NOTE: PURSUANT TO S 22A OF THE ADOPTION ACT 1955, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA108/2020
[2021] NZCA 482

BETWEEN	MP Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	11 March 2021
Court:	Brown, Clifford and Goddard JJ
Counsel:	Appellant in person N J Wills and G Niven for Respondent
Judgment:	23 September 2021 at 1.00 pm

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The High Court's first declaration is quashed and the following declaration is made in its place:**

> **When registering an adoption to which the Adoption (Intercountry) Act 1997 applies, the Registrar-General must record the name (if any) specified by the child's adoptive parents as advised to the Registrar-General at the time of notification or, where an order is made under s 12(1)(b) of that Act, as recognised or recorded in that order, and birth certificates are to be issued pursuant to s 63 of the Births, Deaths, Marriages, and Relationships Act 1995 accordingly.**

C The High Court's second declaration is also quashed. We confirm the legality and validity of the Family Court's order under s 12(1)(b) of the Adoption (Intercountry) Act 1997.

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REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The appellant, MP, and his wife FP, are German citizens and New Zealand permanent residents.[1] In May 2016 the Ps adopted A, a Thai child, pursuant to the Hague Convention on Intercountry Adoption (the Convention).[2]

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1 Throughout this judgment, we use "the Ps" to refer to the parents of the child. We refer to the child as "A", and where necessary the child's name at birth as "AA" and the name given by the Ps as "AP".

2 The Convention on Protection of Children and Co-operation in respect of Intercountry Adoption signed at The Hague on 29 May 1993. The Convention is recognised and given effect to in New Zealand pursuant to the Adoption (Intercountry) Act 1997.

[2] In July 2017 the Ps took steps to register A's Convention adoption in New Zealand as provided for by the Births, Deaths, Marriages and Relationships Registration Act 1995 (the Registration Act). As part of that process the Ps obtained orders from the Family Court classifying their adoption of A as what is known as a "full" adoption[3] and, in so doing, confirming A's adopted surname was "P". The Registrar-General of Births, Deaths and Marriages, nevertheless formed the view he was, in the circumstances, required to register A's adoption under his original Thai surname as recorded on a certificate issued by the Thai Central Authority pursuant to art 23 of the Convention. On that basis, A's New Zealand birth certificate would be issued in that surname. Moreover, even if the Ps applied to change A's surname to theirs, his birth certificate would always record his original surname as a "former name".

[3] MP says that in doing so the Registrar-General acted unlawfully. The Registrar-General had the power, and was required, to register A's surname as that of his adoptive parents (as they had stipulated), namely P.

[4] After some procedural complications, which we explain below, the difference between the legal views of the Registrar-General and the Ps was considered by Clark J in the High Court. In her discretion the Judge characterised the matter as an application for a declaratory judgment as to the name by which the Registrar-General must register the birth of a child who has been adopted pursuant to the Convention. The Judge made the following substantive declaration:[4]

> When registering the birth of a person who is adopted the Registrar-General is bound to record the name specified in the adoption order. In relation to adoptions to which s 11 of the Intercountry Adoption Act applies, the name to be recorded will be the name recorded in the certificate signed by the competent authority in the State where the adoption took place. In this case that is the art 23 certificate.

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3 The Convention distinguishes between jurisdictions, such as New Zealand, under whose laws adoption severs existing parent-child relationships (a "full" adoption) and those which do not (a "simple" adoption). The Convention provides for "simple" Convention adoptions in one jurisdiction to be converted to "full" adoptions in another. See [11] to [16] below.

4 *Registrar-General of Births, Deaths and Marriages v AA and MM* [2020] NZHC 22 [Judgment under appeal] at [66].

[5] In this appeal, the Ps ask us to quash that declaration and replace it with one conforming with their view of what the law required the Registrar-General to do when registering A's adoption and, subsequently, when issuing a birth certificate for them.

[6] Having in that way agreed with the Registrar-General, the Judge turned to the Family Court order confirming A's adopted surname as P. She first concluded that A's adoption had been a "full" adoption all along, so that the order of the Family Court under s 12 of the Adoption (Intercountry) Act 1997 (the Intercountry Act) converting A's Thai Convention adoption to a full adoption was of no effect. Neither, therefore, was the order confirming A's adoptive surname as P. Those orders were, the Judge said, invalid and of no legal effect.[5] The Ps also challenge that conclusion and ask us to quash the declaration the Judge made to that effect.

Overview

[7] In this judgment, we first summarise the background to A's adoption. We then set out the relevant provisions of the Convention and how they are given effect by New Zealand legislation. In particular, we explain the two major differences between the parties: whether the adoption in Thailand was a full adoption, that is one having the legal effect of terminating the pre-existing parent-child relationships, and whether the Registrar-General was required to register A's surname as that chosen by his adoptive parents.

[8] Having discussed the background to the High Court decision and the Judge's reasoning, we address the substance of this appeal which, for the reasons that follow, we have decided to allow.

Background

A Convention adoption

[9] The Ps' adoption of A was effected on 31 May 2016 when the Thai Central Authority issued a Certificate of Conformity of Intercountry Adoption pursuant to art 23 of the Convention. Article 23 provides, as relevant:

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5 At [62]–[63].

Article 23

1 An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States.

[10] Section 11 of the Intercountry Act gives effect to New Zealand's commitment to recognise Convention adoptions. It provides:

> (1) An adoption made in accordance with the Convention, subject to Article 24 of the Convention,—
>
> (a) must be recognised in accordance with the Convention; and
>
> (b) for the purposes of this Act and all other New Zealand enactments and laws, has, subject to section 12, the same effect as an adoption order validly made under the Adoption Act 1955.
>
> (2) A certificate signed by the competent authority in the State where the adoption took place and stating that the adoption was made in accordance with the Convention is for all purposes prima facie evidence of that fact.

Termination of pre-existing parent-child relationships

[11] Section 12 of the Intercountry Act in turn addresses the one respect in which the effect of a Convention adoption may differ from an adoption order by a New Zealand court. Under the Adoption Act 1955 (the Adoption Act) a New Zealand court's adoption order automatically terminates any pre-existing parent-child relationships as regards the adopted child. That is not the position under the Convention. Rather, and as s 12(1) of the Intercountry Act recognises:

> An adoption in accordance with the Convention does not have the effect of terminating a pre-existing legal parent/child relationship unless—
>
> (a) the adoption has that effect in the State where it was made; or
>
> (b) the Family Court makes an order converting the adoption into one having that effect.

[12] In the course of obtaining legal recognition of A's adoption under German law, the Ps were advised by the German authorities that under Thai law A's adoption did not, and indeed could not, have the effect of terminating pre-existing legal parent-child relationships in Thailand: that is, it was under Thai law a "simple" adoption.

Moreover, unless an order under s 12(1)(b) was made by a New Zealand court, German recognition in the form they desired would not be possible.

