

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)**

PARISH COURT CIVIL APPEAL NO COA2022PCCV00008

BETWEEN	KAR	APPELLANT
AND	RCF	1st RESPONDENT
AND	OFFICE OF THE CHILDREN'S ADVOCATE (AS GUARDIAN AD LITEM)	2nd RESPONDENT

Ms Deanna McFarlane for the appellant

The 1st respondent absent and unrepresented

Mrs Kaye-Anne Parke instructed by the Office of the Children's Advocate for the 2nd respondent

Ms Lisa White and Ms Karessian Gray instructed by the Director of State Proceedings (on the invitation of the court)

8, 10, 15 October 2024 and 17 October 2025

Family Law – Adoption – Application for adoption of minor child – Child with special needs – Factors relevant to the court's determination – Whether the learned Judge of the Family Court erred in refusing the application for adoption – Sections 9, 10, 14 and 20 of The (Children Adoption of) Act

P WILLIAMS JA

Introduction

[1] This appeal concerns the refusal by Her Honour Miss Pamela Blackhall ('the learned judge of the Family Court'), presiding in the regional Family Court for the parishes of Saint James, Hanover, and Westmoreland, to grant a final adoption order in respect of

minor, OAR. KAR ('the appellant'), who had applied to adopt OAR, now seeks orders that the refusal be set aside and that, pursuant to section 14 of the Children (Adoption of) Act ('the Act'), he be granted an adoption order in respect of OAR. All names and other identifying details of the parties have been omitted to ensure the child's identity remains protected.

Background to the proceedings

[2] OAR was born on 6 July 2012; he is now 13 years old, and at the time of the hearing, he was nine years old. He has a medical history that includes meningomyelocele (a severe form of spina bifida where the spinal canal does not close completely during foetal development) that was repaired at birth, hydrocephalus (which causes a learning disability), and talipes equinovarus (clubfoot). These issues contributed to incontinence, hearing impairment in the left ear, allergic conjunctivitis in the left eye, rhinitis, and tinea (a skin condition).

[3] The appellant has no biological relation to OAR. He described himself as a citizen of the United Kingdom and a naturalised Jamaican by descent of both parents. On 19 February 2020, the appellant filed the application for an adoption order in the Family Court holden at Montego Bay, Saint James. This application was supported by the requisite forms and a notice to the court in an adoption application dated 12 February 2020, from an adoption officer (subsequently designated as a children's officer in the adoption unit and to be referred to as the children's officer in this judgment) assigned to the case. It is from these documents that relevant background information will be gleaned.

[4] In his particulars accompanying the application, the appellant stated that he was 55 years old, single, lived in the parish of Westmoreland, was domiciled in Jamaica, and was a university lecturer. In the notice, it was stated that the appellant learned of the intention of OAR's mother, RCF ('the 1st respondent'), to give up OAR for adoption because she was unable to care for him, via a social media post. In August 2016, the 1st respondent placed OAR in the appellant's care, and he attended to OAR's needs without

the help of the biological parents. It was asserted that OAR “is closely bonded” with the appellant, who in turn “has bonded” with OAR. The 1st respondent’s consent to the adoption order was included in the application, but OAR’s father, who could not be located at the time of filing, did not provide consent. It was noted that he had played no vital role in OAR’s life.

[5] It was also stated in the notice that a letter of responsibility had been provided, and Mrs Norma Hibbert (‘Mrs Hibbert’) was named as the individual who would assume care and responsibility of OAR in the event of any unforeseen circumstances in relation to the appellant. In the statement to be lodged by the Adoption Board (‘the Board’) dated 27 January 2020, Mrs Hibbert of a Kingston address was named as the guardian of OAR, and it was stated that he was in the actual custody of Mrs Hibbert. It was also stated that the written consent of both the father and the mother was appended thereto (although the consent of the father is dated 27 February 2020).

[6] The children’s officer asserted in the notice that due diligence had been taken by the Board and the Child Protection and Family Services Agency (‘CPFSA’) to assess the appellant’s application. The reason for this due diligence can be surmised from the bald sentence following this assertion: “[f]irst [the appellant’s] eligibility to adopt a Jamaican child, given that [the appellant] worked in the Netherlands (and intends to take (OAR) with him), and a home-study report was not produced of his residence in the Netherlands, as Jamaica is not a signatory to the Convention on Inter-country Adoption”. In any event, the children’s officer concluded with the request that the court grant an adoption order for OAR by the appellant.

The proceedings before the Family Court

[7] The record of proceedings commences with the notes of evidence recorded by the learned judge of the Family Court as of 4 August 2021. She explained that no notes were taken before that date, as the matter was initially to be heard on paper. However, in her reasons for the refusal, the learned judge of the Family Court outlined in some detail what occurred on all the dates when the application came on for hearing. Also of

assistance in an appreciation of the proceedings before the Family Court is a record of the hearings prepared by the children's officer.

[8] On 19 February 2020, when the matter was first before the court, no determination could be made. The learned judge of the Family Court explained that this was due to the fact that there was an absence of a home study report, which was necessary to facilitate the granting of the application, together with the issuance of a licence for the transfer of a child abroad. At that time, the appellant was residing and working in the Netherlands, which is a non-scheduled country for the purpose of an adoption in Jamaica. The learned judge of the Family Court observed that since the appellant's express intention to adopt OAR was in order to take him to the Netherlands to live with him and to access medical care, the application fell within the inter-country adoption category. She further considered that a home study report was a prerequisite for granting an inter-country adoption order in such circumstances.

[9] At the first hearing, the learned judge of the Family Court also expressed concern that RCF had failed to account for the absence of OAR's father, and was also concerned about the absence of proof of his consent to the adoption. The learned judge of the Family Court was not satisfied that a sufficient basis had been established for dispensing with the father's consent.

[10] The matter was next before the court on 9 March 2020, at which time no order was made in light of the continued absence of the home study report from the Netherlands or any background information on the appellant. The appellant was requested to provide an affidavit detailing his career, occupation, and previous overseas addresses. When the matter was returned to court on 11 March 2020, OAR's father had been located and his consent obtained. The appellant informed the court of his intention to return to the Netherlands, and requested that OAR be placed in state care. As a result of the request, the learned judge of the Family Court indicated that no further hearing date would be fixed.

[11] Subsequently, a care and protection matter was laid before the Family Court holden in Westmoreland by the CPFSA on separate dates from 16 March 2020 to 20 April 2020, but neither the appellant nor OAR attended. As a result, the matter was withdrawn by the CPFSA.

[12] Although there was no resumption of hearings in the application, several documents were sent to the court relative to the matter. Among them was a character reference for the appellant, dated 2 April 2020, from Ms Lorraine Pamela Allen ('Ms Allen') of Reddish, Stockport, United Kingdom. In the reference, Ms Allen described her relationship with the appellant as his being "the third child of [her] aunty on [her] mother's side". The appellant filed a character affidavit dated 13 May 2020. He stated that he was temporarily residing in the Netherlands, and he outlined his educational and employment records. Two letters dated 30 July 2020 were submitted on behalf of the appellant. The first acknowledged receipt of an email dated 23 July 2020, from the appellant and agreed to his "request to terminate his contract with [the] school with immediate effect". This letter was purportedly signed by Mr Harrie van Vessem, "HR & Payroll Officer, ESH Luxury Hotelschool, Paris & The Hague". The second letter, dated 30 July 2020, was addressed to the appellant and "referenced his request for a reference". This letter was purportedly signed by Jean-Axel Pasedeloup, "Vice-President, LH Luxury Hotelschool". Also submitted was a report dated 13 August 2020, from the children's officer pursuant to her visit to the appellant's home in Whitehouse, Westmoreland on 13 August 2020. In her review of the documents filed, the learned judge of the Family Court noted that, instead of providing a home study report, the appellant provided email correspondence with schools in the Netherlands in which he hoped to have OAR enrolled.

