indicated that the applicant had retained his domicile of origin, that he had set out in detail in his statements his continuing ties to the UK, the fact that he had retained a property there, that he intended to retire and live in the UK in about seven years' time and on his death to be buried there.

[43] **Jopp v Wood** is also helpful in a further consideration of domicile. The issue concerned a domiciled Scotsman, who was not in the service of the Indian government but resided there. He went to India and resided there for his private business. However, he always retained the wish and intention of returning finally to Scotland. The court held that he never lost nor intended to lose his original Scottish domicile. The appellant in the case had argued that there had been a change of domicile from Scotland to India because of the long continued residence of the testator in the latter country. Turner LJ stated as follows (at pages 1059 to 1060):

"... nothing is better settled with reference to the law of domicil than that the domicil can be changed only *animo et facto*, and although residence may be decisive as to the *factum*, it cannot, when looked at with reference to the *animus*, be regarded otherwise than as an equivocal act. The mere fact of a man residing in a place different from that in which he has been before domiciled, **even although his residence there may be long and continuous, does not of necessity shew that he has elected that place as his permanent and abiding home.** He may have taken up and continued his residence there for some special purpose, or he may have elected to make the place his temporary home. But domicil, although in some of the cases spoken of as 'home' imports an abiding and permanent home, and not a mere temporary one." (Emphasis supplied)

[44] Based on the evidence outlined, the appellant's domicile of origin is Jamaica, in which she was born and raised. Although the appellant's residence in the USA has been long and continuous, it is apparent that she took up residence there for a special purpose,

initially educational pursuits and subsequently employment. She maintains a home in Jamaica to which she returns at various times during the year, when she is on a break. She has also expressed a strong emotional attachment to her family in Jamaica and considers Jamaica as one of two permanent homes. These facts, along with her expressed intention is supportive of a conclusion that Jamaica could be determined to be her abiding and permanent home. It was my view, therefore, that her unchallenged evidence is sufficient to ground a basis for concluding that she is domiciled in Jamaica and had the requisite standing to make an application for an adoption order.

[45] Grounds A, B, and C, therefore, succeeded.

Issue (2) – Whether the learned judge erred in finding that the appellant failed to satisfy the gateway requirements set out in section 6 of the CAA and in so doing undermined the welfare of the child (grounds D and E)

[46] Sections 6(1), (2), and (3) and section 10(6) (already cited, see para. [32] above) of the CAA are the relevant portions. Sections 6(1), (2), and (3) provide:

“6.--(1) Where arrangements are made by the Board for the adoption of a child, an application to the Court for an adoption order in respect of the child shall not be made by the adopter until the expiration of a period of three months from the date upon which the child is delivered into the care and possession of the adopter pursuant to the arrangements and at any time during that period-

(a) the adopter may give notice in writing to the Board of his intention not to adopt the child; or

(b) the Board may cause notice in writing to be given to the adopter of their intention not to allow the child to remain in the care and possession of the adopter,

and where a notice is so given, the adopter shall, within seven days of the date on which the notice was given, cause the child to be returned to the Board for the purpose of restoring the child to the parents or guardian.

(2) The Board shall appoint one or more persons whose duty shall be to keep the child under close supervision during the

said period of three months in accordance with regulations made under this Act.

(3) If, at the expiration of the said period of three months, no notice has been given as aforesaid, the adopter shall within three months from the date upon which that period so expired apply to the Court for an adoption order in respect of the child or shall give notice in writing to the Board of his intention not to apply for such an order, and, where notice is so given or where an application for an adoption order in respect of the child is refused by the Court, the adopter shall, within seven days of the date on which the notice was given or of the date upon which the application is so refused, as the case may be, cause the child to be returned to the Board for the purpose of restoring the child to the parents or guardian."