[13] So, in December 2016 the Ps — acting for themselves as they have throughout, including in this appeal — applied to the Family Court for a s 12(1)(b) order.

[14] Section 12(2) of the Intercountry Act provides the basis for such an order:

> (2) The court may, on application, make such an order if satisfied that—
>
> (a) the adoptive parent is habitually resident in New Zealand; and
>
> (b) the adoptive parent has, in accordance with the Convention, adopted, in another Contracting State, a child who is habitually resident in that Contracting State; and
>
> (c) the consents to the adoption required by paragraphs (c) and (d) of Article 4 of the Convention have been given for the purpose of an adoption that terminates the pre-existing legal parent-child relationship.

[15] Article 4 of the Convention, as referred to in s 12(2)(c), stipulates the steps required to be taken by the competent authority in the State of origin. Paragraph (c) requires that authority to have ensured various consents have been properly obtained, including that:

> (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, *in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin*…
>
> (Emphasis added.)

[16] Articles 26 and 27 also address the question of the termination of any existing parent-child relationships. Article 26 simply confirms that recognition of a Convention adoption includes recognition of the termination of pre-existing parent-child legal relationships, if the adoption had that effect in the Contracting State where it was made. Article 27 applies where an adoption does not have that effect in the Contracting State where it was made. Article 27 recognises such an adoption may be converted into one having that effect if (i) the law of the receiving state so permits

and (ii) as reflected in s 12(2)(c), the art 4 consents have been given for the purpose of an adoption with that effect.

The Ps seek to terminate the pre-existing parent-child relationships

[17] To satisfy the requirements of s 12(2)(c) of the Intercountry Act, the Ps included the following documents with their s 12(1)(b) application to the Family Court for an order converting the adoption into one having the terminating effect:

(a) A letter of 23 June B. E. 2558[6] (2015) recording the consent of the Thai Department of Children and Youth consenting to the Ps' adoption of A. As relevant, that letter read:

> In this connection, the Department of Children and Youth certifies that [AA] born on [date of birth] is an abandoned child who has been in the care of the Department of Social Development and Welfare since [the relevant date]. The Department of Children and Youth is authorized by law to give consent for adoption on behalf of the child's parents, therefore, the child is legally available for adoption. In such case, the natural parents lose parental power, if any, from the time when the child is adopted.

(b) The art 23 certificate for A's adoption which, again as relevant, recorded:

> 5. The undersigned authority certifies that the adoption was made in accordance with the Convention and that the agreements under Article 17, sub-paragraph c, were given by:
>
> a) Department of Children and Youth
> Child Adoption Center
> 255 Ratchawithi Road, Bangkok 10400
> Thailand
> Tel & Fax: 0-2354-7509, 0-2354-7511
> Date of the agreement: 18 February 2015

6 The year according to the Buddhist calendar.

b) Child, Youth and Family National Office

Office Of the New Zealand Central Authority for Intercountry Adoption
P.O. Box 1556 Wellington 6140 New Zealand
Tel: 0064 (04) 918 9153 & Fax: 0064 (04) 918 0041
Date of the agreement: 4 June 2015

6. [✔] The adoption had the effect of terminating the pre-existing legal parent-child relationship.

Done at Child Adoption Center, Central Authority on 31 May 2016.

[18] In terms of arts 26 and 27, and in turn s 12(1) of the Intercountry Act, that material on its face is capable of two interpretations:

(a) either, and contrary to the understanding of the German authorities, in Thailand the Convention adoption of an abandoned child consented to by the Department of Child and Youth *does have* terminating effect: that is, s 12(1)(a) applies;

(b) or, and consistent with the understanding of the German authorities, A's Convention adoption *does not have* that effect under Thai law, but the Thai Department of Child and Youth had given its consent on the basis A's adoption could or would have that effect in New Zealand: that is, s 12(2)(c) applies.

[19] Most of the Convention's Contracting States, including Thailand, have lodged a standard form profile with the Hague Conference. Those profiles are available online. One section of the standard form profile addresses a State's domestic law on termination of existing parent-child relationships. Thailand's profile reads:

PART VIII: SIMPLE AND FULL ADOPTION

30. Simple and full adoption	
a) Is "full" adoption permitted in your State? *See GGP No 1 at Chapter 8.8.8 and note 21 below*	☐ Yes ☒ No ☐ In certain circumstances – please specify: ☐ Other (please explain):
b) Is "simple" adoption permitted in your State? *See GGP No 1 at Chapter 8.8.8 and note 21 below*	☒ Yes ☐ No – **go to Question 31** ☐ In certain circumstances only (*e.g.*, for intra-family adoptions) – please specify: ☐ Other (please explain):

[21] According to the 1993 Convention, a **simple** adoption is one in which the legal parent-child relationship which existed before the adoption is not terminated but a new legal parent-child relationship between the child and his/her adoptive parents is established. A **full** adoption is one in which the pre-existing legal parent-child relationship is terminated. See furthers Arts 26 and 27 and GGP No 1, *supra,* note 15, Chapter 8.8.8.

[20] That material suggests that, as a matter of Thai law, A's adoption was a simple one, but that consents to that adoption had been given on the basis it could be converted into a full adoption.

The Family Court makes a s 12(1)(b) order

[21] In any event, on 21 March 2017, Judge Grace at the Family Court in Nelson made the following order, pursuant to s 12(1)(b) of the Intercountry Act:

> The adoption of the child [AA] [date of birth], registered on 20 April 2016 at the Royal Thai Embassy, Wellington, in accordance with the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, is hereby converted to an adoption having the effect of terminating the pre-existing legal parent-child relationship.

[22] A certificate was issued by the New Zealand Central Authority, the Ministry of Social Development, on 31 March 2017. That certificate confirmed the efficacy of that decision under New Zealand law as converting A's adoption to one terminating pre-existing legal parent-child relationships.

The Ps try to choose their child's name

[23] On 10 April 2017, concerned at the use of A's Thai name in the Family Court's s 12 order and the Central Authority's certificate, the Ps applied again to the Family Court, this time to "have our surname ['P'] and the given name ['A'] conferred on our adopted child".

[24] In their covering letter the Ps explained:

> Our adoption was made and converted in accordance with the Convention of Protection of Children and Co-operation in Respect of Intercountry Adoption and no names were conferred on our child in the process.
>
> We specify these names pursuant to Section 16(1) & (1A) of the Adoption Act 1955 in conjunction with Section 11(1)(b) of the Adoption (Intercountry) Act 1997 and Article 26(2) of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.[7]
>
> We believe conferring these names is in the best interest[s] of our chid because it simplifies his integration. Our [child] is 4½ years old and we are keen to register our son for school with the conferred names.