[13] Subsequently, the appellant filed an affidavit dated 16 September 2020, requesting that the court proceed with the determination of the application and fix a time for the continuation of the hearing. The learned judge of the Family Court explained that due to the onset of the COVID-19 pandemic and the protocols established during this

time, the matter could not be heard. She further stated that the appellant was advised that he should utilise the time to provide the requested information to the CPFSA.

[14] In her account of the proceedings, the children's officer indicated that on 2 September 2020, a meeting was held with the learned judge of the Family Court. It is not clear who else was in attendance at this hearing. The children's officer stated that the learned judge of the Family Court made certain requests which were to be actioned in order for a court date to be fixed. These included instructions for OAR to undergo a medical examination and for his relatives to be located and interviewed. The learned judge of the Family Court also requested that a non-relative of the appellant be asked to provide a character reference on his behalf. In her reasons, the learned judge of the Family Court stated that CPFSA was instructed to request OAR's medical records and to ascertain how medical care for OAR could be accessed.

[15] In a letter dated 21 October 2020, the attorney-at-law then appearing for the appellant, wrote to the children's officer advising that the appellant was "unfortunately not minded to pursue the course of action to include inviting [the] mother to make the request for [a] supplemental report from the Bustamante Children's Hospital". The attorney-at-law further advised that the appellant believed "that having completed all the requisite medical reports as requested formally through the adoption process, any further requests ought rightly to be facilitated through the Court's formal processes where required". Additionally, another character reference for the appellant, dated 22 September 2020, was submitted by Mr Patrick Wiggan ('Mr Wiggan') of 9 Skyline Plaza, Manchester (in the United Kingdom), who said he knew the appellant "for over eight years, as a neighbour in the UK".

[16] Pursuant to the instructions of the learned judge of the Family Court, a report dated 12 February 2021 was received from the Bustamante Children's Hospital ('the BCH') on 27 March 2021. This report did not provide a current analysis of OAR's medical condition. Based on the report, he was last seen at the neurosurgery clinic in 2008, at the orthopaedic clinic on 13 March 2019, the ophthalmology clinic on 8 January 2019 and

in the general surgery clinic on 29 November 2018. Also, further to the instructions of the learned judge of the Family Court, the children's officer visited the home of OAR's maternal grandfather on 1 October 2020. He indicated that he was not in a position to have OAR in his care due to the lack of financial resources.

[17] The learned judge of the Family Court was satisfied that it was necessary for the appointment of a guardian *ad litem*, being of the view that there was "a need to protect the child's best interest given that the [Adoption] Board failed to secure background information on the proposed adopter". One was appointed through the Office of the Children's Advocate ('OCA'). On 26 May 2021, when the matter was back before the court, the appellant appeared on the Zoom platform and reported that he was in the United Kingdom, having gone in April, leaving OAR in the care of a friend in Saint Elizabeth. Miss Natassia Robinson ('Miss Robinson'), attorney-at-law, was present in court on his behalf. Mrs Kaye-Anne Parke ('Mrs Parke'), attorney-at-law from the OCA, was also in attendance. The appellant was asked to provide a home study report from the United Kingdom, where he was a citizen, as one would not be forthcoming from the Netherlands. The appellant was also asked to provide the CPFSA with the addresses where he previously resided in the United Kingdom, along with an address for his father. At this juncture, the appellant indicated his intention to return and remain in Jamaica. The matter was then adjourned to 4 August 2021, a date he indicated he would be in Jamaica.

[18] The appellant filed another character affidavit, dated 30 July 2021, in which he stated that he was unable to produce a home study report or provide a home address in the United Kingdom or his father's last address as requested. He explained that this was because he had "not lived at any fixed address in the UK for over the last 3 decades". He listed the various places he had lived and the period of time he resided at those places.

[19] On 4 August 2021, the learned judge of the Family Court raised concerns about the failure of the appellant to address OAR's medical needs. Miss Robinson indicated that since OAR was not formally placed in the appellant's care, the appellant lacked the legal authority to address the medical issues. She made an application for an interim order

granting the appellant the legal authority to act on the child's behalf. The learned judge of the Family Court heard submissions on the granting of an interim adoption order from Miss Robinson and Mrs Parke. She also questioned the appellant about the steps he had taken to ensure that the OAR received the requisite medical care. The appellant stated that he had facilitated and taken OAR to his appointments at BCH seven times. He acknowledged that OAR was deaf in one ear and required a follow-up with the "Jamaica Hearing Society". When asked about OAR's education, the appellant stated that OAR had completed grade one and that he was awaiting a school report.

[20] On the next hearing date, 27 October 2021, the appellant was absent due to illness. The court was informed that the child's medical needs had still not been addressed. The application for an interim order was granted. The order was to remain in effect until 22 February 2022, the date fixed for the next hearing. The order was in these terms:

"BY COURT INTERIM:

[The appellant] is granted a temporary adoption order in respect of the child, **[OAR]** until the matter is determined.

A condition of the order is that, **[the appellant]** is to ensure child's medical needs are met at the Bustamante Children's Hospital. A reference is to be obtained from the Savanna-la-mar Health Centre.

Dated 27th of October, 2021

..."

[21] The appellant did not receive this order until it was emailed to him on 11 January 2022, approximately one month before the date set for the final hearing. The learned judge of the Family Court acknowledged that there had been a delay in the preparation of the order, but once she was made aware of this, she had it prepared and signed it for delivery to the appellant.

[22] On 22 February 2022, the appellant was present and was now without legal representation, which the learned judge of the Family Court recorded him saying he did

not need. The appellant reported that whilst he was away in the United Kingdom from April to June, OAR had received an injury to his foot, and the wound had not healed. The court was informed that no arrangements were made to take OAR to the BCH, but he had been taken to a general practitioner and a paediatrician in Westmoreland. The appellant complained that BCH was a "cattle market at 7:30" and that the "distance was onerous [and] financially burdensome". The appellant stated that OAR was doing well, was actively engaging in school, and appeared to be happy. He indicated that he had obtained ear drops for OAR but believed that if hearing aids were necessary, OAR would be entitled to receive them through the "Jamaica Society or the Jamaica Council for Disability", provided he qualified. The appellant also stated that he was in the process of securing specially fitted shoes for OAR. However, when specifically asked by the learned judge of the Family Court why OAR's more serious medical needs had not yet been addressed, the appellant explained that his "initial plan had been to seek medical treatment for OAR overseas".

[23] The appellant submitted to the learned judge of the Family Court that he had provided OAR with a loving home, placed him in school, provided for his medical needs and requirements, including the cost of the visits with the general practitioner and the paediatrician. In relation to OAR's educational needs, the appellant stated that although the Ministry of Education paid \$10,000.00 a week for a shadow, he had requested the funds be "free-up" to him so he could pay OAR's cousins who were students at the school. He complained that the school offered no support.

[24] Ultimately, the learned judge of the Family Court made the ruling that the application was refused and in the notes of evidence, the following findings were recorded:

"1. [Appellant] has demonstrated that he is incapable of caring for [OAR's] holistic care especially medical needs without state agencies assistance.

2. Fails to have [OAR's] medical appointments kept – needs such as hearing [a]ids, special fitting shoes [and] incontinence neglected.

