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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA409/2020
CA410/2020
[2021] NZCA 78

BETWEEN	NORMAN Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	26 November 2020
Court:	Cooper, Brown and Goddard JJ
Counsel:	B J R Keith and R L Fletcher for Appellant K F M Wevers and S Deng for Respondent
Judgment:	19 March 2021 at 10.00 am

JUDGMENT OF THE COURT

A **The application for leave to adduce updating evidence is granted.**

B **The appeal is allowed in relation to Tessa, Sam and Ana.**

C **The appeal is dismissed in relation to Wendy.**

D **The parties are directed to confer in relation to the preparation and sealing of final adoption orders under the Adoption Act 1955 in respect of Tessa, Sam and Ana. Leave is reserved to apply to the Court for approval of the orders for sealing.**

E **There is no order as to costs.**

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REASONS OF THE COURT

(Given by Goddard J)

Introduction and summary

The children whom Ms Norman wishes to adopt

[1] The appellant, Ms Norman, is a New Zealand citizen.[1] She is the aunt of four young people who live in Ethiopia: Wendy (aged 20), Tessa (aged 19), Sam (aged 17) and Ana (aged 15) (the children). In 2011–2012, the children's parents went to Eritrea. The parents have not been heard from since 2013: it is likely they are no longer alive. Ms Norman wishes to adopt the four children and provide a home for them in New Zealand.

[2] In Ethiopia, the children live with another aunt — Ms Norman's sister, Ms May. The children are cared for by Ms May and financially supported by remittances from Ms Norman. Ms May currently has no other source of income. The children live in circumstances of significant material deprivation. They share a small room with Ms May and her daughter (aged 10) in a house owned by another family member. After paying rent for that room Ms May can afford only the most basic food for the family. They have no money for other necessities such as clothing.

[3] The children also live in circumstances of significant insecurity. Ethiopia is a fragile State. There is significant civil unrest and fighting in the region in which the children live. One of the children — Sam — was recently kidnapped and only returned some days later after a ransom was paid (funded by Ms Norman). It appears that incidents of this kind are far from unusual where they live.

[4] The children have no birth certificates or other legal identity documents. Despite the absence of the children's parents, Ms May has not been appointed as the children's legal guardian. The children's lack of a legal guardian restricts their access to such public education and health services as are available where they live. The children have had little access to education over their lifetimes, and currently —

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[1] This is an anonymised version of the judgment: see [52] below. Fictitious names have been used for the appellant and other family members.

as a result of the unrest in the region and COVID-19 — have no opportunities at all for education or work. They are largely confined to the compound in which they live, as a result of the prevailing levels of insecurity.

The adoption application in the Courts below

[5] Ms Norman's application to adopt the children was unsuccessful in the Family Court.[2] The Judge was not satisfied that the claimed family relationship between Ms Norman and the children had been established, and was not satisfied that adoption was in the children's best interests.

[6] Before the High Court, DNA evidence confirmed that Ms Norman is the aunt of the four children. But the appeal was unsuccessful, as Doogue J was not satisfied that adoption was in the children's best interests.[3]

The appeal: a summary

[7] Ms Norman applied to the High Court for leave to appeal to this Court. Leave was granted by Doogue J on 29 June 2020.[4]

[8] Ms Norman says that all the criteria for making an adoption order under the Adoption Act 1955 (the Act) are satisfied. In particular, she says adoption is in the best interests of the children. She emphasises the clearly expressed desire of the children to be adopted by her, and to come to live with her in New Zealand.

[9] In the three years since the adoption application was first filed, the oldest of the children, Wendy, has turned 20. We consider that it is no longer possible for an adoption order to be made in respect of Wendy. Were it not for her age, we would have been prepared to make such an order.

[10] We consider that an adoption order should be made in respect of the three younger children: Tessa, Sam and Ana. These children are not being, and will not be, cared for by their own parents. We are satisfied that adoption by Ms Norman would

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2 *Re [Norman]* [2019] NZFC 7023 [Family Court judgment].
3 *[Norman] v Attorney-General* [2020] NZHC 336 [High Court judgment].
4 *Norman v Attorney-General* [2020] NZHC 1483 [Leave judgment] at [42].

provide the children with a permanent family life with Ms Norman. And we are satisfied that the adoption is in the best interests of these children. The Courts below were right to emphasise that the children have a family life with their aunt in Ethiopia. But they do not have parents or any other legal guardian, and we consider that in their current environment, characterised as it is by a high level of insecurity and deprivation, the children are not able to receive the parental care and support that they require in order to flourish and develop "to their fullest potential".[5]

[11] The issue that has given us the greatest pause in reaching this decision is our inability to make an adoption order in relation to Wendy because of her age. It is in the interests of the three children who are to be adopted — and who are, by virtue of the adoption, New Zealand citizens — that they not be separated from their older sister. They have already suffered significant loss and disruption of their family life. It would be far preferable for all four children to be adopted by Ms Norman and come to New Zealand together. The only reason that is not possible is the significant amount of time — more than three years — it has taken for this matter to be finally determined by the New Zealand courts. In those circumstances, the Attorney-General may wish to invite the Minister of Immigration to consider whether the interests of the three children, who are now New Zealand citizens, and the fact that Wendy would be a New Zealand citizen but for the time taken to resolve these proceedings, provide a basis for the exercise of the Minister's discretion to grant a visa that would enable Wendy to come to New Zealand with her fellow siblings.

Background

Ms Norman

[12] Ms Norman is a New Zealand citizen. She lives in Wellington. She is originally from Ethiopia. Her former husband arrived in New Zealand as a refugee in 2000. At that time Ms Norman was living in Khartoum, Sudan. She was eventually granted a New Zealand visa based on her relationship with her former husband and came to New Zealand in 2009. She became a New Zealand citizen in 2015.

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5 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCRC], art 29(1). See also arts 6(2) and 27–28.