[25] Judge Russell's judgment of 20 September 2017 granting that order reads, as relevant:[8]

> [1] These are proceedings under the New Zealand Adoption (Intercountry) Act 1997 in respect of a child originally named [AA] who was born [date of birth].
>
> [2] Judge Grace considered the application by [MP and FP] for the adoption of [the child] on 21 March 2017. He was satisfied that the provisions of the Adoption (Intercountry) Act 1997 were met and made the order as [MP and FP] had sought.
>
> [3] In that order Judge Grace confirmed the name for this child, following the adoption, to be the original name that he held, namely: [AA].
>
> [4] [MP and FP] are German citizens. They have permanent residency in New Zealand. They wish to stay here. What they had sought and which did not occur on 21 March is for [the child] to be named [AP]. They wish this to be corrected and to have this name recorded on any legal documents for their child and have made application back to the Court for this to occur.
>
> …

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7 We consider the significance of those provisions at [28] below and following.

8 *[P]* [2017] NZFC 7521

> [7] My review of the proceedings concludes that the name that [MP and FP] wished to call their child could have been set out in Judge Grace's order of 21 March 2017 but unfortunately it was not.
>
> [8] I see no issue or difficulty in varying the order made by Judge Grace to correctly name [the child] in the way that is sought.
>
> [9] Against this background, I make the following orders and directions:
>
> (a) I vary the order made by Judge Grace on 21 March 2017 to record the correct name of [AA] from that time is to be [AP] born [date of birth].
>
> (b) An amended order is to be issued to [MP and FP].
>
> (c) I direct that any re-issued birth registration papers for [the child] does not contain [MP and FP's] name noted as being as the adoptive parents of [the child].

[26] As can be seen, there was a degree of confusion in the Family Court as to the implications of the Ps' earlier application for a conversion order. The Ps had not applied "for" A's adoption. That had already occurred. Rather, the Ps had applied for a s 12(1)(b) order converting a simple adoption under Thai law to a full adoption under New Zealand law. Nor, in making that order, had Judge Grace purported to "confirm" A's name as the Family Court would do when authorising an adoption under the Adoption Act. But the purport of Judge Russell's orders and directions were clear, and satisfied the Ps.

[27] Thereafter the Ps engaged extensively with the Registrar-General with a view to obtaining a birth certificate for A under their preferred surname. As now relevant, on 9 February 2018 the Family Court on behalf of the Ps forwarded copies of its orders of 26 March and 20 September 2017 to the Registrar-General. Then, on 21 February 2018, the Registrar-General wrote to the Ps confirming his view A's birth could not be registered in the name "AP". Rather the Ps would have to register A's birth under the surname A, then apply for a name change. That was because it was not possible "to consider post adoption information as being information deemed to have occurred at the time of adoption".

The P's challenge the Registrar-General's approach

[28] On 3 January 2019 the Ps commenced proceedings in the Family Court to enforce the orders made by Judge Russell.[9] They asserted the Registrar-General was wrong in refusing to comply with those orders. The combination of the provisions of both the Convention and the Intercountry Act allowed, as affirmed by the Family Court, for a birth certificate for A to be issued under the surname P.

[29] Taken overall, the Ps argued that where a child is adopted in New Zealand:

(a) pursuant to s 16(1A) of the Adoption Act the adoptive parents specify the child's "new" name or names to the Family Court;

(b) section 63(2) of the Registration Act limits the information that may be shown on an adopted child's birth certificate to the information that such a certificate would contain if the adoptive parents were the person's biological mother and father, and the name or names recorded under ss 24 or 25 of that Act had been recorded as information relating to that person's registration of birth; and

(c) unless the adoptive parents have asked to be referred to as adoptive parents, the child's birth certificate will not show they have been adopted.[10]

[30] The Ps contended that under s 11 of the Intercountry Act, that same regime was to be made available to them and A.

[31] On 12 February 2019 the Registrar-General filed a notice in the Family Court opposing the Ps' application for enforcement orders. In doing so the Registrar-General summarised his position in the following terms:

> 6. The applicants wish to register [the child's] name on his birth certificate as [AP], i.e. they wish the birth certificate to show [the child's]

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9 Pursuant to the District Court Act 2016, s 134.

10 The Convention and the Intercountry Act both contain provisions whereby an adopted child may later in life have their birth registration and other records amended to reflect their original biological family details as well as their subsequent adoptive family details.

> post-adoption name as being his name at birth. They also wish to have [MP's] name recorded as [MP] (as he is now known), as opposed to [another name], as it appears on the birth certificate and on the Art 23 certificate. The respondent is unable to do either of these things in the manner requested by the applicants.

[32] Then, on 9 April 2019 the Registrar-General filed in the High Court an interlocutory application for special leave to appeal Judge Russell's 20 September 2017 judgment out of time, and a notice of appeal. In a minute issued following a case management conference in the High Court on 20 May 2019 Clark J timetabled the steps required for the application and the appeal, and directed the Registrar to list the matter for a half-day hearing after consultation with the parties. The application was later set down to be heard on 18 November. The hearing took place that day and Clark J reserved judgment.

An application for declaratory relief

[33] On 13 December 2019, and whilst the judgment was still reserved, Clark J issued the following minute:

> [1] Counsel will recall that just prior to the commencement of this hearing on 18 November and through the case officer, I signalled my concern about the Registrar-General's standing to bring this appeal given he was not a party to the proceeding in the Family Court whose decision the Registrar-General purports to appeal.
>
> [2] In the course of the hearing I discussed with counsel the possibility of treating the appeal as though it had been brought in another form for example, an application for judicial review or an application for a declaration.
>
> [3] The email of Ms Hutchison, for the Registrar-General, dated 2 December 2019 to the case officer has been brought to my attention. I understand the Registrar-General proposes to submit the proceeding should be treated as a judicial review of the Family Court's decision.
>
> [4] The purpose of this minute is to signal to counsel that I consider the better way forward is to treat the appeal as though it were an application for a declaration and I propose to do so in reliance on r 1.9 of the High Court Rules, and the inherent jurisdiction of the High Court.
>
> [5] I propose to deliver my judgment on that basis. Accordingly, I do not require submissions on the jurisdictional issue.

[34] So, the jurisdictional difficulties the Registrar-General's appeal faced were resolved by a recategorization of that proceeding to one seeking declaratory relief.

[35] In the interim, and in response to an official information request by the Ps, the Department of Internal Affairs had on 22 August 2019 confirmed its position on the question of birth certificates for children adopted under the Convention in the following terms:

> The Department also wishes to advise that on 3 May 2019 the RG agreed to resume registration of Hague Convention adoptions. Adoptive parents who have sought a post-adoptive New Zealand birth certificate have been advised by the Department that, in the case of Hague Convention adoptions where the Article 23 certificate does not provide post-adoptive names for the child, the child's birth will be registered with the name that appears on the Article 23 certificate, and any subsequent name changes will be included in the registration. Consequently, the child's post-adoptive New Zealand birth certificate will be issued showing both the pre-adoptive name as stated on the Article 23 certificate and any subsequent name changes for the child.

[36] That was the approach taken by the Registrar-General in the High Court.