3. No confirmation or verification of [appellant's] background from any official source.
4. Affidavit shows [appellant] does not have a stable life style or settled place of abode.
5. [OAR's] best interest not protected by [appellant].
6. [OAR's] injuries not treated properly from April 2021."

[25] It is also to be noted that the learned judge of the Family Court made additional orders, with the matter now being treated as one of care and protection. Among the orders made was for OAR to undergo a comprehensive medical examination, that a referral be obtained for BCH, and that he receive "all necessary health care". Further orders were made for OAR's school records to be obtained and for arrangements to be put in place to ensure the continuation of his education. Subsequently, the court received additional medical reports concerning OAR's visits to a clinic and to the BCH, following the conclusion of the adoption application hearing. The court was also provided with OAR's school records, which included a report on shadow support dated 18 February 2022. These records and the report were submitted through the Regional Director in the Ministry of Education, by way of a letter dated 7 April 2022. These documents form part of the documents filed in this Court.

The reasons for the decision

[26] The learned judge of the Family Court commenced her reasons by acknowledging her jurisdiction to hear and determine the application pursuant to section 20(1) of the Act. She noted that a court may authorise an adoption only if it is satisfied that doing so would be in the best interest of the child. The learned judge of the Family Court expressly referred to the relevant provisions of the Act concerning eligibility for adoption, emphasising, in particular, the requirement under section 9(1) that the applicant must be domiciled in Jamaica. She subsequently considered issues arising in relation to the adoption of a child from Jamaica by an applicant from the Netherlands, which she identified as a non-scheduled country, being one not listed as a scheduled country pursuant to section 23(5) of the Act. Her consideration included a discussion of the

relevant provisions of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (referred to as 'HCCH'), as well as section 24 of the Act. In her analysis, she was guided by the decision of Sykes J (as he then was) in **In the matter of an appeal against the Adoption Board** [2015] JMSC Civ 185.

[27] In detailing what she referred to as her findings, there was some overlapping in the approach used by the learned judge of the Family Court. She began by acknowledging the fact that the matter had been delayed due to the appellant's initial intention to take OAR to reside with him in the Netherlands, which is not a scheduled country. She found that the narrative regarding the circumstances surrounding OAR's placement in the appellant's care changed over time, with OAR being returned to his mother at some point when an alternate caregiver was unable to assist when the appellant had to travel abroad. She observed that the appellant had, at one point, requested that OAR be returned to state care, but subsequently failed to attend the hearings related to that matter. She further remarked that the appellant later left OAR in the care of his paternal relatives and friends.

[28] The learned judge of the Family Court then went on to consider whether OAR "was happily settled in a family arrangement". She found that although the appellant had demonstrated to some extent that he cared for OAR and may be in a better position to provide for OAR financially and perhaps emotionally, there was nothing actually presented in relation to the appellant's financial, parental or emotional capability. She noted that OAR had been in the appellant's care or with caregivers paid for by the appellant since 2016 and had physically lived with him since February 2020.

[29] In assessing the appellant's overall care of OAR, the learned judge of the Family Court expressed concern that the child had suffered an injury to his foot, during which time necessary medical advice, such as avoiding placing weight on the injured foot and obtaining special shoes, was disregarded. The learned judge of the Family Court described the child's welfare as "woefully" neglected, highlighting the absence of regular medical check-ups and the failure to address his need for a hearing aid. The appellant

had also provided no evidence of the costs involved or any concrete efforts made to secure these necessities. Similarly, he did not provide or source another pair of specially fitted shoes to replace those that had been provided through the assistance of the OCA/CPFSA, which OAR had outgrown. The learned judge of the Family Court also identified, as further evidence of the woeful neglect, the fact that OAR shared a bed with the appellant, although the appellant explained that this arrangement was due to OAR being afraid to sleep alone.

[30] The learned judge of the Family Court was satisfied that the welfare of OAR would be protected by refusing the order. Among the findings she made that led her to this conclusion was that the appellant did not demonstrate stability or permanence in the past, especially given his assertion that he “moves to where the better financial job opportunity is”. Furthermore, she found that he was merely a visitor to Jamaica and, apart from the period during the COVID-19 travel ban, had not resided in the country for any significant length of time. She also reiterated that no evidence had been provided regarding his financial stability or his capacity to care for a child, nor was there any reliable or official information about his background. Additionally, she questioned the credibility of his decision to resign from his job in the Netherlands after being unable to adopt and relocate OAR there. She queried his claim that the failure to obtain proper medical care was due to the absence of a court order, given that an interim adoption order had been granted, which he refused to utilise, citing a lack of understanding. However, she acknowledged that his complaint about the interim adoption order being signed late had some merit. She also noted that he made no effort to obtain a referral from the clinic where the wound sustained by OAR was allegedly being treated.

[31] The learned judge of the Family Court then proceeded to outline what she titled her reasons for decision. She properly recognised that adoption is a permanent legal arrangement, as it confers the permanent status of parenthood upon the adoptive parents, and further recognised that the legal obligation to provide child support automatically flows from that parental status. The learned judge of the Family Court

expressed concerns, based on the affidavit evidence, the submissions, and the reports regarding the appellant's "ability, emotional stability, capability and reliability to provide the level of support that [OAR] needs and deserves". She acknowledged that the appellant had been caring for OAR for a period of five years and that, according to a medical report from OAR's family physician, submitted in support of the application, a bond had been established between them. This report left the learned judge of the Family Court in no doubt that the appellant was fully aware of OAR's needs, and that the child's medical condition was the primary reason the appellant gave for his decision to pursue adoption and to take OAR abroad.

[32] The learned judge of the Family Court interspersed under this heading, the principle, as stipulated in the Act, that the welfare of the the child is the paramount consideration. She looked, for guidance, to the Child Care and Protection Act ('the CCPA'), where, at section 2(2), the factors to be taken into account in determining a child's best interests wherever that is referenced within that legislation are outlined. The learned judge of the Family Court also considered it appropriate to reference section 2(3), which states that the CCPA should "be interpreted and administered so that the best interests of the child is the paramount consideration" and then sets out the principles that should guide that consideration.

[33] The learned judge of the Family Court concluded that, based on reports from the CPFSA, the lack of background and character references from the necessary sources, and the CPFSA's request for the appellant to undergo a psychiatric assessment, she was not convinced that the appellant was a suitable person to be given custody and care of OAR. She determined that transferring OAR to the appellant would likely not serve the child's welfare or best interests. The learned judge of the Family Court had cause for concern that the appellant had, in several significant instances, failed to act in OAR's best interest and therefore could not be relied upon to safeguard the child's welfare. She further identified approximately 20 areas of concern, primarily relating to OAR's medical and educational needs, as well as issues regarding the adequacy of the appellant's

background information. These concerns were consistent with findings and observations made under other headings.

[34] Under the heading 'welfare finding', the learned judge of the Family Court questioned whether OAR was benefitting from consistent, safe, secure and reliable care. She found that the appellant had "demonstrated to the contrary of his expressed intention for adopting [OAR] that his medical care and security are paramount". Further, she stated that "the child is happy and no doubt is provided with the basic needs of food, clothing, and shelter, which his biological parents have no intention of doing. The [appellant], however, has not demonstrated his care beyond this, given the lack of interest shown to assist [the] child with his dire medical needs outside of charity, or to empower him socially and enhance his educational potential".

[35] The learned judge of the Family Court found that there was an "inability or reluctance on the part of the appellant to carry out task [sic] as simple as seeking aid from suitable person within the community to shadow child whilst at school in order to provide and foster OAR's educational development". Overall, the learned judge of the Family Court found that the appellant did not provide holistic care for the child and determined that he was not credible and not a fit and proper person to have custody of OAR.