[13] In 2011, Ms Norman and her former husband applied to the Family Court to adopt five children aged 14 to 19 from her former husband's extended family in Ethiopia. This application was successful, and the children became New Zealand citizens by virtue of the adoption. They arrived in New Zealand on 6 July 2013. Ms Norman and her former husband separated later that same year. Ms Norman's former husband and the five children now reside in Australia.

[14] Ms Norman met her current husband on a trip to Ethiopia in 2015. He travelled to New Zealand in June 2015 on a visitor's visa. He was granted residence based on his relationship with Ms Norman in July 2018. The couple now have two young daughters. Ms Norman's husband is employed full-time as a cleaner. Ms Norman is working part-time as a cleaner. She was working full-time until the birth of her daughters. In her evidence before the Family Court she explained that if the current adoption application is successful, she intends to return to work full-time as a cleaner at night to help support the enlarged family. She anticipated that this would be facilitated by Wendy assisting with childcare after school. Although we have not received updating evidence on this issue, it seems likely that, some years on, that role could also be filled by the other children.

[15] Ms Norman and her family live in a two-bedroom property rented from Kāinga Ora.[6] Ms Norman acknowledges that this would not be appropriate accommodation for the family if an adoption order is made: they would need to find a larger home in which to live. When Ms Norman and her former husband adopted his five relatives, it appears they were provided with an adjacent unit, enabling all members of the extended family to have sufficient room in which to live. Ms Norman has made inquiries and understands that a similar arrangement might be possible in this case.

[16] It was common ground before the Courts below, and before us, that Ms Norman is a fit and proper person to take on the role of caring for the children if the adoption is approved. Likewise, Ms Norman's husband, who was interviewed as part of the assessment process, is a fit and proper person to adopt the children.

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6 Kāinga Ora — Homes and Communities is the Crown agency which (among other functions) is responsible for the rental properties previously administered by Housing New Zealand.

The children and Ms May's role in their care

[17] Much of the information set out below is based on a very thorough and helpful Child Study Report (Report) prepared in December 2018 at the request of Oranga Tamariki by Ms Atnafu Wube, a qualified lawyer and accredited member of the International Social Service network in Ethiopia. Ms Atnafu Wube travelled to the regional town in which the children live with Ms May and conducted interviews with them there. She also located, and met with, a priest who baptised the children and signed the baptismal certificates that are their only identity documents.

[18] Ms Norman and Ms May are, as noted above, sisters. Ms May is the youngest of four children. She was born while her parents were living in Sudan. The eldest daughter was the children's mother. Ms Norman was the third child. Their parents died in Sudan in 1995 and 1997. Ms May went to live with her eldest sister and her husband — the children's parents — who were also living in Sudan at that time. The children that Ms Norman is now seeking to adopt were born in Sudan while their parents were living there. Wendy was born in 2000; Tessa was born in 2001; Sam was born in 2003; and Ana was born in 2005. From the time of their birth Ms May played a significant role in caring for the children.

[19] In September 2008 the children's parents, Ms May and the children moved to Ethiopia. It appears that the children's father left the family and travelled to Eritrea in 2010–2011. After an extended period without hearing from him, he made telephone contact in 2012. The children's mother decided to travel to meet her husband in Eritrea. She left the children in the care of Ms May. It appears that the children's mother met with her husband in Eritrea. They spoke with Ms May and the children by telephone from Eritrea on a couple of occasions. But from 2013 onwards the family has not heard from, or received any news about, the children's parents. Responsibility for the day-to-day care of the children fell on Ms May from 2012 onwards.

[20] As noted above, Ms May also has one child of her own, a daughter born in 2010. She is a solo mother. Ms May and the children have lived in several places in Ethiopia since 2012. After the children's parents left Ethiopia, Ms May faced significant difficulties in caring for the children and her daughter. As a result, she

decided to move to another town where she could live with relatives: her maternal aunt and her aunt's son. Ms May and the children now live in a house with Ms May's aunt and a number of other family members. Ms May, her daughter and the children share one small room in the house. It appears the house has amenities such as electricity and running water.

[21] Ms Atnafu Wube observed that the house is too small and poorly furnished to accommodate four girls and one boy together with Ms May. She was advised by Ms May that the care that has been provided to the children for some years could not go beyond fulfilling some of their basic needs like food and shelter to survive. Ms May said that they had been living for years "without the privilege to even get decent and nutritious meal[s] and a housing environment with basic facilities".

[22] Ms May has in the past attempted to support herself and the family by selling tea and bread to labourers in nearby plantations. But the income she earned was barely enough to cover the cost for food, rent for the room and clothing. It was only with additional support from Ms Norman that the family was able to survive.

[23] The frequent moves the family has made, the remoteness of the region in Ethiopia in which they live, the economic challenges they have faced, and the absence of their parents or any other legal guardian, have all combined to limit the children's opportunity for schooling. Wendy and Tessa attended school in Sudan for a year. They have not been enrolled in school since they came to Ethiopia. The younger children have had no formal schooling. It appears that the children received some informal language education in Amharic and English during a summer school break in 2018. They also received some private language education paid for by Ms Norman in recent years, although this was interrupted when the private school they were attending was closed due to COVID-19.

[24] The Report records Ms May's advice that the health of the children has been good. They have not suffered any serious illnesses.

[25] Ms Atnafu Wube observed that the children and Ms May have "a very strong and tight relationship amongst each other". Wendy told her that they love each other

as a family and treat Ms May more as a mother than as an aunt. Ms Atnafu Wube noted that "[a]ll the children express their deepest love to each other and to their aunt [Ms May]".

[26] The Report notes the presence of a "smooth relationship" between the children and their maternal great aunt, from whom they rent their current accommodation. Ms Atnafu Wube had the opportunity to interview the children's great aunt, who said she "usually feels sorry for the children and it makes her sick seeing them sitting in their room for the entire day instead of going to school".