The challenged High Court decision

[37] In her judgment, Clark J first explained the basis of the decision she had foreshadowed in her minute of 13 December 2019. She explained that she acted in reliance on r 1.9 of the High Court Rules 2016, which empowers the Court to regularise procedural defects and failures. In doing so she noted that questions of standing were not generally seen as involving ones of procedure.[11] However, and following the approach in *Niak v Armitage*, she recognised what she referred to as the "substantive reality" of the important issue raised and the need for certainty, not only for the Ps, but also for others in similar positions.[12] Moreover, the parties had submitted to the jurisdiction of the High Court and the Court had before it all that was necessary in order to determine the issue of statutory interpretation.[13] It was therefore appropriate, she said, for the Court to take a broad view of its r 1.9 discretion.[14]

[38] In essence, the Judge reasoned, the question of the correctness or otherwise of the Registrar-General's approach was susceptible to declaratory relief.[15] The question was one of law, there were no facts in dispute and an actual controversy was

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11 Judgment under appeal, above n 4, at [20].
12 *Niak v Armitage* (1992) 6 PRNZ 566.
13 Judgment under appeal, above n 4, at [22].
14 At [23].
15 At [24].

involved.[16] It was appropriate for the Court to solve the impasse that existed. On that basis she concluded:

> [27] The respondents have attempted to enforce the Family Court order but, of course, the Registrar-General cannot be compelled to do that which is contrary to the powers conferred upon him by statute. It is for the High Court therefore to break the impasse by determining whether the Registrar-General's view of the scope of the powers he holds is correct.

[39] We make one comment. The Judge's observation that there were "no facts in dispute" may have overlooked the difference in view between the parties as to the effect of A's Convention adoption under Thai law. Section 144 of the Evidence Act 2006 provides for the way in which evidence of foreign law may be introduced. The courts are to determine matters of foreign law as questions of fact on the basis of such evidence.

[40] We return to the Judge's finding on the status of A's Convention adoption under Thai law below. We do not consider it necessary to comment further on the reason the Judge approached the matter before her as an application for a statutory declaration. That was a pragmatic and legally sensible approach to take and, as the Judge noted, enabled the controversy between the parties to be considered by the High Court.

[41] The Judge then identified the legal issue that arose: the name by which the Registrar-General must register the birth of a child who had been adopted pursuant to the Convention. In particular, where the parents wish to change the child's name from that recorded in the art 23 certificate, must the Registrar-General nevertheless register the child under the name recorded in that certificate?

[42] In making the substantive declaration recorded at [4], the Judge reasoned:[17]

(a) It was a pre-condition to registration of both New Zealand and overseas adoptions of children whose births had not been registered that those births be registered (s 24(1) and s 25(a) respectively).

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16 At [25].
17 At [47].

(b) Where the Court notifies the adoption of a person whose birth has not been registered, s 24(2) requires the Registrar-General to "forthwith" record the information contained in the s 23 notice "as if the person's birth is registered, and the information is included in the registration".

(c) But, in the case of an adoption which takes place overseas, there is no s 23 notice. How then, the Judge asked, was s 24(2) to apply? For the purposes of registering a Convention adoption, the art 23 certificate could be relied upon in place of the s 23 notice.[18] Where the birth had not been registered in New Zealand the information contained in the art 23 certificate was to be included "as if the person's birth is registered and the information is included in the registration".[19]

(d) Accordingly, unless the art 23 certificate was varied, or the child's new name was registered pursuant to s 21B of the Registration Act, "the birth certificate is required to contain the child's birth name, that being the name deemed by s 24(2) to be registered on the registration of birth".[20] That was consistent with reg 6 of the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995, which provides:

> **6 Birth certificates**
>
> There is hereby prescribed to be contained in a birth certificate relating to any person's birth,—
>
> (a) in all cases,—
>
> (i) the person's full name as registered on the initial registration of the birth:
>
> (ii) details of all changes of the person's name registered after the initial registration of the birth:
>
> …

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18 At [51].
19 At [54].
20 At [55].

[43] Clark J further reasoned that Judge Russell's September orders could not vary that position. First, and contrary to the P's submissions, the earlier March order by Judge Grace was not an "adoption order" which could be varied under s 20 of the Adoption Act. Rather, that order was one purporting to convert A's adoption, under s 12 of the Intercountry Act, to have the effect of terminating the pre-existing parent-child relationships.[21] But Clark J considered that order was not necessary because the overseas adoption had already done that. The adoption was certified as having that effect in the art 23 certificate.[22] Accordingly, the March order of the Family Court was of no effect, and so the September order purporting to vary that order was also of no effect.[23]

[44] In summary, central to the first declaration Clark J made were her findings that:

(a) in the case of Convention adoptions, an art 23 certificate performed the "information providing" role of a s 23 Registration Act notice of adoption; and

(b) accordingly, the name of the child as shown in the art 23 certificate was, in terms of s 24(2) of the Registration Act, to be recorded "as if the person's birth is registered and the information is included in the registration".

[45] By that we take the Judge to have concluded it was as if the child's birth had been registered in the name shown on the art 23 certificate and registration of the subsequent Convention adoption was to proceed accordingly. As to the information to be contained in the child's birth certificate, reg 6 supported that interpretation.

[46] Those conclusions are, we note, essentially a restatement of the Registrar-General's view that it was not possible for him "to consider post adoption information as being information deemed to have occurred at the time of adoption".

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21 At [60].
22 At [62].
23 At [63].

Correct respondent and scope of the appeal

[47] Before we set out our substantive analysis, there are two preliminary matters to consider. The first relates to the identity of the respondent and the second is the approach we take to the scope of this appeal.

[48] As to the first of those matters, counsel for the respondent in the High Court, that is the Registrar-General, in a preliminary memorandum in this appeal submitted that the correct (Crown) respondent was in fact the Attorney-General, rather than the Registrar-General. She did so because s 14(1) of the Crown Proceedings Act 1950 provides that civil proceedings on behalf of the Crown are to be instituted by an officer who "has the power the sue on behalf of the Crown or of any government department apart from this section". The Registrar-General did not have that power. Moreover, whilst the Declaratory Judgments Act 1908 in s 3 allowed "any person" to apply for a declaratory order, Crown counsel's submission was that the appropriate person to do so, and hence to be the respondent, was the Attorney-General. Making such an order would regularise the proceeding, rather than affecting any of its substantive aspects.

[49] We consider such an order is appropriate. The Attorney-General is the most representative of Crown defendants and we are satisfied no prejudice arises for the appellant in substituting the Attorney-General as respondent, as reflected in the way this judgment is now intituled.

[50] Turning to the second of those matters, the scope of this appeal, it became apparent at the start of the hearing that there was a difference in views between parties as to scope.

[51] That is because, at the hearing, some differences between the Ps and the Attorney-General as to the correct approach became apparent.