[36] It must be noted that the learned judge of the Family Court, in her reasons, made reference to some information which could only have come to her attention from the reports which were received after the order was made refusing the application for the adoption. As previously mentioned, these documents were part of the record of proceedings prepared by the court below and filed with this court. As a result, this court had to be careful during the hearing of the appeal to consider only the material that was before the learned judge of the Family Court at the time she refused the application.

The appeal

[37] The appellant, dissatisfied with the decision of the learned judge of the Family Court, challenged some 62 findings of fact and seven findings of law. He filed eight grounds of appeal, which are as follows:

- "1. The learned judge erred by failing to adequately consider the best interest of the child subject of the application, [OAR], and how these could be meaningfully met.
2. The learned judge erred by failing to appreciate that the Appellant had insufficient legal interest/authority to be in a position to properly address the child's medical and educational needs and failed to give due consideration to this and the failings and delays of the system and the peculiar global circumstances when assessing the Appellant's care of [OAR's] medical and educational needs.
3. The learned judge erred by finding that the Appellant was failing to take proper care of the child's medical and educational needs.
4. The learned judge erred by finding that the Appellant had not disclosed financial information to support how the child would be provided for during his lifetime in circumstances where the Appellant had duly responded to every other request of the court but was not asked to disclose such information, which was provided in the adoption application.
5. The learned judge erred by finding that the appellant has acquired permanent resident status in the Netherlands and by failing to recognize [sic] that the Appellant is domiciled in Jamaica.
6. The learned judge erred by placing reliance on the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption (1993).
7. The learned judge erred by considering that the application fell within the category of inter-country adoption.
8. The learned judge erred by taking irrelevant factors into consideration and by failing to consider relevant factors."

[38] I consider it most convenient to deal with the issues to be addressed as follows:

1. Whether the learned judge of the Family Court erred in her finding that the appellant failed to take proper care of the child's medical and educational needs (Grounds 1,2 and 3);
2. Whether the learned judge of the Family Court erred in her determination that the appellant was not domiciled in Jamaica and that the application fell within the category of inter-country adoption and erred in reliance on the HCCH (Grounds 5, 6 and 7);
3. Whether the learned judge of the Family Court erred in considering the relevancy of certain factors to the application (Grounds 4 and 8);

[39] It should be noted that, on 14 June 2022, the appellant filed an application to adduce fresh evidence for the purposes of the appeal. This application was heard and refused by this court on 23 June 2022. On 10 October 2024, at the commencement of the hearing, Ms Deanna McFarlane informed the court that she was representing the appellant, who had been self-represented when the matter was first before this court for hearing on 27 February 2023. She indicated that she would be advancing the appeal as filed by his previous attorneys-at-law. Although her representation was not formally filed, we permitted her to participate to avoid further delay in hearing the appeal, on the condition that she would submit the required documents at a later date.

The standard of review

[40] It is crucial to recognise the well-established principles that govern this court's approach when considering findings of fact in the court below. This court, on numerous occasions, has reaffirmed that it will not lightly interfere with a trial judge's findings in respect of findings of fact. This was also reinforced by the Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21. In

that case, their Lordships, while addressing the findings of the judge at first instance, endorsed a statement of the relevant principles set out in **In re B (A Child) (Care Proceedings: Threshold Criteria)** ('re B') [2013] 1 WLR 1911. In that case, Lord Neuberger set out the bases on which an appellate court will interfere with the findings of fact made by a judge at first instance. At paras. 52 and 53, he stated that:

"52 ...The Court of Appeal, as a first appeal tribunal, will only rarely even contemplate reversing a trial judge's findings of primary fact.

53 ... this is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. **Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it.** This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on fact can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)." (Emphasis supplied)

[41] The appellate standard for reviewing findings in adoption proceedings has also been considered **In re W (An Infant)** [1971] 2 WLR 1011, where the House of Lords examined the basis on which a reviewing court might interfere with the decision of a trial judge in such matters. Although the immediate question before the court concerned whether a parent was unreasonably withholding consent to an adoption, Lord Hailsham's observations at page 1021 remain instructive. He emphasised that:

"This means that, in an adoption case, a county court judge applying the test of reasonableness must be entitled to come to his own conclusions, on the totality of the facts, and a revising court should only dispute his decision where it feels reasonably confident that he has erred in law or acted without adequate evidence or where it feels

that his judgment of the witnesses and their demeanour has played so little a part in his reasoning that the revising court is in a position as good as that of the trial judge to form an opinion.”

[42] These principles underscore the restraint with which appellate courts must approach challenges to adoption decisions. They affirm that deference is owed to the trial judge’s evaluation of the evidence, save in those limited circumstances where the legal or evidential basis for the decision is demonstrably unsound.

The legal framework

[43] To determine whether the learned judge erred in her findings, this court will have to examine those findings along with the affidavits and reports that were before her that she relied on in arriving at a decision. However, before exploring this aspect of the appeal, I believe it is prudent to examine the legal framework as it pertains to adoptions in Jamaica.

[44] In the Act, adoption is defined as:

“15.- (1) ... all rights, duties, obligations and liabilities of the parents or guardians of the child in relation to the future custody, maintenance and education of the child, including all rights to appoint a guardian and to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the child were a child born to the adopter in lawful wedlock...”

[45] Lord Simon of Gaisdale also captured the essence of what adoption is and what it entails in **O’Connor and Another v A and B** [1971] 1 WLR 1227, where he remarked that an “[a]doption is the procedure whereby the two classes of adults — those who wish to surrender their rights and obligations in respect of a child and those who wish to assume them — are brought together, so that the latter are legally substituted for the former in relation to the child in question”.

[46] Section 9(1) of the Act sets out the power of the court to make an adoption order, which may be made on the application of a person domiciled in Jamaica.

Restrictions on the making of adoption orders are set out in section 10 of the Act. Briefly, section 10(1) and (2) provide that an adoption order shall not be made in respect of a child unless the applicant, or one of the applicants, has attained the age of 25 years; or has attained the age of 18 years old, where the applicant is a relative of the child. Under section 10(3), an adoption order shall not be made authorising more than one person to adopt a child. Section 10(4) provides that an adoption order shall not be made, in any case, except with the consent of every person who is a parent or guardian of the child or who is liable by virtue of any order or agreement to contribute to the maintenance of the child. Under section 10(6), an adoption order shall not be made unless the applicant and the child reside in Jamaica. An adoption order may be made on the application of a person who, although domiciled in Jamaica, is ordinarily resident in Jamaica.

[47] Section 14 provides:

“14. – (1) The Court before making an adoption order shall be satisfied –

(a) that every person whose consent is necessary under this Act, and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order for which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;

(b) that the order if made will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child; and

(c) that the applicant has not received or agreed to receive, and that no person has made or given or agreed to make or give to the applicant, any payment or other reward in consideration of the adoption except such as the Court may sanction.

(2) The court in an adoption order may impose such terms and conditions as the court may think fit, and in particular may require the adopter by bond or otherwise to make for the child

such provision (if any) as in the opinion of the court is just and expedient.”

[48] **In re W (An Infant)**, in commenting on the import of a similar provision in the English legislation, Lord Hailsham stated the following at page 1015:

“Thus in custody cases the welfare of the child is the first and paramount consideration but in adoption proceedings the welfare of the child is the second of three separate conditions as to each one of which the court has to be separately satisfied...

The difference, it need hardly be said, is due to the different nature and effect of the orders sought in the two classes of cases...in adoption cases what is in issue is the parent-child relationship itself and in that relationship the parent as well as the child has legitimate rights.”