[27] The Report also addresses the relationship between the children and Ms Norman:

> In the words of [Wendy], their relationship with [Ms Norman] … is getting stronger and stronger every time. The children stated that [Ms Norman] is like our life savior. They said she think and worry about them a lot and that gives them a hope. The son said 'we couldn't think what our options would be if it was not for [Ms May] and [Ms Norman]'. They said they gave a visit to [Ms Norman] whenever she came to Ethiopia and they have a very good relationship with her husband and their kids as well. They said they usually call and talk to them once in a week and this gives them too much hope.

[28] The children have repeatedly expressed, to Ms Atnafu Wube and the social workers who interviewed them by telephone, their desire to come to live with Ms Norman in New Zealand. As Ms Atnafu Wube recorded:

> [Wendy], the eldest daughter stated that they have lived for long puzzling what their future would be as their parents were not there with them and as they didn't get a proper educational opportunity. She said after this process started we gave all our hope and wish on it. In her words she said 'we started to dream about getting a proper education and helping the people who has been there for us such as [Ms May]. In the discussion with [Tessa], [Sam] and [Ana], they said they all felt very much distressed and useless when they spent the whole day [idle]. Accordingly, they said it worries them a lot especially as they feel that they are becoming too much burden on their aunt [Ms May] who is suffering a lot to feed them. According to them their hope to get out of this circle lies on the process their other aunt [Ms Norman] has started years back. In the words of [Sam], 'we feel so much pain for not getting the chance to education and we look [at this] process as our only hope to get the chance for education and in return to open the door for others who couldn't get the chance as a paying back strategy'.

[29] The Report addresses alternative forms of protection available for the children in Ethiopia. According to Ethiopian law any person under the age of 18 should have

a guardian, either by operation of law or through the court. Parents are automatically assigned as guardians of their children by law. In the absence of one or both of the parents, the other parent, or anyone who shows interest in the protection and care of the child, can be assigned as a guardian of the child by court order. Ms Atnafu Wube noted that in this case, both the biological parents are absent and have ceased performing their responsibilities as lawful guardians of the children. The care and protection of the children is vested in the aunt and other relatives. However, as the Report goes on to note:

> … the Aunt [Ms May] has been exercising such responsibility without the proper court's approval as it is mandatory by law. As it is normally assumed, it is very difficult to execute the responsibility as a guardian of a child for non-biological parents without being assigned as such by the court. School registration, seeking medical attentions, or other basic necessities on behalf of the children would be very difficult for someone like [Ms May] without getting the proper guardianship status from the court. As a matter of coincidence, [Ms May] has never been obliged to seek those public services on behalf of the children.

[30] Ms Atnafu Wube identified the various options for children in need that are available under Ethiopian law. She did not consider that any of these options was likely to be both available and satisfactory. She observed that:

> … the support system currently available for the children is barely enough to go beyond fulfilling survival needs. All these [make] the adoption application very much relevant.

Updating evidence

[31] Because some two years had passed since the hearing in the Family Court, this Court granted leave to Ms Norman to provide updating evidence by affidavit.[7] At the hearing of this appeal we also granted leave to the parties to provide further updating evidence in the form of affidavits prepared by social workers instructed by Ms Norman and by Oranga Tamariki. Key points that emerged from the updating evidence were:

(a) The family's material conditions have not improved and have, in some respects, deteriorated as a result of civil war and COVID-19. It appears Ms May is no longer able to sell bread and tea to labourers in nearby

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7 *[Norman] v Attorney-General* CA409/2020, 2 November 2020 (Minute of Cooper J).

plantations. The children have even fewer opportunities than before to undertake activities outside their home.

(b) All four children have been attending a language school to learn to read and write in Amharic, and to have lessons in English. Ms Norman had been paying for these lessons for all four of them until the school was closed due to COVID-19. The children had attended the school for almost two years prior to its closure and had learnt a small amount of English.

(c) The four children do most things together and rely primarily on each other for support. Their aunt, Ms May, is their primary caregiver, and there is undoubtedly a close relationship between the children and their aunt. However, the children appear to view each other as their key support network.

(d) In July 2020, there was a major incident when Sam was kidnapped while outside playing. He was held by the kidnappers for some days and was only released when a ransom was paid. The money for the ransom was provided by Ms Norman.

(e) The kidnapping of Sam has significantly increased the concern felt by Ms May and the children in relation to the risks of venturing outside the compound in which they live, and has further limited the activities they feel they are able to safely undertake.

(f) All the children confirmed that it is hard for them living with Ms May in current conditions, because she does not have enough money to help them, and because their opportunities are very limited.

(g) It appears that their diet consists largely of "shiro", a kind of soup made from chickpea flour. They do not normally eat meat and vegetables, or anything other than shiro.

(h) The children have had regular contact with Ms Norman in New Zealand, through weekly or bi-weekly "WhatsApp" calls.

(i) The children remain anxious to come to live with Ms Norman in New Zealand. They see this as their only chance for education and employment.

(j) The children see coming to New Zealand as also providing benefits for Ms May. They would be able to provide a better life for her by reducing the burden on her and providing her with some support. They also expressed gratitude to Ms Norman, and thought that if they came to New Zealand, they would be able to work and repay some of the support they had received.

[32] As one of the reports prepared by Oranga Tamariki notes, if the children come to live in New Zealand, they will remain within their birth family and their culture. They will be raised in their native culture (albeit within a different society) with their language and traditions, and will maintain connections with their extended family in New Zealand. They will also be able to maintain some contact with Ms May and other relatives in Ethiopia, as they have done in recent years with Ms Norman. But they will lose day-to-day contact with Ms May, who has cared for them since their birth and with whom they are very close. They will also have little or no contact with other members of their extended family living in Ethiopia, including the great aunt in whose house they currently live.

[33] In interviews with the social workers, the children referred to their career aspirations if they were to come to New Zealand, with Wendy hoping to become a social worker, Tessa wanting to become a social worker and children's rights advocate, Ana wanting to be a doctor and Sam saying he would like to follow a career in art and design. Ms Bernadette Kee-Sue, a social worker employed by Oranga Tamariki who conducted the updating interview, expressed concern that the four children did not appear to have much information or understanding about the opportunities available to them in practice in New Zealand. She also expressed concern about difficulties for the children in transitioning into the New Zealand

education system given their ages, compounded by their inability to read, write or speak English.