[47] An application for an adoption order is not to be made by the adopter until the child has been delivered into the care and possession of the adopter for three months pursuant to the arrangements made by the Board (section 6(1)). In this case, the relevant period is six months (see section 10(6)), as the appellant has been determined to be domiciled but not ordinarily resident in Jamaica. The Board is to appoint one or more persons to keep the child under close supervision during the period of three months or (in this case) six months in accordance with Regulations made under the Act.

[48] The Regulations are found in the first schedule to the CAA and paint in greater detail the requirements. Regulation 6 sets out that the child is not to be delivered into the care and possession of the adopter until:

"(a) the adopter has been interviewed, and any premises in the Island in which the adopter intends that the child should reside permanently have been inspected by the case committee or some person on their behalf; ..."

[49] Regulation 7 provides:

"At least once during every month of the probationary period of three months or six months, as the case may be, ... a representative of the Board shall visit the child and also visit or otherwise make contact with the parents or guardian of the

child and shall report upon the case and the result of such visits and contact to the case committee. ...”

[50] On the strict requirements of the CAA, SNF ought to have been placed with the appellant for a period of six months and the requirements set out in the Regulations then effected accordingly. It is interesting to note that, at para. [49] of his judgment, the learned judge expressed that the CAA is an aged legislation, “[n]evertheless, as a creature of Statute, without more, I must respect the provisions of Parliament and deny the application”.

What actually happened

[51] As the learned judge determined, the Board never delivered SNF into the care and possession of the appellant, and SNF was never physically in the care and possession of the appellant for six months prior to the court hearing. The adoption officer assigned to the case stated that she was ignorant of these provisions of the CAA. The learned judge considered these provisions and rightly concluded that the prescribed probationary period was never satisfied.

[52] The evidence revealed that an initial adoption application was submitted to the court by the Board prior to 10 October 2022, but was discontinued. While the reason for discontinuing is not clearly stated, it appears this was because there were no home visit reports. Subsequently, an amended court factual report and three home visit reports were submitted. The home visit reports were dated 13 October 2022, 23 February 2023, and 6 April 2023. These would supposedly be the reports from the once-monthly visits to be made by the adoption officer for three or six months before the application. The relevant adoption application by the Board (as seen in the records) was filed in court on 14 June 2023. However, the six-month placement period would not have been carried out prior to this application.

[53] The appellant admitted that SNF was never placed in her care by the Board and at the time of the application to the Board, she was never instructed to take SNF under her care and possession for any specific period.

[54] However, as stated previously, there were three home visits by the adoption officer, Ms Hill. In report dated 13 October 2022, Ms Hill indicates that she visited the appellant's house in Balaclava, Saint Elizabeth. SNF was present there. On this visit, the appellant was present in the island and at home with SNF. It is noteworthy to include the adoption officer's assessment of the appellant's relationship with SNF as well as her assessment and recommendation:

"Relationship with Applicant

The applicant and the adoptee have a very close relationship and they are aunt and niece. Whenever the applicant is here in Jamaica, she cares for the proposed adoptee during the week and wherever she goes the proposed adoptee is with her. The proposed adoptee enjoys the attention and gifts that the applicant gives to her, therefore it is difficult when they both have to be apart. During this time the applicant and the proposed [sic] communicated by telephone and video calls frequently.

Assessment and Recommendation

The adoptee is loved and cared for by her family. She loves both her parents and appears to be a happy child. The applicant has a very strong bond with the adoptee and wishes to make their relationship more permanent.

Observation of the proposed adoptee and the applicant's relationship is that, it is natural and not forced. The proposed adoptee appears to have a secure attachment with the applicant where her needs are being met."

[55] In the report dated 23 February 2023, Ms Hill stated that SNF is supervised by the appellant while she is here during the winter and summer breaks and that SNF resides with her mother during the appellant's absence. The assessment and recommendation are favourable. In the report dated 6 April 2023, a similar positive assessment is made.