[49] The Act is silent as to the definition of the welfare of the child. However, it is widely recognised in our jurisdiction that, in cases concerning applications for guardianship, custody, care, and control of a minor child, the court's primary focus, both under common law and statute, should be the child's welfare. In **Dennis Forsythe v Idealin Jones** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 49/1999, judgment delivered on 6 April 2001, this court, in considering the principle, adopted the words of Lindley LJ in the case of **In re McGrath (Infants)**, at page 148:

“...**The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense.** The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.” (Emphasis added)

[50] At page 8 of **Dennis Forsythe v Idealin Jones**, Harrison JA (as he then was), writing on behalf of the court, went on to say:

“A court which is considering the custody of the child, mindful that its welfare is of paramount importance must consider the child's happiness its moral and religious upbringing, the social and educational influences, its psychological and physical wellbeing and

its physical and material surroundings, all of which go towards its true welfare. These considerations, although the primary ones, must also be considered along with the conduct of the parents, as influencing factors in the life of the child, and its welfare.”

[51] A court determining any question relative to the welfare of a child for the purposes of the adoption may consider relevant factors, including the physical, emotional, and educational needs of the child; the age and sex of the child; as well as any harm the child has suffered or is at risk of suffering. The court can also assess the actions and inactions of any individual seeking to adopt a child, as these actions may also have a significant impact on the child's well-being. This is eminently a necessary requirement given the nature of the relationship being created by an adoption that terminates the biological one. Ultimately, the court is obliged to satisfy itself that the order, if made, will be for the welfare of the child, and the court must determine what is needed for it to be so satisfied.

Whether the learned judge of the Family Court erred in her finding that the appellant failed to take proper care of the child’s medical and educational needs (Grounds 1,2 and 3)

Submissions in summary

On behalf of the appellant

[52] Ms McFarlane began her submissions by highlighting what she considered to be errors in the learned judge of the Family Court’s findings, which, in her view, led to the conclusion that the appellant had failed to adequately address the child's medical needs. She contended that the instances cited by the learned judge of the Family Court occurred when the appellant did not have the necessary legal authority to act. He was only granted an interim order in October 2021, which he did not receive until January 2022. In the absence of this order, he was unable to “robustly” manage the child's medical needs, although he did everything he could under the circumstances. Similarly, the educational needs were addressed by the appellant to the best of his ability.

On behalf of the OCA

[53] In concise and pointed oral submissions, Mrs Parke posited that the learned judge of the Family Court identified two principal concerns. The first concern was the appellant's failure to provide independent evidence detailing his employment history and personal circumstances over the years. Secondly, the appellant had not shown that he had attended to the medical well-being of the child. Counsel indicated that her submissions were directed primarily on the considerations and legal principles applied by the learned judge of the Family Court, specifically, whether those considerations were in the best interests of the child, rather than on whether the application ought to have been granted.

[54] Mrs Parke argued that, on a reading of the court's reasons, it was clear that, as at 22 February 2022, the appellant had failed to comply with the court's order regarding the medical care of OAR. She highlighted the instances in the reasons which demonstrated that up to that time, OAR's medical and educational needs had not been addressed. Furthermore, she contended that one of the factors the learned judge of the Family Court could have considered was whether a bond had developed between the appellant and the child, and she conceded that this had been acknowledged.

[55] She submitted that, pursuant to section 14 of the Act, the court was vested with the authority to be satisfied that the welfare of the child was prioritised before granting the adoption order sought. Therefore, the court was within its right to satisfy itself that the best interest of the child was met. Reliance was placed on **Re McGrath (Infants)** and **Dennis Forsythe and Idealin Jones**. Reference was also made to the case of **S v S** [1997] 1 All ER 109, to support the argument that, when determining the child's welfare, the court should consider the importance of continuity of care and avoid unnecessarily disrupting the child's existing circumstances. She submitted that, though the continuity of care had been entrusted to the appellant, there continued to be a failure to appropriately get treatment for OAR's medical condition, a breach that continued to loom over the proceedings despite an interim order being granted.

On behalf of the Director of State Proceedings

[56] Ms White commenced her submissions by asserting that the learned judge of the Family Court's refusal to grant the final adoption order could not be considered plainly wrong. She referred to the learned judge of the Family Court's findings that the appellant lacked credibility, both in his presentation before the court and in his role as the child's guardian. She emphasised that, in such circumstances, the learned judge of the Family Court appropriately focused on what was in the child's best interests in refusing the application.

[57] Counsel also referred to section 14 of the Act, arguing that the provisions are cumulative in nature, and if the court was not convinced of all the requirements, it could not grant the adoption order. Further, family court judges are creatures of statutes, and they operate within the bounds of the statute. Thus, she submitted that, given the "factual matrixes [sic] and information" presented, the learned judge of the Family Court's decision was in the best interests of the child and was neither unreasonable nor plainly wrong.

[58] Ms White posited that the appellant's primary complaint was with the findings of fact by the learned judge of the Family Court and maintained that the appellant was not disputing the evidence presented to the court, but rather the interpretation of it. She submitted that this court should apply the principles enunciated in **Watt (or Thomas) v Thomas** [1947] AC 484, when reviewing the factual findings made by a judge acting as the tribunal of fact. Reliance was also placed on **In re W (An Infant)** for the principle that a judge applying reasonableness must be entitled to come to his own conclusions on the totality of the facts. Counsel submitted that, having seen and heard the appellant, the learned judge of the Family Court was in a position to assess his oral and written evidence, draw reasonable inferences, and make findings supported by the evidence, findings that should, therefore, not be disturbed on appeal.

[59] Miss White directed the court to the evidence showing that the learned judge of the Family Court did not err but acted in the child's best interests. She referred to parts

of the judge's reasoning that demonstrated careful consideration of multiple reports. Counsel contended that the learned judge of the Family Court was required to properly assess what was in the best interests of the child, especially considering the child's special needs. She also posited that the learned judge of the Family Court found that the appellant had refused to take the child for medical check-ups and made no effort to comply with the court's instruction to ensure that the child's medical needs were addressed.

[60] In conclusion, Ms White contended that the appellant failed to demonstrate how his intentions and abilities served to benefit the best interests of the child. Further, she submitted that the learned judge of the Family Court thoroughly assessed all the evidence presented, considered all the relevant factors, and was correct in finding that the appellant had not acted in the child's best interest.

Analysis and discussion

[61] The appellant's major complaint is that the learned judge of the Family Court erred when she found that the appellant had failed to attend to the child's medical and educational needs.

Medical needs

[62] On the issue of the child's medical care, the learned judge, at page 35 of her reasons, commented:

"Quite significant and important is the fact that the child's education and medical care has been neglected."

[63] She, thereafter, outlined some issues related to OAR's medical needs as follows:

"Child has been injured whilst in [the appellant's] care and whilst he was left in other person's care and the recommendation to keep him off the foot was ignored. To provide [the child] with special fitting shoes to assist in the healing has been ignored. Instead, [the child] was allowed to ride a bicycle which is also prohibited given the nature of the

child's foot condition. In addition, the child welfare has been woefully neglected in the following regards; -

- A. Child has not been for regular medical checks in relation to his known illnesses.
- B. Child has several medical challenges and requires medical attention which the [appellant] says is too burdensome both financially and physically for him [the appellant] to travel to Kingston to fulfill...
- C. Child needs hearing aid [and] [appellant] finds it expensive although he has not been able to provide any evidence of cost or any attempt to obtain same...
- D. Child has outgrown his specially fitted shoes which [were] provided through the assistance of OCA/CPFSA from the Bustamante Children's Hospital and the [appellant] has failed to provide or source another or even to find the cost...
- E. ...
- F. Child shares bed with [the appellant] although he is said to have his own room...
- G. Home is unkempt and unhygienic [.]”