[34] There will certainly be significant challenges for the children if they come to live in New Zealand, as they learn English and learn to navigate a new and unfamiliar society. With the exception of Ana, they are probably too old to attend mainstream New Zealand schools. But we were advised from the bar that they will receive support from the Ethiopian community to integrate into New Zealand society, and would be able to attend classes targeted at adult immigrants. They will also of course have the support of Ms Norman, who (as the Oranga Tamariki reports record) has experience and a good track record of caring for teenagers adopted into New Zealand. And of course, Ms Norman herself has lived through the experience of coming to New Zealand from Ethiopia, so she is well placed to understand the challenges involved and support the children in adjusting to a new way of life.

Legal framework for adoption application

The Act

[35] Ethiopia is not a party to the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption (Hague Intercountry Adoption Convention).[8] So the Adoption (Intercountry) Act 1997 does not apply to Ms Norman's application to adopt the children. Ms Norman's application was made under the Adoption Act 1955 (the Act).

[36] The Act does not contain a purpose provision. Rather, it focuses on the machinery for adoption, and on the criteria that must be met if an adoption order is to be made. The social context in which adoptions take place, and the purpose of adoption, have evolved significantly over the 65 years since the legislation was enacted. In its report on adoption law delivered in 2000, the Law Commission recommended enacting new legislation to replace the Act.[9] The Law Commission

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8 Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption 1870 UNTS 167 (opened for signature 29 May 1993, entered into force 1 May 1995) [Hague Intercountry Adoption Convention].

9 Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000).

report proceeds on the basis that the fundamental purpose of adoption in contemporary New Zealand circumstances should be to provide a child who cannot, or will not, be cared for by his or her own parents, with a permanent family life.[10]

[37] It is elementary that enactments apply to circumstances as they arise.[11] We consider that the Act can, and should, be read in the context of current circumstances. In particular, we consider that the Act can, and should, be treated as having the purpose identified by the Law Commission as the fundamental contemporary purpose of adoption. We return to this below.

[38] An adoption order may only be made under the Act in respect of a child. The Act does not provide for adult adoptions. The term "child" is defined in s 2 as:

> … a person who is under the age of 20 years; and includes any person in respect of whom an interim order is in force, notwithstanding that the person has attained that age

[39] Section 3 of the Act provides that a court may make an adoption order upon an application made by any person whether domiciled in New Zealand or not, and in respect of any child, whether domiciled in New Zealand or not.

[40] Section 4 sets out certain restrictions on making adoption orders. As relevant, it provides:

> **4 Restrictions on making adoption orders**
>
> (1) Except in special circumstances, an adoption order shall not be made in respect of a child unless the applicant or, in the case of a joint application, one of the applicants—
>
> (a) has attained the age of 25 years and is at least 20 years older than the child; or
>
> (b) has attained the age of 20 years and is a relative of the child; or
>
> (c) is the mother or father of the child.
>
> …

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10 At [168].
11 Interpretation Act 1999, s 6.

[41] It is now common ground that the criteria in s 4 are met in this case, as Ms Norman has attained the age of 20 years and is a relative of the children.

[42] Section 5 creates a presumption in favour of making an interim adoption order before making a final adoption order:

> **5 Interim orders to be made in first instance**
>
> Upon any application for an adoption order, if the court considers that the application should be granted, it shall in the first instance make an interim order in favour of the applicant or applicants:
> provided that the court may in any case make an adoption order without first making an interim order, if—
>
> (a) all the conditions of this Act governing the making of an interim order have been complied with; and
>
> (b) special circumstances render it desirable that an adoption order should be made in the first instance.

[43] Again, it is common ground that in this case the children could only be issued with the documents that would enable them to travel to New Zealand if a final adoption order is made, and they become New Zealand citizens. Ms Norman seeks a final adoption order. The Attorney-General accepts that this is not a case where an interim order would be appropriate. The parties submit, and we agree, that special circumstances make it desirable that a final adoption order should be made if this Court concludes that the application should be granted.

[44] Section 7 of the Act sets out the persons whose consent is required before any adoption order is made, including the parents and guardians of the child. However, s 8 provides that the consent of the parents and guardians of the child may be dispensed with by the court where, among other circumstances, the court is satisfied that the parents have failed to exercise the normal duty and care of parenthood in respect of the child. In this case, the children's parents have not been in contact with the children and have not been heard from for some seven years. Their location is unknown. There is, as noted above, a likelihood that they are no longer living. In those circumstances, both the Family Court and the High Court considered that this was

a case in which the consent of the parents should be dispensed with under s 8.[12] We agree.

[45] Section 10 provides that a report must be obtained from a social worker before any adoption order is made. The court must consider any report which the social worker provides.

[46] Section 11 is at the heart of this appeal. It sets out the criteria that the court must apply in deciding whether to make an adoption order:

> **11 Restrictions on making of orders in respect of adoption**
>
> Before making any interim order or adoption order in respect of any child, the court shall be satisfied—
>
> (a) that every person who is applying for the order is a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain, and educate the child; and
>
> (b) that the welfare and interests of the child will be promoted by the adoption, 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 any condition imposed by any parent or guardian of the child with respect to the religious denomination and practice of the applicants or any applicant or as to the religious denomination in which the applicants or applicant intend to bring up the child is being complied with.

[47] In this case, it is common ground that s 11(a) is satisfied: Ms Norman is a fit and proper person to have the role of providing day-to-day care for the children, and is of sufficient ability to bring up, maintain and educate them. Section 11(c) is not relevant. The focus is thus on s 11(b): whether the adoption will promote the welfare and interests of each of the children, having regard to the wishes of the children.