[52] When the Ps first filed their notice of appeal, they said the appeal related only to that part of the High Court judgment that found A's Convention adoption did in fact have the effect of terminating pre-existing legal parent-child relationships. The Ps reiterated their position that it was not possible for such a "full" adoption to have been made in Thailand, irrespective of the fact that the art 23 certificate might have claimed

otherwise. At that stage, the Ps only sought relief in the form of a declaration by this Court that their Convention adoption of A did not have that terminating effect.

[53] On 7 September 2020, the Ps amended their grounds of appeal.[24] In addition to their original grounds, they said the High Court decision was wrong because the Judge's finding deprived A of rights equivalent to those enjoyed by locally adopted children.

[54] In their written submissions, they argued more specifically that the rights enjoyed by children adopted under the Adoption Act include a right to a new name conferred by their adoptive parents, and to a New Zealand birth certificate showing only the new name. They also addressed the significance for them of the Judge's finding that their Convention adoption had had the effect of terminating pre-existing parent-child relationships, with the result the Family Court's s 12 order had been of no effect. They explained that the formalisation of the status of their adoption of A under German law relied on the original conversion order of Judge Grace.

[55] In reply, the Attorney-General took a narrower view of the scope of the appeal. He said it was limited to the correctness of the High Court's finding that A's Convention adoption had had the effect of terminating pre-existing legal parent-child relationships. It did not, he argued, concern his powers in registering births of children adopted intercountry, as he asserted Collins J had recognised in a case management decision.[25] Nor did the appeal concern the deprivation of rights owed to A to have a new name chosen by their adoptive parents.

[56] We accept that, as originally framed, the Ps had limited their appeal to, in effect, the Judge's second declaration as to the status of the Family Court orders. However, and as we indicated at the hearing, we think it was very clear by the time of the hearing of the appeal, as reflected in the P's written submissions, that the Ps' appeal was directed at the issue of name as well as to the Judge's determination that A's Convention adoption was a full adoption and, hence, that the initial order of the Family Court was of no effect.

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24 Court of Appeal (Civil) Rules 2005, r 34.

25 *AA v Registrar-General of Births, Deaths and Marriages* [2020] NZCA 162.

[57] We also note the Attorney-General's written submissions addressed the name issue, albeit in less detail than in relation to the validity of the Family Court's orders.

[58] For those reasons, we are satisfied the issues raised by the Ps in their written submissions and elaborated on at the hearing of this appeal were properly before us. Given the jurisdictional difficulties the steps taken by the Registrar-General in support of his views faced, and the pragmatic approach taken by the High Court in characterising those proceedings as an application for declaratory relief on the very point of name, it would be surprising if we were to agree with the narrower framing of the scope of the appeal proposed by the Attorney-General.

[59] We proceed accordingly.

Analysis

Overview

[60] Acknowledging the complexity of the overlapping statutory provisions involved, and with the benefit of the submissions we received on appeal, we have come to a different view from that of the High Court as recorded in the declarations it made. In this section of the judgment, we first explain how those provisions interact, contrasting the operation of ss 24 and 25 of the Registration Act as they relate to the registration of New Zealand and overseas adoptions respectively. We recognise, and identify the source of, the difficulties that regime presents to the Registrar-General in the case of Convention adoptions of children born overseas, including as regards to the contents of birth certificates.

[61] We then consider, as a matter of statutory interpretation, how those difficulties should be resolved. We determine that the Registrar-General is to include, as he does in the case of a New Zealand adoption of a person whose birth has not been registered, the name (if any) chosen by the adoptive parents, so a birth certificate will issue under s 63 in that name and, unless the adoptive parents choose otherwise, without reference to the child having been adopted.

[62] We finally consider the Ps' challenge to the Judge's second declaration. On the basis of the available information relating to the status of A's Convention adoption under Thai law, and in the absence of expert evidence on that question, we consider the Judge was wrong to determine that as a matter of Thai law A's Convention adoption had the effect of severing the pre-existing parent-child relationships so that the Family Court orders were of no effect. We therefore quash the second declaration also, and confirm the lawfulness of those orders.

The statutory scheme

[63] As relevant here, the current statutory scheme is found in a number of places:

(a) Under s 11 of the Intercountry Act, and with the exception relating to simple adoptions, an adoption made in accordance with the Convention has the same effect as an adoption order validly made under the Adoption Act.

(b) Simple Convention adoptions may be converted into a full adoption under New Zealand law under s 12(1)(b) of the Intercountry Act.

(c) The effect of an adoption order made by a New Zealand court (that is, in Convention terms, a full adoption) is stipulated by s 16 of the Adoption Act. As relevant s 16 provides:

(i) First, in subss (1) and (1A) that:

> (1) Every adoption order shall confer on the adopted child a surname, and 1 or more given names.
>
> (1A) The names conferred on an adopted child by an adoption order shall be those specified by the applicant for the order, unless the court is satisfied it is not in the public interest for the child to bear those names.

(ii) Secondly, in subs (2)(a) that: upon an adoption order being made:

> the adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall

> be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock.

(d) Once an adoption order under the Adoption Act is made, s 23 of the Registration Act (i) requires that the Registrar-General be notified of that order and (ii) specifies the range of the information that must be provided in such a notification. That information includes:

(i) the names (if any) of the adopted person immediately before the making of the adoption order;

(ii) the names conferred on the person by the order; and

(iii) whether or not the adoptive parent or parents want the words adoptive parent or parents to appear on the face of the birth certificate relating to the (adopted) person.

(e) Unlike Adoption Act orders, however, the notification and registration of overseas and Convention adoptions is not mandatory. Rather, it is permitted by s 25 of the Registration Act.

(f) When a notice of an adoption is received:

(i) section 24 of the Registration Act stipulates the steps the Registrar-General *must* take where the adoption was one made under the Adoption Act; and

(ii) section 25 stipulates the steps the Registrar-General *may* take where the adoption was an overseas adoption under s 17(1) of the Adoption Act or a Convention adoption under s 11 of the Intercountry Act.

(g) Finally, s 63(2) of the Registration Act limits the information to be included on the face of the birth certificate of a child whose adoption (New Zealand, overseas or Convention) has been registered.

[64] We do not place the same emphasis on reg 6 of the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995 that the Judge did.[26] She appeared to place reliance on the fact that that regulation "makes it clear that *in all cases* the birth certificate is to contain the person's full name, as registered on the initial registration of the birth, and details of all changes of the person's name registered after the initial registration of birth".[27] In our view, however, reg 6 must be read consistently with s 63(2) and therefore does not support the Judge's reasoning in the way she concluded it did.

[65] Taken overall, ss 11 and 12 of the Intercountry Act, when applied to the "effects" of that scheme, provide very strong, if not almost conclusive, support for the outcome the Ps argue for. But there are aspects of specific provisions of the legislation which raise interpretive questions for that approach.