[64] In concluding her assessment of the child's health care at page 36, the learned judge of the Family Court stated that:

“It is my opinion that child's health care was neglected and therefore an Adoption Order would not cure that as [the appellant] has demonstrated that by the way he treated the child's medical needs, the injuries the child received in his care and the lack of interest to get medical care offered here in Jamaica free of cost even after getting an Interim Adoption Order which stipulates that child's medical needs should be met... [the appellant] did not even attempt to fulfill the simplest aspect of the Order, 'to get a referral from the clinic in Westmoreland'. A clinic that he ought to have been taking the child every other day for dressing of the injuries to his foot bottom and the others that were noted to his heel...In addition, [the appellant] opted to take the child to a private doctor instead of following the court [sic] order and he did not have the doctor look at the injuries on the

child's foot/feet. Had I not noticed the child's shoes in his hand the injury would have been left there and his health deteriorating."

[65] The learned judge of the Family Court had before her a medical report from the South East Regional Health Authority, dated 17 February 2021. This report provided the child's medical history, noted specific health concerns, and listed the dates of the child's last medical appointments. It highlighted that the child had defaulted on attending clinical appointments as scheduled. The report specified that the child was last seen by the Neurosurgery Clinic in 2018, the Orthopaedic Clinic on 13 March 2019, and the Ophthalmology Clinic on 8 January 2019. Thus, information gleaned from the report from the BHC indicated that the child had not undergone a medical examination in several years up to the time the application for adoption was made. Of course, the onset of COVID-19 may have been a factor, but this was not seemingly relied on by the appellant nor considered by the learned judge of the Family Court.

[66] The need for a report from BCH was clearly communicated to the appellant, and the response through his attorney in a letter, dated 21 October 2021, although already mentioned, bears repeating. She stated the following:

"By way of update please be advised that [the appellant] is unfortunately not minded to pursue the course of action to include inviting mother to make [a] request for the Supplemental Report from the Bustamante Children's Hospital...

Our client believes that having completed all the requisite medical reports as requested through the adoption process, any further requests ought rightly to be facilitated through the Court's formal process where required."

[67] In response to the child's urgent medical needs, an interim order was granted on 27 October 2021, to assist the appellant in addressing these concerns, given the acceptance of the learned judge of the Family Court that he may have lacked legal authority to do so. Although it was acknowledged that there was some delay in having the interim order prepared, the appellant was advised in an email message on 7 January

2022 that it was ready for collection. It was sent by email to the appellant on 11 January 2022, after his expressed inability to collect it. This was approximately one month before the final hearing date, scheduled for 22 February 2022. From the email thread exhibited in relation to this matter, it seems that even prior to 5 January 2022, Miss Robinson had “communicated with him several times what the order was”.

[68] On the final hearing date, it was noted that the appellant reported he was unable to take the child to the BHC, stating that it was a “cattle market”, the distance was onerous, and it was financially burdensome. No arrangements were made by the appellant for the child to receive medical care at the BHC, pursuant to the interim order. The appellant had instead taken OAR to a paediatrician in Savanna-la-mar, Westmoreland. The appellant stated that he did not understand the terms of the order at the time he received it.

[69] It was at that hearing that the appellant also explained to the court that the child had sustained an injury to his foot in April or June 2021 that remained unhealed. He claimed to have taken the child to a clinic for wound dressings, but was unable to provide an appointment card to confirm these visits.

[70] When asked about OAR’s hearing, the appellant explained that he was aware that OAR could only hear from one ear, but informed the court that no referral had been made by a doctor to deal with this issue. When pressed, the appellant expressed his belief that if OAR needed a hearing aid the, “Jamaica Society Jamaica Council for Disability [was] to give him one if he is entitled”. When asked about the special-fitting shoes for the child, he indicated that he was “trying to get special fitting shoes”.

[71] Ultimately, there can be no dispute that there was no evidence presented to show that the necessary medical checks were carried out by the BHC. Notably, there is an undated letter from a paediatrician, on which the appellant relied, stating that she could not provide a comprehensive report on OAR's medical issues, as it was based only on an initial visit. It cannot be denied that the child was without a hearing aid up to the date of

the final hearing and that he had outgrown his special shoes. These were admissions made by the appellant.

[72] As such, there was sufficient evidence before the learned judge of the Family Court for her to make the findings that she did in relation to the insufficiency of the attention which had been given to the medical needs of OAR, especially given that he was a child with special needs. In an effort to assist the appellant in obtaining the necessary medical care for OAR, the learned judge of the Family Court granted an interim adoption order, thereby conferring sufficient legal authority on the appellant to address the issue. Whilst it is indisputable that there was a delay by the court in having the interim adoption order prepared for the appellant to collect, equally indisputable is the fact that the appellant failed to demonstrate sufficient effort to even commence the process of securing the requisite care after the order was available and collected by him. The findings of the learned judge of the Family Court on the neglect of OAR's medical needs cannot be faulted, and the conclusion that this issue impacted OAR's welfare was correct in the circumstances.

Educational needs

[73] Ms McFarlane contended that the learned judge of the Family Court fell into error when she found that the appellant had failed to address the child's educational needs. She referenced the child's school reports, asserting that they demonstrated the child's progress and that the learned judge of the Family Court had failed to consider these reports. However, it became apparent during her submissions that these reports may not have been before the learned judge of the Family Court up to the time the application for adoption was refused.

[74] From the material that was before the court, it is noted that the children's officer in the adoption home visit report stated that OAR "is delayed academically" and had not been in any formal schooling for over a year. She observed that the appellant had organised a section of the living room for home-schooling OAR and indicated that he had

made contact with the Llandilo School of Special Education for placement for the upcoming school year and was awaiting a response.

[75] There was a reference to the issue of the finding of a suitable shadow for OAR in the following recorded exchange between the learned judge of the Family Court and the appellant on 22 February 2022:

“Question: How is his incontinence?

Response: I get calls three quarter of the times. Sometimes it is hard to get him in school. He is to get a shadow I can’t find one. I am doing it. He calls I drop everything. Ministry of Education (MOE) pays \$10,000.00 per week for shadow. I wrote to her to free-up funds to me maybe I could pay his cousins who are students there I don’t really need the money.

School offers no support, the [sic] won’t allow him to use big boys toilet he is afraid of.”

[76] The findings of the learned judge on this issue, at page 44, are as follows:

“I. Child unable to attend face to face school due to his incontinence and the [appellant’s] reluctance to find [a] suitable shadow for the child, but rather insisting on being paid the money for doing it himself and then called upon at times is unable to attend due to his work schedule.

...

O. I have also formed the view that the child’s independence is also being hampered by the [appellant]. This is shown by his reluctance to seek help to shadow child in order to advance his education now that school is conducting face to face classes. I am of the opinion that he fails to find a suitable shadow as he does not believe that anyone but him should have access to child. See his emails and responses regarding any medical requested by court.”

[77] The learned judge of the Family Court’s findings focused specifically on the appellant’s failure to secure a shadow for the child and the consequences of that failure. It is not clear whether the learned judge of the Family Court had before her at the time of the final hearing the shadow support report, which, although dated 18 February 2022,

was referenced in the letter from the Regional Director dated 7 April 2022. However, what is clear is that at the final hearing, the appellant sought to respond to queries about OAR's incontinence by referring to the difficulty in getting OAR to school and his inability to find a suitable shadow. It is also clear that the learned judge of the Family Court had information that, up to August 2020, OAR had not been in any formal schooling. There was no information at the time the application was refused that the situation had changed. Ultimately, the learned judge of the Family Court could not be faulted in concluding that OAR was unable to attend school due to his incontinence. The issue of securing a shadow for the child to resume in-person classes remained an unresolved concern at the time of the final hearing. Coupled with this, the information from the children's officer was that OAR was delayed academically. The learned judge of the Family Court cannot be faulted for concluding that OAR's educational needs were not being adequately addressed.