[48] Section 13A provides a right of appeal from the Family Court to the High Court where the Family Court refuses to make an interim order or an adoption order in

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[12] Family Court judgment, above n 1, at [71]; and High Court judgment, above n 2, at [37].

respect of any child. A further appeal may be brought to this Court with the leave of the High Court, or of this Court.[13]

[49] Section 14 provides for the date on which an adoption order becomes effective:

> **14 Date on which adoption order becomes effective**
>
> (1) An adoption order made after the commencement of this Act shall be deemed to be made,—
>
> (a) in any case where it is issued after an interim order has been made and without further hearing, on the date on which it is so issued:
>
> (b) in any other case, on the date of the actual granting of the order by the court, whether or not a formal order is ever signed.
>
> …

[50] Section 16 sets out the effect of the making of an adoption order:

> **16 Effect of adoption order**
>
> (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.
>
> (1B) Notwithstanding subsection (1), if the court is satisfied that it is contrary to the religious beliefs or cultural traditions of the applicant for an adoption order for the adopted child to bear a given name, the order may confer on the child a surname only.
>
> (2) Upon an adoption order being made, the following paragraphs of this subsection shall have effect for all purposes, whether civil, criminal, or otherwise, but subject to the provisions of any enactment which distinguishes in any way between adopted children and children other than adopted children, namely:
>
> (a) 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:
> provided that, where the adopted child is adopted by his mother either alone or jointly with her spouse, the making of the adoption order shall not prevent the making of an

[13] Senior Courts Act 2016, s 60.

affiliation order or maintenance order, or of an application for an affiliation order or maintenance order, in respect of the child:

(b) the adopted child shall be deemed to cease to be the child of his existing parents (whether his natural parents or his adoptive parents under any previous adoption), and the existing parents of the adopted child shall be deemed to cease to be his parents, and any existing adoption order in respect of the child shall be deemed to be discharged under section 20:
provided that, where the existing parents are the natural parents, the provisions of this paragraph shall not apply for the purposes of any enactment relating to forbidden marriages or civil unions or to the crime of incest:

(c) the relationship to one another of all persons (whether the adopted child, the adoptive parent, the existing parents, or any other persons) shall be determined in accordance with the foregoing provisions of this subsection so far as they are applicable:

(d) the foregoing provisions of this subsection shall not apply for the purposes of any deed, instrument, will, or intestacy, or affect any vested or contingent right of the adopted child or any other person under any deed, instrument, will, or intestacy, where the adoption order is made after the date of the deed or instrument or after the date of the death of the testator or intestate, as the case may be, unless in the case of a deed, instrument, or will, express provision is made to that effect:

(e) subject to the Citizenship Act 1977, the adoption order shall not affect the race, nationality, or citizenship of the adopted child:

(f) the adopted child shall acquire the domicile of his adoptive parent or adoptive parents, and the child's domicile shall thereafter be determined as if the child had been born in lawful wedlock to the said parent or parents:

…

[51] In certain very limited circumstances, an adoption order may be varied or discharged under s 20 of the Act.

[52] Section 22A provides that ss 11B to 11D of the Family Court Act 1980 apply to the publication of a report of any proceedings under the Act. Any report of proceedings under the Act in the Family Court or other courts must not include identifying information in relation to persons under the age of 18, or vulnerable

persons who are the subject of the proceedings. This anonymised version of the judgment has been prepared to ensure compliance with these provisions.

[53] Section 28A provides for rules to be made regulating the practice and procedure of courts in proceedings under the Act. The Adoption Regulations 1959 make detailed provision in relation to applications for adoption. Regulation 10 provides that unless the court directs otherwise, the applicants and the child proposed to be adopted must attend personally before the court at any hearing of the application for adoption. Ms Norman attended the hearings before the courts below, and was present at the hearing before this Court. For obvious reasons the children were not able to be present at the hearings, and we direct that their attendance was not required.

Immigration consequences of adoption

[54] If a child who is not a New Zealand citizen is adopted by a New Zealand citizen, the child automatically becomes a New Zealand citizen. Section 3(2)(a) of the Citizenship Act 1977 provides that a person is deemed to be the child of a New Zealand citizen if the child has been adopted by that citizen, in New Zealand, by an adoption order made under the Act. The child is deemed to have been born when and where the adoption order is made, for the purposes of the Citizenship Act. So the child will qualify as a New Zealand citizen by birth under s 6(1)(b) of that Act.

[55] It is common ground that if the adoption order sought by Ms Norman is made, the children to whom the order relates would automatically become New Zealand citizens by virtue of that order.

Relevant international instruments

The United Nations Convention on the Rights of the Child

[56] The United Nations Convention on the Rights of the Child (UNCRC)[14] was at the forefront of Mr Keith's argument on behalf of Ms Norman. Both New Zealand and Ethiopia are parties to the UNCRC. We agree that the UNCRC provides an important backdrop to the interpretation and application of the Act.

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14 UNCRC, above n 5.

[57] The preamble to the UNCRC notes that in the Universal Declaration of Human Rights,[15] the United Nations proclaimed that childhood is entitled to special care and assistance. The preamble refers to the family as the fundamental group of society and the natural environment for the growth and wellbeing of all its members, particularly children. It goes on to recognise that:

> … the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

[58] The preamble also refers to a number of other international instruments that identify the need to extend particular care to the children, including the International Covenant on Civil And Political Rights (in particular in arts 23 and 24) and the International Covenant on Economic, Social And Cultural Rights (in particular in art 10).[16]

[59] Article 1 provides that for the purpose of the UNCRC, a child means "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". The UNCRC rights are engaged directly in relation to the children under 18. Ms Wevers, counsel for the Attorney-General, submitted that the UNCRC rights are also relevant by analogy when considering the application of the Act to young people aged 18 or over, who are in need of the same special care and assistance. We agree. And it would make no sense to read the Act differently in relation to children aged 18 or 19.

[60] Article 3 identifies the best interests of the child as a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

[61] Article 7 provides that a child must be registered immediately after birth. A child has the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

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15 *Universal Declaration of Human Rights* GA Res 217A (1948).