[56] Counsel has sought to get around the procedural requirements as set out in section 6 of the CAA on two bases. Firstly, that this is not a circumstance where the Board made the adoption arrangements. Therefore, the requirements should be restricted to

circumstances where the Board itself has instigated the adoption arrangements and that it is necessary where the proposed adoptee is a literal stranger to the proposed adopter. The Board would be obliged to ensure that both parties become familiar with each other and they would be able to assess whether the proposed adoption is in the best interest of the child; also that both parties are comfortable with the adoption arrangements being finalised. In reliance on this contention, counsel referred the court to section 23 of the CAA.

[57] That section makes it unlawful for a person, in connection with any arrangements made for the adoption of a child who is a Jamaican citizen, to permit or cause the care and possession of the child to be transferred to a person who is not a citizen of a scheduled country or the guardian or relative of the child and who is resident outside the island. It is also unlawful for a person to permit or cause the care and possession of the child to be transferred to a person who is a citizen of a scheduled country and who is not a guardian or relative, without a licence being granted under section 24. These restrictions would not apply to the appellant, who is the aunt of SNF and also a citizen of a scheduled country (see the fifth schedule of the CAA).

[58] This argument, however, cannot succeed. Parliament established the Board and enacted the CAA to regulate all adoption proceedings in the jurisdiction. While adoption arrangements may be made otherwise, they cannot be effected locally without the Board's involvement. This is clear when all the pertinent sections of the CAA are considered in totality. Section 2(1) of the CAA defines "adopter" as a person who is proposing to adopt, or who has adopted a child in pursuance of an "adoption order" and "adoption order" means an order made under section 9 of the CAA by the court. Section 9(1) reads:

"Subject to the provisions of this Act, the Court may, upon an application made in the prescribed manner by a person domiciled in the island make an order authorizing the applicant to adopt a child."

[59] For the process to be completed, an application must be made to the Board. The court may authorise the adoption, subject to the provisions of the CAA. No legal adoption can, therefore, be made locally outside of arrangements made by the Board.

[60] Counsel's alternative submission is that the learned judge failed to consider a purposive interpretation of section 6 of the CAA based on the specific facts of this case. Counsel asked the court to consider that this case is concerned with arrangements organically arising out of a familial relationship between two parties, whereas the probationary period is necessary and reasonable to ensure that both adoptive parents and the child have an opportunity to get to know each other and to determine whether the desired adoption should proceed. Reliance was placed on **Re B (An Infant)** in which the court noted the absurd result of a strict interpretation of statutory requirements relative to continuous care and possession. In that case the court considered section 3(1) of the UK Adoption Act, 1958, which provides:

"An adoption order shall not be made in respect of any infant unless he has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order, not counting any time before the date which appears to the court to be the date on which the infant attained the age of six weeks."

[61] In **Re B (An Infant)**, the court determined that it would be absurd to construe the section in its strictly literal terms. It was a question of whether requirement for continuous care and possession was satisfied where the mother who sought to adopt her own illegitimate child, worked night shifts as a nurse and paid a couple to care for the child while she was at work. The court concluded that it would be foolish to suppose that the legislature could have intended that no such adoption order could be made in those circumstances. The court interpreted possession as not meaning continuous physical propinquity of the infant's person (see page 476). Those circumstances are, however, distinct from the case at bar.

[62] Counsel contended that the CAA is not requiring continuous care and has not been worded that way. It is true that the UK Act speaks to the infant always having her home with the applicant during the period of six months preceding the application. Those words “at all times” are not present in the CAA but it is apparent that Parliament intended that the delivery of the child into the care and possession of the proposed adopter for the specified period must essentially be continuous for a proper assessment to be made as to the feasibility of the adoption process. This is not a scenario where the adopter is absent some hours from the home while at work as in **Re B (An Infant)**. Clearly the intention would be defeated if a proposed adopter could be more absent than present during the three or six-month period. I was, therefore, not minded to give such an interpretation to section 6.