[78] There was sufficient credible information contained in the material and reports available to the learned judge of the Family Court at the time the order was made, refusing the application, that OAR's medical and educational needs were not being properly met by the appellant. Accordingly, there is no merit in grounds 1,2 and 3.

Whether the learned judge of the Family Court erred in her determination that the appellant was not domiciled in Jamaica and that the application fell within the category of inter-country adoption and erred in reliance on the HCCH (Grounds 5, 6 and 7)

Submissions in summary

On behalf of the appellant

[79] It was contended that the learned judge of the Family Court erred when she found that the appellant was a permanent resident of the Netherlands when he had been domiciled in Jamaica at the time the application for adoption was made. It was submitted that the issue of where he was domiciled was all that was required pursuant to section 9(1) of the Act. It was further contended that at the time of the application, the appellant was domiciled in Jamaica but not ordinarily resident here. At the start of the proceedings,

he had temporary residence in the Netherlands to facilitate his teaching position there. Flowing from this, the learned judge of the Family Court erred by considering that the application fell within the category of inter-country adoption. Further, it was submitted that in these circumstances, there was no need for the learned judge of the Family Court to consider the HCCH.

On behalf of the OCA

[80] Mrs Parke acknowledged that the learned judge of the Family Court did spend some time considering the issue of the residential status of the appellant in the Netherlands before forming the view that this was an inter-country adoption and hence a licence was required to fulfil the obligations under the Act. She, however, contended that these issues did not form part of the decision of the learned judge of the Family Court that the application must be refused. Further, it was Mrs Parke's submission that, while the learned judge of the Family Court considered the HCCH, there was no undue reliance on that consideration in arriving at the decision to refuse the application.

On behalf of the Director of State Proceedings

[81] Ms White contended that the learned judge of the Family Court was correct in finding that the appellant had acquired permanent residence in the Netherlands. This was a position properly reached from the various bits of evidence and material before the learned judge of the Family Court, including from the appellant himself. She pointed out that the appellant had stated that he resided in various countries without settling for long periods based on the availability of work, which counsel described as a nomadic lifestyle. She also pointed out that the appellant stated that he would be taking OAR to the Netherlands, where he could receive medical care as needed.

[82] Counsel cited the following definition of domicile from Black's Law Dictionary 7th edition: "...the domicile of a person [is] where he has his true fixed permanent home and principal establishment and to which whenever he is absent he has the intention of returning". She submitted that the information provided by the appellant demonstrated

that he does not have a true and fixed principal permanent home. Although he may have acquired a house in Jamaica, he provided no evidence that he resided here, or at the very least, he had established a settled connection with Jamaica.

[83] Ms White contended that the learned judge of the Family Court could not be faulted for considering the HCCH as a factor in determining whether a final order could be made and whether the adoption would be in OAR's best interest. Specifically, she argued that the learned Judge of the Family Court was justified in assessing whether an adoption, with a high likelihood of taking OAR to the Netherlands, was in the child's best interest. Counsel further argued that the approach of the learned judge of the Family Court in considering the articles of the HCCH was solely on the premise that the appellant was a permanent resident of the Netherlands and as such more information about the appellant's background, character, social and economic stability was required.

[84] Ms White maintained that, in any event, the learned judge of the Family Court was correct in finding that the application fell within the category of inter-country adoption, especially given that the appellant himself acknowledged his intention to take OAR to the Netherlands to reside with him. Counsel also emphasised that it was said that OAR was aware that he was migrating with the appellant and that he had reportedly been told by the appellant that he would see his mother and other siblings when he visits Jamaica.

Discussion and analysis

[85] It cannot be disputed that the learned judge of the Family Court took into account the appellant's residential status in the Netherlands and its impact on his application, and addressed the issue in a distinct section in a detailed manner. It is also undisputable that the learned judge of the Family Court concluded that the appellant was not domiciled in Jamaica, thus the application was an inter-country adoption. However, the context in which the consideration was done and the conclusion arrived at is of significance. From a careful reading of the reasons, the issue arose on the first date the matter was before the court, that is, on 19 February 2020. Therefore, it is important to recognise the information before the court at that time. The children's officer in her notice

accompanying the application said that the appellant intended to take the child with him to the Netherlands, that there was no home study report from the Netherlands and that Jamaica was not a signatory to the convention on inter-country adoption. In the psychological assessment of OAR, which accompanied the application, it was stated that OAR was "aware that he will be migrating or 'going to foreign' ...however was not aware that his mother would not be accompanying them". Further, it was stated that "when [OAR was] told his mother would not be accompanying them but assured by [the appellant] that he would see her whenever he visits Jamaica [OAR] said that would be okay".

[86] It is also pertinent to recall that at the time the application was made, the statement from the Board, dated 27 January 2020, indicated that OAR was under the actual custody of a guardian residing in Kingston. However, in the appellant's application, dated 19 February 2020, the appellant stated that he was residing in Westmoreland and that OAR "has been in his care and has been brought up, maintained, and educated by him". The application was silent as to how long OAR had been in the appellant's care given the assertion that up to January 2020, he was in the actual custody of the guardian in Kingston.

[87] In these circumstances, it is hardly surprising that the learned judge of the Family Court concluded that, up to the time of the first hearing, the appellant's residency was in issue. This issue needed to be resolved, as the determination of whether the appellant was domiciled in Jamaica was crucial to whether the court could properly exercise its power to make the adoption order pursuant to section 9(1) of the Act. Additionally, the question of whether there should be any restrictions on making the adoption order arose, particularly if the appellant, while domiciled in Jamaica, was not ordinarily resident here, as contemplated by section 10(6) of the Act.

[88] Following the first hearing, further reference to the fact that OAR would be residing in the Netherlands with the appellant appeared in the character reference provided by Ms Allen. She spoke of the changes and amendments the appellant had made to his home

in readiness for OAR's arrival and commented that the room and home the appellant provided for OAR had been so thoughtfully put together, she knew that OAR would love it. Further, she expressed the view that OAR would enjoy living there and stated: "[l]iving in the Hague in the Netherlands would greatly enhance [OAR's] quality of life, providing him with ample opportunities to achieve all he can in life". It is reasonable to infer that her belief regarding OAR's relocation to the Netherlands was based on information conveyed to her by the appellant. Further, the appellant provided email correspondence with schools in the Netherlands, including one in which he asked if the school would consider OAR "for admission in 2019 into the Dutch language classes as we intend on living in the Netherlands for the long term". In a subsequent email, the appellant sent after the Board had informed him that approval had been granted for the placement of OAR as his adopted child, the appellant stated that he would notify the school when he expected "to be able to bring OAR to the Netherlands to start his new life".

[89] In his own character affidavit, dated 13 May 2021, the appellant, while listing his address as being in Westmoreland, stated that he was temporarily residing at an address in the Netherlands. In that affidavit, he also outlined his educational background as well as the various places in which he had lived and worked. He stated that he had made yearly trips to Jamaica during summer vacation while in university to visit family and friends. This information was further expanded, in a later character affidavit dated 30 July 2021, in which he stated that when he started the process to adopt OAR he was living in the Netherlands and he had since permanently moved back to Jamaica which "is now [his] home" and had "no intention of moving either by [himself] or with [OAR] to another country".