16 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

[62] Article 12 provides for the views of the child to be taken into account when decisions are made concerning the child:

ARTICLE 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[63] Articles 20 and 21 are of particular relevance to the interpretation of the Act:

ARTICLE 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

ARTICLE 21

States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognise that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

[64] Article 21 requires States such as New Zealand that have a system of adoption to ensure that the best interests of the child are the paramount consideration when making decisions in relation to adoption. As Mr Keith emphasised, this goes beyond the general art 3 requirement that the best interests of the child must be a primary consideration: in the adoption context, the child's best interests are the paramount consideration.

[65] Article 21(b) expressly recognises that intercountry adoption may be an appropriate means of providing care for a child. The United Nations Committee on the Rights of the Child (CRC Committee) has referred to intercountry adoption as "a measure of last resort".[17] But we agree with Doogue J that this statement goes too far.[18] Treating intercountry adoption as a last resort, to be used only if there is no suitable manner in which a child can be cared for in that child's country of origin, would be inconsistent with the requirement that the best interests of the child be the paramount consideration in each case. Intercountry adoption, in particular by a member of the child's extended family, may well be preferable to institutional care or a series of short-term care arrangements in foster homes. It may even be preferable to a permanent home with an unrelated family in the State of origin. The importance of focusing on the child's best interests in each case, rather than adopting a bright-line rule that relegates intercountry adoption to a last resort, is recognised by the

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17 John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford, 2019) at 796, citing *Concluding Observations of the Committee on the Rights of the Child: Mexico* UN Doc CRC/C/15/Add.13 (1994) at [18]; and *Concluding Observations of the Committee on the Rights of the Child: Brazil* UN Doc CRC/C/15/Add.241 (2004) at [47(b)]. See also UNICEF *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, UNICEF, 2007) at 298.

18 High Court judgment, above n 2, at [64].

Guide to Good Practice issued by the Hague Conference on Private International Law (HCCH) (HCCH *Good Practice Guide*) in relation to the Hague Intercountry Adoption Convention:[19]

> The question may arise as to where the child's best interests lie when the choice is between a permanent home in the State of origin and a permanent home abroad with a family member. Assuming that the two families in question are equally suitable to adopt the child, in most cases the child's interests may be best served by growing up with the biologically-related family abroad. This example illustrates that it is not subsidiarity itself which is the overriding principle of this Convention, but the child's best interests.
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> … It is sometimes said that the correct interpretation of "subsidiarity" is that intercountry adoption should be seen as "a last resort". This is not the aim of the Convention. …

[66] As Mr Keith submits, intrafamily adoption addresses many of the concerns that attach to intercountry adoption more generally. In particular, it maintains family and wider cultural connections and lessens many of the risks that are present in the intercountry adoption context.

[67] Thus, as one recent commentary put it:[20]

> *In abstracto*, it can be argued that inter-country adoption is only subsidiary to national suitable solutions, and that institutional care is less and less considered suitable. *In concreto*, every case requires a case-by-case approach in which the different care options are considered in light of the best interests of the child.
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> (Footnote omitted.)

[68] It is of course the case that domestic solutions are generally preferable to those involving another country.[21] But general principles of that kind are no substitute for

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19 Hague Conference on Private International Law *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice (Guide No. 1)* (The Hague, 2008) [HCCH *Good Practice Guide*] at [52]–[53]. See also, in respect of the UNCRC: Wouter Vandenhole, Gamze Erdem Türkelli and Sarah Lembrechts *Children's Rights: A Commentary on the Convention on the Rights of the Child and Its Protocols* (Edward Elgar Publishing, Cheltenham, 2019) at [21.05]–[21.09]; and Tobin, above n 17, at 800.

20 Vandenhole, Türkelli and Lembrechts, above n 19, at [21.09]. See also Tobin, above n 17, at 800; and Daniel O'Donnell *Child Protection: A Handbook for Parliamentarians No 7* (UNICEF, 2004) at 115, which sets out three interrelated principles that:

- Family-based solutions are generally preferable to institutional placements
- Permanent solutions are generally preferable to temporary ones
- National (domestic) solutions are generally preferable to those involving another country

21 O'Donnell, above n 20, at 115.

a case-specific consideration of the best interests of the child as the paramount consideration.

[69] The inquiry into the best interests of the child is broad and comprehensive. As the CRC Committee said in its 2013 general comment:[22]

> The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.

[70] And as the CRC Committee has also observed:[23]

> Children's well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety.

[71] UNCRC rights that are relevant when assessing the best interests of a child include:

(a) The child's right to survival and development, to the "maximum extent possible": art 6(2).

(b) The child's right to a standard of living "adequate for the child's physical, mental, spiritual, moral and social development": art 27(1).

(c) The child's right to education, directed to the "development of the child's personality, talents and mental and physical abilities to their fullest potential": arts 28(1) and 29(1)(a).

Hague Intercountry Adoption Convention

[72] Reference has already been made to the Hague Intercountry Adoption Convention, a widely ratified multilateral instrument designed to give effect to art 21 of the UNCRC, as contemplated by art 21(e). The Hague Intercountry Adoption Convention recognises that "intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her

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22 *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)* UN Doc CRC/C/GC/14 (29 May 2013) at [4].

23 At [71].

State of origin".[24] Although the Hague Intercountry Adoption Convention does not apply in the present case, we agree with the Courts below that the principles underpinning that Convention are relevant when considering intercountry adoption applications under the Act.[25]

[73] Under the Hague Intercountry Adoption Convention, an intercountry adoption can proceed only after the State of origin has given due consideration to possibilities for placement of the child within the State of origin and has concluded that an intercountry adoption is in the child's best interests.[26]

[74] The HCCH *Good Practice Guide* notes that a child should be raised by his or her birth family or extended family whenever possible. But in the majority of cases an intercountry adoption would be preferred ahead of institutionalisation or multiple temporary foster homes. And (as noted above) in some cases, adoption by a family member abroad may be preferable to a national adoption by a non-relative.[27]

United Nations General Assembly Declaration on Social and Legal Principles relating to the Protection and Welfare of Children

[75] We also note, for the sake of completeness, the United Nations General Assembly Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.[28] That Declaration preceded the UNCRC and the Hague Intercountry Adoption Convention. It describes the purpose of adoption in language that is closely reflected in the New Zealand Law Commission report referred to above:[29]

> The primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family.