[63] Those conclusions aside, however, I took note of some weighty considerations and observations made by the court in **Re X**. Theis J had to consider, among other gateway requirements, whether, pursuant to section 42(3) of the UK Adoption and Children Act 2002, the adoptee has had her home with the applicant at all times during the period of six months preceding his application. The adoptee was the child of the applicant’s wife. Counsel, on behalf of the local authority, submitted that the purpose of section 42(3) is to ensure that the child has spent sufficient time living with the applicant in a home environment to enable the court to be satisfied that they are sufficiently well matched for the adoption to be likely to be successful and the word “home” should be considered in that context.

[64] Theis J considered **Re B (An Infant)** at para. 22:

“The much more difficult question in this case concerns the requirement in s 42(3) that X:

‘[M]ust have had [her] home with the applicant or, as the case may be, applicants at all times during the period of six months preceding the application’.

Similar requirements were used in the CA 1975 and AA 1976. Prior to that s 3(1) of the Adoption Act 1958 stated:

'An adoption order shall not be made in respect of any infant unless he has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order, not counting any time before the date which appears to the court to be the date on which the infant attained the age of six weeks.'

This more demanding test was considered in *Re B. (An Infant)* [1963] 3 W.L.R. 471 in which Buckley LJ determined that the Court had jurisdiction to make an adoption order where the mother, who sought an order to adopt her own illegitimate child, worked night shifts as a nurse and paid a married couple to care for the child while she was at work. Buckley LJ held that, at 8;

'A widowed mother, compelled to earn a living to maintain her child and herself, might well find herself in just such a situation as the applicant and might, as it seems to me, make just such arrangements as the applicant has made for the care of her child without surrendering any part of her parental control or responsibilities.'

Buckley LJ noted concerning the application of the provision that:

'....the section cannot reasonably be construed in its most strictly literal terms. In this connection it must be borne in mind that the Act is not confined in its operation to the adoption of infants in arms. It is equally applicable to the adoption of a child of school age or a young man or woman of 20. To suppose that the legislature could have intended that no order could be made in any case in which the infant in question had within the past three months attended a school would be foolish, although, while at school, the child would be subject to the discipline of the school and would be more literally in the care of the school authorities than of the prospective adopter. It would be equally unreasonable to suppose that an applicant would be prevented from obtaining an order if he or she had on any occasion in the past three months left the child for a short time in the care of a servant, relation or neighbour or if the infant had paid a short visit to a friend. It would no doubt be unwise to

attempt to define what is meant by the words 'continuously [sic] the care and possession of the applicant' in this section and I shall make no such attempt.'

Courts have subsequently looked to the intention of the provisions and have interpreted the provision so as to have application to the varied family situations (see Munby J (as he then was) *Re SL (Adoption home in jurisdiction)* *ibid*). ..."

[65] She found, however, that the applicant did not meet the gateway requirement of section 42(3) and stated at para. 33:

"33. In my judgment, the applicant, on the particular facts of this case, does not meet the gateway requirement of s 42(3) that require him to establish, on the balance of probabilities, that 'the child must have had his home with the applicant ... at all times during the period of six months preceding the application'. I have reached that conclusion for the following reasons:

(1) It is accepted that any period in boarding school should be disregarded. The evidence, in my judgment, establishes (contrary to the position set out in the applicant's statements that each long school holiday since January 2011 had been spent with the applicant) that prior to October 2012 the applicant has spent only very limited physical time with X. Even adopting a wide lens, as Ms Cronin invited me to do, at most it has consisted of three or four relatively short periods spent in country C (two in 2009 and Christmas 2009/2010 and one occasion in 2010), four relatively short periods spent in the applicant's home in country B (the first in January 2011 was to be on hand for a week or so when X started school, followed by a week or so Easter and Summer 2011 and possibly Easter 2012), one period in country A (Christmas 2011). In the context of the 6-month period prior to October 2012 it consists, at most, of possibly a week or so in country B, but the applicant's oral evidence on this was somewhat vague. He thought he 'may' have spent some of the Easter holidays in 2012 with X in country B. So the factual position is that in the 6 months prior to this application X had, at most, spent only a week or so with the applicant in any home.