[90] Hence, to my mind, the information before the learned judge of the Family Court was such that she could not be faulted for forming the view that the appellant at some point had residency in the Netherlands and was not domiciled in Jamaica. In those circumstances, it is understandable that she found that this was an inter-country adoption. This conclusion of the learned judge of the Family Court could only be

considered flawed after the expressed intentions of the appellant made in his affidavit of 30 July 2021. As already noted above, it was then that the appellant asserted that he had permanently moved back to Jamaica and had no intention of moving either by himself or with OAR to another country.

[91] In relation to the learned judge of the Family Court's references to the HCCH, the first was while considering the case in summary at the beginning of her decision. She indicated that although the "[appellant's] domicile, remaining in Jamaica for over one year due to Covid 19 travel restrictions, might be deemed to meet residency requirements under the HCCH, [it] did not satisfy section 9 of the Act". There being no other significant reference to the HCCH, to say that she erred by placing reliance on the HCCH in arriving at a conclusion on the issue of his status is inaccurate.

[92] The learned judge of the Family Court later embarked on such an extensive discussion on the HCCH, which she explained she found necessary since the receiving state for the child, the Netherlands, is a signatory. This discussion may have been helpful in considering whether the order was to be made at the time it appeared that the appellant was living in the Netherlands and OAR was to join him there. However, to my mind, this was not shown to be ultimately one of the determining factors of the decision. I am not satisfied that her reliance on the HCCH justifies interfering with her decision to refuse the application on the bases she did.

Whether the learned judge of the Family Court erred in considering the relevancy of certain factors to the application (Grounds 4 and 8)

[93] The gravamen of the complaint advanced in these grounds is that the learned judge of the Family Court fell into error by making findings on matters that had not been raised, by relying on irrelevant considerations, and by failing to take into account relevant ones.

[94] Ms McFarlane submitted that the learned judge of the Family Court erred in finding that the appellant had failed to disclose information demonstrating how the child would

be provided for throughout his lifetime. Counsel argued that this conclusion was unwarranted in circumstances where the appellant had duly complied with every request made of him by the court, and where such financial particulars had already been disclosed in the original adoption application, but no further request for that information was made during the proceedings. Counsel conceded that at the time the matter commenced, the appellant was a university lecturer but during the course of the matter, he indicated that he had resigned and there was nothing placed before the court to assist the court in determining how the child would be maintained.

[95] It is a requirement under the Act that a proposed adopter provides, among other particulars, details of his occupation. At the conclusion of the proceedings, it was undisputed that the appellant was no longer employed, as evidenced by a termination letter placed before the court. In the absence of any further information regarding the appellant's financial circumstances, the learned judge of the Family Court was left without a sufficient basis upon which to assess the appellant's capacity to provide the requisite financial stability and support. Further, he did not indicate to the court that he was re-employed or seeking any other employment. Thus, even on the appellant's own case, he was no longer gainfully employed. This is an issue that must have an impact on the welfare of OAR. Therefore, the learned judge of the Family Court cannot be faulted in considering this factor in arriving at her decision and for recognising that there was no information in relation to it.

[96] Counsel challenged the finding of the learned judge of the Family Court that the appellant had failed to provide credible background information from a reputable source regarding his social, parental, or emotional capability. Counsel pointed to the fact that character evidence was provided by one of the appellant's neighbours, who claimed to have known him for eight years.

[97] In his own affidavit, the appellant presented a list of his residential addresses and the duration of his stay at each. According to this breakdown, the appellant would have lived next to the neighbour who provided the character evidence for only two years,

contradicting the claim of an eight-year acquaintance. As a result, I find that the learned judge of the Family Court could not have found that this reference was credible. The appellant also provided a reference from a relative, but the learned judge of the Family Court determined it to be potentially biased and chose not to rely on it as she was entitled to do. Consequently, there was indeed no credible evidence before the court to substantiate the appellant's social, parental, or emotional capability.

[98] Considerable criticism was made of the finding of the learned judge of the Family Court that the appellant demonstrated "an unstable or nomadic lifestyle as he does not reside in any place for a reasonable period to provide stability for the child". Further, the appellant's counsel asserted that the learned judge of the Family Court should have adjusted her findings to reflect that the appellant was no longer nomadic, as he was no longer employed in the Netherlands.

[99] The description by the learned judge of the Family Court, that the appellant was unstable and nomadic, was grounded in the appellant's own affidavit, where he acknowledged not having a fixed address in the United Kingdom for over three decades. He provided details of the various residences where he had resided during that period, with the longest stay of 10 years being in Dubai, with all others not exceeding two years. In the circumstances, the learned judge of the Family Court's characterisation of the appellant's lifestyle as nomadic cannot be said to have been entirely inaccurate, and the use of the term unstable would not be objectionable in describing his residential status. It is correct that the learned judge of the Family Court did not advert to the appellant's express evidence in his affidavit of July 2021 that he had settled in Jamaica. Nonetheless, the material placed before the court was sufficient to justify a conclusion that prior to that time, the appellant had not settled in any one place for a long duration. I find that these factors pointed to were, in fact, relevant considerations for the learned judge of the Family Court being mindful of the fact that she needed to be satisfied that the order would be for the welfare of OAR.

[100] Miss McFarlane also pointed to a comment from the learned judge of the Family Court as an example of an irrelevant factor that was taken into consideration. This was that the appellant “showed instability which could very well have stemmed from his childhood”. It appears that the learned judge of the Family Court derived this conclusion from her appreciation of the appellant’s affidavit evidence, in which he stated that his parents divorced when he was four years old, and that he alternated between living with each parent, seven years with one and six years with the other, until he was 16. Such information could properly be regarded as relevant to an assessment of whether vesting parental responsibility for a minor child in the appellant would be in the child’s best interests. However, whilst it is not clear that this was what was the learned Judge of the Family Court intended, to equate this account of the appellant’s upbringing with an indication of mental instability, without more, may reasonably be regarded as unsubstantiated.

[101] Ms McFarlane further submitted that the learned judge of the Family Court failed to take into account as a relevant factor that OAR was said to have bonded with the appellant. This factor was, in fact, expressly acknowledged by the learned judge of the Family Court and discussed at paras. [28] and [31] of this judgment. Accordingly, this complaint is unwarranted.

[102] The factors identified by Ms McFarlane were ultimately, to my mind, not such that would give rise to any merit on grounds 4 and 8 sufficient to disturb the findings of the learned judge of the Family Court.

Conclusion

[103] One of the fundamental requirements under the Act is that the court must be satisfied that an adoption order would be for the welfare of the child. It is clear that the learned judge of the Family Court approached the appellant’s application to adopt OAR with this requirement as the primary consideration. Having carefully reviewed the evidence and information placed before her, I am satisfied that there was ample material to support her conclusion. In the absence of any demonstrable error of law or principle,

this court is bound to give due deference to the findings of the trial judge. Accordingly, I am satisfied that her decision falls within the proper exercise of her discretion, and the appeal must, therefore, be dismissed. I would propose that there be no order as to costs.

DUNBAR GREEN JA

[104] I have read in draft the judgment of my sister, P Williams JA, and agree with her reasoning and conclusion. There is nothing that I wish to add.

G FRASER JA (AG)

[105] I, too, have read the draft judgment of P Williams JA and agree with her reasoning and conclusion.

P WILLIAMS JA

ORDER

1. The appeal is dismissed.
2. The judgment and order of the Family Court Judge, made on 22 February 2022, refusing to grant a final adoption order, is affirmed.
3. There shall be no order as to costs.