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24 See the preamble to the Hague Intercountry Adoption Convention.

25 High Court judgment, above n 3, at [30], citing *P v Department of Child, Youth and Family Services* [2001] NZFLR 721 (HC); and Family Court judgment, above n 2, at [64].

26 Hague Intercountry Adoption Convention, art 4(b).

27 HCCH *Good Practice Guide*, above n 19, at [52]–[53] and [511]–[518].

28 United Nations General Assembly *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* UN Doc A/RES/41/85 (3 December 1986).

29 Article 13.

Family Court judgment

[76] The application for adoption was filed in September 2017. It appears that it took some time to obtain the information needed to enable the Court to consider the application. In particular, the Child Study Report prepared by Ms Atnafu Wube was ultimately obtained in December 2018. It appears that (for reasons which are not apparent from the material before us) nine months then passed before the application was heard in the Family Court on 4 and 5 September 2019. Judge Grace's decision was delivered on 6 September 2019.

[77] The Judge declined to make an adoption order for two reasons:[30]

(a) The identity of the children, and their relationship with Ms Norman, had not been satisfactorily established.

(b) The Judge considered that it would not be in the best interests of the children or in the best interests of their welfare to approve the application.

[78] The issue of identity has been superseded by the DNA evidence that was provided in the High Court, which confirmed that Ms Norman is the children's aunt.[31] We need therefore do no more than note that the evidence before the Family Court did not satisfy the Judge about that relationship. The children do not have birth certificates. Copies of baptismal certificates for the children were in evidence. But the Judge identified a number of difficulties in relation to the accuracy and adequacy of those documents as evidence of the identity of the children. The Judge considered that because there were so many unexplained matters in relation to the identity of the children, he could not conclude on the balance of probabilities that the children's identity, and therefore the blood link, had been established to the degree where it would be safe to proceed with the application. However in the event that he was incorrect on that, he went on to deal with the substantive application.[32]

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30 Family Court judgment, above n 2, at [85] and [115].
31 High Court judgment, above n 3, at [44]–[53].
32 Family Court judgment, above n 2, at [85]–[86].

[79] The Judge considered that in circumstances where the parents had not exercised the duties and obligations of parenthood in respect of these children for at least seven years, and had in effect abandoned the children, this was an appropriate case for the Court to exercise its discretion to dispense with the consent of the parents.[33]

[80] The Judge considered that on the balance of probabilities, the parents of the children are not still alive. But the possibility that they are still alive could not be discounted.[34]

[81] The Judge then went on to consider whether there is a suitable carer for the children in their home country. He emphasised the strong connection between the children and Ms May, whom they treat like their mother. Removing them from that relationship would be a significant factor to be borne in mind in coming to the ultimate decision.[35]

[82] The Judge summarised his conclusions as follows:

> [112] The fundamental purpose behind an adoption is to provide a child/young person with a new family, to assimilate them into a new family unit because they do not have a family or a family unit. That carer is a family relative, not a stranger. While the parents have disappeared and are no longer playing their parental roles for these young people, the fact remains that there is a family unit in existence. There is a person providing a care role, and she has been doing that role for some years. There may be poverty within the family but that is not the basis for removing the young people and allowing them to be adopted.
>
> [113] There is a loving and supportive relationship between the current caregiver and the young people, and that relationship goes both ways.
>
> [114] It cannot be said that this is not a family living in Ethiopia.
>
> [115] Taking all these factors into account and endeavouring to weigh them as best I can, I have come to the view that it would not [be] in the best interests of these children or in the best interests of their welfare to approve this application. Even if the question of identity was resolved in favour of the applicant and the young people proving the family link, it would not alter the reality of the relationship which already exists between the young people and their existing carer and the extended family in Ethiopia.

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33 At [70]–[71].
34 At [90].
35 At [91].

High Court judgment

[83] As noted above, DNA evidence before the High Court confirmed the family relationship between Ms Norman and the children.[36] That effectively resolved the issue of identity.

[84] The High Court Judge recorded that Ms Norman meets the criteria in s 4(1)(b) of the Act: she is over the age of 20 and is a relative of each of the children.[37] The social worker had assessed Ms Norman and her partner as fit and proper people to adopt, notwithstanding some concerns regarding their financial resources, housing situation and ability to support the children's transition to New Zealand. So the criterion in s 11(1)(a) was satisfied.[38]

[85] The Judge then moved on to the question of whether the proposed adoption would promote the welfare and best interests of the children. The Judge emphasised the significance of the step of adoption, involving as it does the total substitution of new parents for the existing parents of a child.[39] The Judge identified some additional reasons for caution in the present case:

> [57] In this case there are additional reasons for the court to exercise caution. First, Ethiopia is not a signatory to the Hague [Intercountry Adoption] Convention. Accordingly, the safeguards in the Hague [Intercountry Adoption] Convention, including steps by the state of origin to ensure the adoption is in the children's best interests, are not in place here. Second, the Court is unlikely to have the option, in practical terms, of first granting an interim adoption order. Under the Act, the Court is required to first make an interim adoption order unless special circumstances exist. One of the reasons for this is to provide Oranga Tamariki with an opportunity to monitor the placement to ensure that adoption will promote the children's welfare and interests. However, the children would not be able to travel to New Zealand without first obtaining New Zealand passports, which will only be possible with a final adoption order. Third, the children have not been able to appear personally before the court, as is generally required.
>
> (Footnotes omitted.)

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36 High Court judgment, above n 3, at [44]–[53].
37 At [36].
38 At [39].
39 At [56].