Interpreting the legislative scheme

[66] The rationale for the approach taken by the Registrar-General appears to have its origins in the differences in the procedures under the Registration Act for the registration of New Zealand adoptions and, here, Convention adoptions.

Registration of New Zealand adoptions

[67] Those procedures differ, in the case of New Zealand adoptions, depending on whether the birth of the child has or has not (already) been registered under the Registration Act.

[68] Where a birth has already been registered, the Registrar-General is directed by s 24(1) to "forthwith cause the information it [that is, the notice from the Court] contains to be included in the registration". Put another way, that information is added to that already provided when the child was born. Part 9 of the Act, and in particular ss 74 and 75, then limit the circumstances in which that information may be searched and s 67 limits the information that thereafter will be contained in the child's birth certificate.

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[26] Set out at [42] above.
[27] Judgment under appeal, above n 4, at [37].

[69] Where a birth has not been registered, s 24(2) provides that where the Registrar-General receives notice of the (New Zealand) adoption of a child:

> … the Registrar-General shall, if satisfied of the correctness or likely correctness of the information relating to the date and place of the person's birth, forthwith record the information it contains *as if* the person's birth is registered and the information is included in the registration.
>
> (Emphasis added.)

[70] The use of the phrase "as if" points to the existence of a legal fiction: that is, the birth which has not been registered is treated as if it has in fact been registered, and all the information of which the Registrar-General has received notice was included in that birth registration.

[71] In that way s 24(2) provides for the registration of the birth details of an adopted person at the same time as the registration of that person's adoption. That is made possible, in practical terms, by the notice requirements of s 23 which include, at (g):

> those matters required by the standard form for the purposes of section 11 (which relates to the notification of births) that would have been appropriate if the adopted person had been born to the adoptive parent or parents:

[72] Thus, pursuant to s 24(2) a court will have been notified of the adopted person's actual date and place of birth. But it will also have been provided pursuant to s 23 with all other relevant details (including those required by the standard form) that would have been appropriate if the adoptive parents had been the child's birth parents. Of all that information, s 63(2) stipulates the limited subset which is to appear on the adopted child's birth certificate. That subset includes, in summary, their actual date and place of birth together with the names of their (adoptive) parents, but the certificate is silent as to the parents' status as adoptive parents unless they have stipulated otherwise.

Registration of "overseas" adoptions

[73] Section 25 of the Registration Act provides for the registration of "overseas adoptions" and is directly applicable here. It states:

> **25 Registration of overseas adoptions**
>
> If the Registrar-General—
>
> (a) is satisfied that section 17(1) of the Adoption Act 1955 or section 11 of the Adoption (Intercountry) Act 1997 applies to the adoption outside New Zealand of a person *whose birth is registered*; and
>
> (b) has received any particulars the Registrar-General requires for the purpose, and is satisfied that they are or are likely to be correct,—
>
> the Registrar-General may direct that section 24 of this Act should apply to the adoption; and in that case that section and section 27 of this Act, with any necessary modifications, shall apply as if the adoption had been effected by an adoption order under the Adoption Act 1955.
>
> (Emphasis added.)

[74] The first point to note is the potential significance of the words "whose birth is registered" in s 25(a). Pursuant to s 5 of the Registration Act every birth in New Zealand must be notified and registered and, with only three exceptions, s 6 provides that no birth outside New Zealand shall be registered:

> **6 Births outside New Zealand**
>
> Except as provided in sections 7(2) and 8 and Part 4, no birth outside New Zealand shall be registered.

[75] Thus, s 6 anticipates that pt 4 provides for the registration of births outside of New Zealand. But if an overseas adoption may only be registered (that is, if the Registrar-General may only direct that s 24 of the Registration Act should apply where "the birth is registered") then on its face s 25 would only provide for the registration of the overseas adoption of persons *whose birth has already been registered in New Zealand*, that is, persons born in New Zealand but adopted overseas.[28] That interpretation would appear to be the logical meaning of the words found in para (a) "… applies to the adoption outside New Zealand of a person *whose birth is registered*".

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[28] We note in passing that it is at least theoretically possible for an overseas-born child to be adopted in New Zealand under s 3 of the Adoption Act. That is because a court may make an adoption order "in respect of any child, whether domiciled in New Zealand or not". That adoption could then be registered under s 24(2) of the Registration Act.

The origin of the difficulties with s 25

[76] The difficulties presented by s 25 would appear to have their origin in various aspects of the legislation over time relating to the registration of births occurring outside New Zealand, and the registration of New Zealand and of overseas (including Convention) adoptions.

[77] The registration of births outside New Zealand was explicitly provided for in the first registration legislation: the 1847 Ordinance for Registering Births Deaths and Marriages in the Colony of New Zealand.[29] Clause 14 of the Ordinance provided:

> **14.** Provided always that nothing hereinbefore contained shall be taken to extend to prevent the registration of the birth of any child, although born at sea or out of the Colony, of parents whose ordinary place of abode is within the Colony. But it shall be lawful for the Deputy Registrar, upon a solemn declaration of the parents or guardians of such child of such particulars of the birth of the child as are herein before required then and there to register the birth of the child according to such information.

[78] The Registration Act 1858, the first relevant parliamentary legislation, contained a similar provision, s 16:[30]

> **XVI Children born out of the Colony**
>
> In every case of the arrival in the Colony of a child under the age of eighteen months at the time of such arrival, born at sea or in any place out of the Colony, whose parents, or other persons having lawful charge of such child, are about to take up their abode in the Colony, it shall be lawful for the Registrar, at any time within six months next following the day of such child's arrival, on a solemn declaration by one of the parents, or by a person having lawful charge as aforesaid of such child, of the particulars required to be registered, to register the birth of such child according to the provisions made for the registration of Births taking place within the Colony, and the terms of sixty-two days, and six months respectively shall be reckoned from the day of such child's arrival in the Colony, instead of from the day of birth.

[79] That provision appeared in very similar form in the subsequent consolidating Acts of 1875,[31] 1908,[32] 1924,[33] and 1951.[34] It was, in fact, not repealed until 1972

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29 An Ordinance for Registering Births Deaths and Marriages in the Colony of New Zealand 1847 11 Vict 9.

30 Where applicable, we have treated the margin notes in the older legislation as section headings for the provisions quoted.

31 Registration of Births and Deaths Act 1875, s 18.

32 Births and Deaths Registration Act 1908, s 18.

33 Births and Deaths Registration Act 1924, s 19.

34 Births and Deaths Registration Act 1951, s 15.

by which time the equivalent provision was s 15 of the 1951 Act.[35] Given subsequent legislative changes, it was the repeal of s 15 in 1971 that is, in many ways, the origin of the difficulties presented by the current version of s 25.

[80] Legal adoption was first provided for in New Zealand in the Adoption of Children Act 1881. That Act was, as is still the case with the Adoption Act today, agnostic as to the place or registration of birth of the adopted person.