(2) Whilst it is correct that the applicant appears to have taken on financial and moral responsibility in providing for X and, according to the applicant, they are in regular contact by telephone, email and text, that does not, in my judgment, equate to having a 'home with the applicant' even allowing for the most flexible and purposive construction of the provision. **Making all due allowances for the international nature of this family, the purpose of s 42, ACA 2002 is to ensure the child has spent sufficient time living with the applicant in a home environment to enable the court to be satisfied that they are sufficiently well matched for the adoption to be likely to be successful.** It is difficult to see how that gateway requirement has been met on the facts of this case.

(3) Ms Cronin invites the court to look at the widest picture of the facts. I take that to mean not limiting the analysis to the 6 months, but to look at the *modus operandi* of the family outside that time period to inform the picture within the 6-month time frame. That, in my judgment, **does not assist as the picture on the evidence is of intermittent times being spent together in different locations, the longest being no more than 2 weeks.** It was revealing when asked where he thought X would think her home is, the applicant replied country B, more specifically her boarding school.

(4) A powerful force in considering my decision has been the welfare considerations, which are not in dispute, and drive the court in the other direction from the conclusion I have reached. Rather like Sheldon J *Re Y (Minors) (Adoption: Jurisdiction)* I have conflicting emotions. I have no reason to doubt that it would be in the best interests of X to be adopted by the applicant. But however powerful those considerations are they cannot, in my judgment, change the hard, stubborn facts of the case, **even giving the provisions their most purposive construction. None of these relatively short stays, taken individually or cumulatively could accurately describe X as having had her home with the applicant in the 6 months prior to the application.**" (Emphasis supplied)

[66] In contrast to the circumstances in **Re X**, the case at bar reveals a radically distinct dynamic family situation. The evidence of care and possession by the appellant has been

set out above. It is instructive, however, to set out the actual periods of the appellant's care and possession over an extended period.

[67] SNF is the niece of the appellant, her father being the appellant's brother, DAF. SNF and the appellant have had a strong bond from SNF's birth. The application states that the child has been in the appellant's care and has been brought up, maintained, and educated by her since September 2015 (this is from birth). This is uncontested.

[68] SNF's mother, KNS, supported that the appellant has been helping with the child from pregnancy up to the hearing. She also supported that SNF stayed every summer and Christmas at the appellant's house. The longest period of SNF's stay with the appellant at any one time was three months and some days. The appellant's brother also agreed that the longest period of SNF's stay with the appellant was three and a half months. This has been continuous for years.

[69] The frequency of the appellant's visits to Jamaica is, therefore, noteworthy. Once she is in Jamaica, SNF lives with her at her house in Saint Elizabeth. Both SNF's mother and father support the appellant's testimony in this regard. As stated previously, the appellant visits Jamaica three to four times per year with a cumulative period of three to four months. In 2020, SNF was under her care and possession for three months from June to 21 September 2020. Prior to February 2020, SNF was under her care from November 2019 to January 2020 and May 2019 to August 2019. The adoption application was resubmitted to the court on 14 June 2023. In the year preceding the resubmission, the appellant visited Jamaica between June to July 2022 for her usual summer break, then October 2022 for one week, November to December 2022 for five to six weeks, and finally January 2023 for two weeks. She was also present in the island for one and a half weeks prior to the court hearing held in June 2023. Her plan was to stay to the end of August to return to work in September. She indicated that her visits to Jamaica over the years have been to see her family and SNF.

[70] Without taking note of the couple of weeks or days yearly, from 2019 to 2022, SNF would have been continually in the appellant's care and possession for three to four months for each of those years.

[71] Further, this history relates only to the years 2020 to 2023. The evidence reveals a consistent and substantial relationship between SNF and the appellant from birth (2015). This is borne out by the parents and in the interviews by the adoption officer during the three home visits.