[81] The registration legislation first provided for the notification and registration of New Zealand adoptions in 1915.[36] No provision was made then for the possibility the birth of the adopted child was not registered.

[82] That circumstance was first addressed by s 2 of the Statutes Amendment Act 1943. That section provided, as relevant:

> **2 Registration of birth of child adopted in New Zealand when birth not previously registered in New Zealand**
>
> (1) This section shall be read together with and deemed part of the Births and Deaths Registration Act, 1924 (in this section referred to as the principal Act).
>
> (2) In any case where an order of adoption is made under Part III of the Infants Act, 1908, in respect of a child whose birth is not registered in New Zealand, the Registrar-General, upon being satisfied as to the correctness of the particulars necessary for the proper registration of the birth of the child, shall send to the Registrar at Wellington a copy of the notice received by him from the Clerk of the Court under section twenty-seven of the principal Act; and that Registrar shall register, in duplicate, particulars as to the birth of the child, stating the name by adoption instead of the natural name of the child, and stating particulars as to the adopting parent or parents instead of particulars as to the natural parents; and shall transmit the duplicate of the entry to the Registrar-General as if it were a duplicate of an entry made by him pursuant to section twelve of the principal Act.

[83] Section 2 became s 21(5) of the Births and Deaths Registration Act 1951 without substantive amendment. As can be seen, no distinction was made at that point between unregistered births which had occurred in New Zealand and those which had not. That approach would appear to reflect the relative ease with which the birth

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35 Births and Deaths Registration Amendment Act 1972, s 2.
36 Births and Deaths Registration Amendment Act 1915, s 8.

of children outside of New Zealand who arrived in New Zealand before the age of 18 months with lawful caregivers could be registered.

[84] Recognition of overseas adoptions was first provided for by s 17 of the Adoption Act 1955. Overseas adoption orders, legally valid under the relevant local law and giving the adoptive parents, under that law, "a right superior to that of any natural parent of the adopted person in respect of the custody of the person",[37] would have the same effect as a New Zealand adoption order when made in a court of a qualifying jurisdiction.[38]

[85] It was not until 1961, however, that the registration of overseas adoptions was provided for. Section 5 of the Births and Deaths Registration Amendment 1961 provided:

> **5 Registration of adoptions made overseas**
>
> The principal Act is hereby further amended by inserting, after section 21 (as substituted by section 4 of this Act), the following section.
>
> "21A. Where any person whose birth is registered in New Zealand has been adopted in any place outside New Zealand, the Registrar-General shall —
>
> (a) If he is satisfied that the adoption is one to which section 17 of the Adoption Act 1955 applies; and
>
> (b) If he receives such particulars as he requires and is satisfied by statutory declaration or such other evidence as he deems sufficient as to the correctness of those particulars;
>
> direct that the provisions of subsections (2) to (4) and subsections (6) to (8) of section 21 of this Act shall apply to that adoption, with all necessary modifications, as if that person had been adopted under an adoption order made under the Adoption Act 1955."

[86] So, s 21A was only to apply to overseas adoptions of persons whose birth was already registered in New Zealand. Therefore, s 21(5) of the 1951 Act dealing with the New Zealand adoption of children whose birth had not been registered, was not provided as a birth registration pathway. The explanation for that apparent

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37 Adoption Act, s 17(2).
38 Section 17(1).

inconsistency, which is the source of our difficulties with s 25, would appear to be the continued existence of s 15 of the Registration Act 1951 at that time. Under that section, as we have seen, the registration in New Zealand of the *birth* of children adopted overseas before their arrival here was already provided for: hence it was only the registration of their *overseas adoption* that had to be provided for.

[87] In 1963 the first substantive change was made to s 15 since the enactment of its predecessor as far back as 1848. A new s 15A was added, dealing with the registration of births on New Zealand ships and planes. But s 15 itself remained unamended. Then, and as already noted, s 15 was repealed in 1972. But no other provision for the registration of births of children born outside New Zealand took its place. Hence a gap was left in the statutory regime. While an adoption of a child overseas could now be registered under the amendments passed in 1961, that child's birth could not be.

[88] It was against that background that the current Registration Act became law in 1995.

[89] Section 6, the general restriction that only births within New Zealand could be registered was enacted for the first time, with three classes of exceptions:

(a) foundlings abandoned in New Zealand but possibly born overseas;[39]

(b) births on New Zealand ships and planes;[40] and

(c) births registerable in conjunction with the pt 4 registration of adoptions.

[90] Our concern was with the third of those classes. Importantly, no change was made to the class of births that could be registered in conjunction with the registration of adoptions. As before, the only overseas adoptions that could be registered were of persons whose birth had already been registered in New Zealand. Put another way,

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39 Births, Deaths, Marriages and Relationships Registration Act 1995, s 7.
40 Section 8.

the process for registering overseas adoptions provided no pathway for the registration of the birth of children adopted overseas.

[91] That position did not change with the passage of the Intercountry Act. That Act enlarged the provisions for the registration of overseas adoptions and distinguished between adoptions generally and Convention adoptions. However, on the face of the Registration Act and as already explained, the only Convention adoptions that could be registered were those of children whose births were already registered in New Zealand at the time of their Convention adoption. Given the absence of any other method of procuring the registration of an overseas birth, in reality — and inconsistently with the clear intent of the Intercountry Act itself and the amendments made to the Adoption Act — Convention adoptions, while effective themselves under New Zealand law, could not be registered.

A purposive interpretation of s 25

[92] As a result of those legislative changes pt 4 would not on its face provide for the registration of births which occur outside New Zealand as part of the process of registering overseas adoptions. Convention adoptions would, by definition, not be able to be registered and there would be no mechanism for recognition within New Zealand, in terms of public records, of the equal status of New Zealand and Convention adoptions.

[93] We were advised that the Registrar-General is satisfied that s 25, interpreted purposively, applies both to:

(a) overseas and Convention adoptions of persons born outside New Zealand whose births have not already been registered in New Zealand; and

(b) to the much less likely circumstance of such an adoption involving persons born outside New Zealand whose births have already been registered.

[94] We agree with the approach taken by the Registrar-General on that point. When considered against the scheme and purpose, and in light of the legislative history, the obvious and available interpretation of the phrase "is registered" is as a reference to the adoption outside New Zealand of a person whose birth "is or is to be" registered. That is, the phrase "is registered" in s 25(a) applies both to births that have been and have not been registered because both possibilities are addressed by s 24(1) and (2).

[95] Section 25 then empowers the Registrar-General to treat s 24 as applicable to the Convention adoption, "with any necessary modifications", as if that adoption had been effected by an adoption order under the Adoption Act. It is through that ambulatory mechanism that the separate registration pathways of ss 24(1) and (2) apply to Convention adoptions just as they do to New Zealand adoptions.

Registering Convention adoptions and issuing birth certificates

[96] Having found our way through that legislative thicket, we turn now to the Registrar-General's approach to the registration of Convention adoptions and, in particular, to the name to be registered that will subsequently appear on the child's birth certificate.