[72] Having considered all the above evidence, I wholeheartedly agreed with the assessment of Theis J at para. 33(2) of **Re X** concerning the provision of section 42 of the UK Adoption and Children Act 2002 (which is essentially similar to section 6 of the CAA). It has been set out previously but is repeated for expediency:

"... Making all due allowances for the international nature of this family, the purpose of s 42, ACA 2002 is to ensure the child has spent sufficient time living with the applicant in a home environment to enable the court to be satisfied that they are sufficiently well matched for the adoption to be likely to be successful. ..."

[73] While the focus is not merely to be on the relationship between the adopter and the child (as devoted as this is in the present case), the court had sufficient and uncontested evidence of prolonged periods when SNF was in the care and possession of the appellant, spanning from her birth in 2015 up to 2023. The evidence also revealed the feasibility of the adoption, as there was no intention by the appellant to terminate the adoption application or any concerns by the Board about the unsuitability of the proposed adoption (see section 6 of the CAA as well as the home visit reports).

[74] It was my view, therefore, that the adoption order ought to be granted in all the specific circumstances. However, it is to be understood that no precedent is being established in this matter in relation to a trial judge's assessment of the procedural requirements of the CAA. The pressing concern for this court was whether, in these circumstances, this court should require a strict interpretation of section 6 or whether a

purposive approach to the requirements of the CAA ought to be adopted. Further, it was clearly in the best interests of the child that the adoption order be granted. The factual circumstances weighed heavily on the side of allowing such a purposive construction to the statutory requirements to be given. In doing so, it was thought fitting to adopt the words quoted by Theis J at para. 22 in **Re X** in quoting Munby J, that courts have looked to the intention of the provisions and have interpreted the provision to have application to the varied family situations. Having considered all the above, I formed the view that the appeal should be allowed and the adoption order made.

[75] Ground of appeal E, therefore, succeeded.

Issue (3) – Whether the learned judge erred in finding that the appellant needed a licence to transfer the child out of the jurisdiction (ground F)

[76] This did not require much debate. Section 24 of the CAA empowers the Court to grant a licence subject to the conditions and restrictions as it thinks fit “authorizing the care and possession of a child for whose adoption arrangements have been made to be transferred to a citizen of a scheduled country resident outside the Island; ...”. However, section 24 has to be read in connection with section 23 subsections (1) and (2) of the CAA:

“23-(1) It shall not be lawful for any person, in connection with any arrangements made for the adoption of a child who is a citizen of Jamaica, to permit, or to cause or procure, the care and possession of the child to be transferred to a person who is not a citizen of a scheduled country or the guardian or a relative of the child and who is resident outside the Island.

(2) It shall not be lawful for any person, in connection with any such arrangements as aforesaid, to permit, or to cause or procure, the care and possession of such a child as aforesaid to be transferred to a person who is a citizen of a scheduled country resident outside the Island and who is not the guardian or a relative of the child, unless a licence has been granted in respect of the child under section 24.”

[77] Sections 23 and 24 deal with restrictions on sending children abroad for adoption. These sections would not permit an applicant who is not a citizen of a scheduled country or the guardian or relative of a child and who is resident outside the Island to have a child transferred into their care and possession. Section 24 then places a further restriction on the transfer of the child to a person who is a citizen of a scheduled country resident outside the island but is not a guardian or relative. In such a case, a licence would have to be granted by the court. In this case, there would be no barrier to the appellant who, although resident outside the island, is a relative of the child. No application for a licence would, therefore, have been required by the appellant.

[78] Ground of appeal F, therefore, succeeded.

[79] It is for these reasons, that the court made the orders set out at para. [2] above. It bears repeating that this decision does not create any precedent that the full requirements of the CAA should not be followed.

D FRASER JA

[80] I have read, in draft, the reasons for judgment of my learned sister Straw JA and I agree that it was for these reasons that I concurred with the orders made. I have nothing else to add.

SIMMONS JA

[81] I, too, have read, in draft, the reasons for judgment of my learned sister Straw JA, which accord with my own reasons for concurring with the court's decision. I have nothing else to add.