[97] As reflected in the wording of s 25(b), there is no positive obligation to advise the Registrar-General of an overseas adoption. Rather the section anticipates the Registrar-General:

(a) in fact being notified of such an adoption albeit in an unspecified way;

(b) receiving any particulars they require for the purpose of registration;

(c) being satisfied those particulars are or are likely to be correct; and

(d) then directing that s 24 applies, with any necessary modifications, as if the adoption had been effected by an adoption order under the Adoption Act.

[98] Thus, in applying s 24 the necessary modification is that the word "it" in the phrase "forthwith record the information it contains" refers not to the information provided by the Court pursuant to s 23 but rather to the information in fact received by the Registrar-General — such as it may be — including in response to the particulars the Registrar-General has required.

[99] In the case of a Convention adoption, the Registrar-General would have received notification, in terms of s 24, of the adoption of a person whose birth had not been registered. Accordingly under s 23(2) the Registrar-General is then to record the information the Registrar-General has received "as if the person's birth is registered and [that] information is [already] included in the registration".

[100] So the effect of that legal fiction is that the registration of the birth of the adopted child is recorded at its actual time and place but as if the adoptive parents were the child's natural parents.

[101] Thus, and where the adoptive parents under a Convention adoption notify the names they have chosen for their adopted child, in our view a "necessary modification", in terms of the basic statutory regime summarised at [63] is for the Registrar-General to include, as he does in the case of a New Zealand adoption, the names chosen by the adoptive parents so that, in turn, a birth certificate will issue under s 63 accordingly.

[102] There is not, in our view, any statutory mandate, given the wording of s 25(b) to limit the Registrar-General's response to the details he has received to only those details which are found in the art 23 certificate.

[103] In that way, and as is the case in a New Zealand adoption of a child whose birth has not been registered at the point of the adoption, the register is to include the date and place of the child's actual birth, together with the other information the Registrar-General in fact receives and — where this is provided to the Registrar-General — the name the adoptive parents have stipulated for their child. That is, under New Zealand law and where the birth of a child being adopted has not previously been registered, it is the adoptive parents who, in effect, through

the notification provided by the Family Court of the name they have chosen, choose the name in which the birth of that child is to be registered in New Zealand.

[104] Moreover where, as here, the Family Court has made a s 12(1)(b) order, then the (simple) Convention adoption has become a full adoption under New Zealand law. It is that full adoption that the Registrar-General is to register. In our view the Family Court may at the time of making that s 12(1)(b) order and consistently with its powers under the Adoption Act confirm the names specified by the adoptive parents. Where it does so the birth of the child is to be registered, that is, it is to be treated "as if" it is registered, by reference to that name or names.

[105] Birth certificates are to be issued accordingly.

A's Convention adoption under Thai law — "simple" or "full"?

[106] In considering whether A's adoption had the effect of terminating the pre-existing parent-child relationships under Thai law, the parties differed as to the evidential status and reliability of the art 23 certificate.

[107] MP characterised its sole purpose as being to certify that the adoption took place in compliance with the Convention. As noted, we were also provided with a variety of written material, recorded at [17], including Thailand's Hague Conference "profile".[41] That information calls into question the accuracy of the position recorded in the art 23 certificate.

[108] By contrast, the Attorney-General submitted the art 23 certificate is an official document by a foreign state about its own law and should accordingly be afforded deference by the Court under the principle of international comity. Although the certificate's accuracy was open to challenge, there was not sufficiently cogent evidence before the Court to rebut the "presumption" that it was correct. Alternatively, if this Court were to disagree that the art 23 certificate accurately recorded the position under Thai law, the inconsistency should be resolved by recourse to expert evidence

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41 Although this matter was not addressed in submissions, and we have reached no firm view, it may be that the Hague profile constitutes a publication in terms of s 144(3) of the Evidence Act.

(similar to the course taken in *Cheon v Attorney-General*[42]) which, in their submission, should be produced by MP.

[109] Based on the information before us and acknowledging the absence of expert evidence, the position appears to be that, as a matter of Thai law, A's adoption was a simple one. Indeed, there is a suggestion at one point in the record that the Central Authority agreed with the approach the Ps had taken on that basis. The Ps, in an affirmation filed in the Family Court, stated that the Ministry of Social Development "confirmed that a Thai adoption may be considered a 'simple' adoption" without the effect of terminating the pre-existing parent-child relationships. But for reasons which were not before us, the Attorney-General did not refer to the approach taken by the Central Authority, or to its role more generally in these matters. We also infer that the combination of the Family Court order and the Central Authority's certificate of conformity with the Convention was sufficient for the German authorities.

[110] In any event, for present purposes we proceed on the basis that it was for the Registrar-General in the High Court to establish that, notwithstanding the arguments counsel for the Attorney-General advanced to the contrary, Thai law provided for a full adoption. In our view, the onus was on the Registrar-General because he wished to obtain from the High Court an order setting aside the Family Court's March order. No admissible evidence to that effect was before the High Court, or this Court. In particular, the art 23 certificate was not admissible evidence that the Thai adoption was a full adoption, for two reasons.

[111] First, the certificate is prima facie evidence of the fact of adoption, under s 11(2) of the Intercountry Act. Its evidential effect does not extend beyond that and it is not admissible evidence of Thai law under s 144 of the Evidence Act. Although the Attorney-General referred us to the decision of *Re A*, the relevant part of the art 23 certificate — a tick box — would not appear to have the same reliability, in terms of s 144, as a legal opinion from the Solicitor-General of Tonga as to the consequences of an adoption order as in that case.[43]

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42 *Cheon v Attorney-General* HC Auckland CIV-2007-404-7669, 8 July 2008.
43 *Re A* HC Timaru CIV-2004-476-513, 28 July 2005.

[112] Secondly, in our view, the better interpretation is that the art 23 certificate issued in the case of A provided consent to facilitate his simple Convention adoption under Thai law becoming a full New Zealand adoption under New Zealand law. The Family Court order was, therefore, required.

[113] We accordingly quash the Judge's second declaration and confirm the validity and lawfulness of the High Court orders.

Result

[114] The appeal is allowed.

[115] The High Court's first declaration is quashed and the following declaration is made in its place:

> When registering an adoption to which the Adoption (Intercountry) Act 1997 applies, the Registrar-General must record the name (if any) specified by the child's adoptive parents as advised to the Registrar-General at the time of notification or, where an order is made under s 12(1)(b) of that Act, as recognised or recorded in that order, and birth certificates are to be issued pursuant to s 63 of the Births, Deaths, Marriages, and Relationships Act 1995 accordingly.

[116] The High Court's second declaration is also quashed. We confirm the legality and validity of the Family Court's order under s 12(1)(b) of the Adoption (Intercountry) Act 1997.

Solicitors:
Crown Law Office, Wellington for Respondent