[86] Against that backdrop, the Judge proceeded to make an overall assessment of whether the welfare and interests of the children would be promoted by the adoption. As she noted, that assessment is fact dependent and case specific.[40]

[87] As the Judge identified, the "welfare and interests" of the child referred to in s 11(b) of the Act should be interpreted in a manner that is consistent with international law and New Zealand's international obligations. The UNCRC contains a number of relevant provisions. The principles underpinning the Hague Intercountry Adoption Convention are also relevant, even where the Convention does not apply directly.[41]

[88] The Judge proceeded on the basis that an intercountry adoption "may only be considered if a child cannot be cared for 'in a suitable manner' within the child's country of origin".[42]

[89] The Judge considered that intercountry adoption should not be seen as a measure of last resort. There are circumstances in which intercountry adoption is preferable to alternatives. For example, adoption by a family member abroad may be preferable to a national adoption by a non-relative, or institutionalisation or multiple temporary foster homes.[43] As the Judge noted, both the Hague Intercountry Adoption Convention and UNCRC recognise that intercountry adoption can be in the best interests of a child in an appropriate case.

[90] The Judge noted that a number of cases identify the purposes of adoption in the modern day as "to create a permanent family life for a child that otherwise does not have one".[44]

[91] As the Judge noted, there is some variation in the case law on the relevance of immigration factors.[45] She considered that the general approach to adoption cases

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40 At [58].
41 At [59]–[65].
42 At [60] (footnote omitted).
43 At [64]–[65].
44 At [67], citing *Re Application by Nana* [1992] NZFLR 37 (FC) at 42; and *K v Attorney-General* (2006) 25 FRNZ 413 (FC) at [31].
45 At [69].

with an immigration dimension should include consideration of the following principles and factors:[46]

> (a) there is some tension between the effect of the Act on citizenship and the Immigration Act 2009, and the Act should be applied in a way that is mindful of the statute book as a whole;
>
> (b) the jurisdiction of the Family Court should not be misused to circumvent the Immigration Act 2009;
>
> (c) the motivation behind an adoption application is relevant to the assessment of whether the applicants are fit and proper persons to adopt, and to the assessment of the welfare and interest of the child;
>
> (d) the statutory criteria in s 11 should be interpreted in light of the modern purpose of adoption to create a permanent family life for a child who otherwise does not have a suitable permanent family life;
>
> (e) the welfare and interests of the child should be interpreted consistently with New Zealand's international obligations, which demonstrate a strong preference for children remaining in their country of origin;
>
> (f) it is unlikely to be in the best interests of a child to be adopted by a person who is primarily motivated to confer citizenship or residency, rather than to welcome that child as a permanent member of their family and commit to their upbringing. For example, a child who is adopted to achieve an immigration outcome may not feel they have been really accepted by their new family.
>
> (g) The Family Court in *Re SP-I-HT* listed a number of factors that can be considered when determining whether an adoption application is made solely for the purposes of securing immigration status or not. These factors include the ages of the children; whether the children have carers who can adequately provide for their care; whether there is a blood relationship between the applicants and the children; whether the applicant has previously provided care for the children; and the situation in the children's home country.
>
> (h) It will always be a case specific, fact dependent inquiry.

[92] The Judge proceeded to consider those principles and factors. The Judge did not consider that the application was a calculated or cynical attempt to use adoption to circumvent the immigration legislation.[47] Turning to factor (c) the Judge found that Ms Norman is a fit and proper person to adopt the children. Her motivation is genuine. That meant factor (f) need not be considered. However, in the Judge's view, Ms Norman was "misguided as to what is in the children's best interests".[48]

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46 At [76] (footnotes omitted).
47 At [80].
48 At [81]–[82].

[93] The Judge saw the first and critical question in relation to principle (d) as whether the children can be cared for in a suitable manner in Ethiopia: "[i]f so, it would be inconsistent with New Zealand's international obligations to permit an intercountry adoption".[49] She noted that the children have lived with Ms May since they were born, and she has been their sole caregiver for the past seven or so years. There was no doubt that she is suitable from the perspective of providing the children with a loving and stable family life. The children live with family and appear to have wider family support to some extent.[50]

[94] The Judge noted that Ms May is dependent on funds remitted from Ms Norman in order to provide food and shelter for the children. She described their material circumstances, and the fact that they are not receiving any formal education. She recorded that Ms May has been acting as guardian of the children without court approval, which could give rise to various difficulties.[51]

[95] Under cross-examination in the Family Court, Ms Norman had agreed that the children have a family in Ethiopia, but said that it was hard for them financially. She had described the reasons for the adoption in terms of providing the children with better opportunities, rather than creating a family for them. The Judge considered it was realistic of Ms Norman to identify those outcomes, and not the creation and preservation of a new family unit, as key reasons for the adoption, given the relatively mature ages of all four children.[52]

[96] The Judge also questioned whether Ms Norman truly apprehended the burden she and her partner would be assuming in attempting to assist four teenagers to make such a significant move at such a vulnerable age in their development.[53] Turning to the views of the children, the Judge noted that there did not appear to be any suggestion from the children that they wanted to come to New Zealand in order to be raised and cared for by Ms Norman. "It seems clear that the purpose of this adoption is to enable

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49 At [84].
50 At [85]–[86].
51 At [87].
52 At [91].
53 At [92].

the children to live in New Zealand, rather than to create a permanent family life with [Ms Norman]."[54]

[97] The Judge considered that in circumstances where the proposed adoptions were socioeconomically and educationally driven, rather than driven by the need for the children to have a new family, factor (d) pointed against the adoption being appropriate in this case.[55]

[98] The Judge then turned to consider factors (e) and (g) and concluded that the following factors pointed against adoption being in the children's best interests:[56]

> (a) Given the ages of the children, they are not going to recreate a parent child relationship with [Ms Norman] and her partner.
>
> (b) It is not appropriate to sever their obvious, loving and interdependent relationship with one another and [Ms May] and their great-aunt and extended family in Ethiopia.
>
> (c) The psychological distress of leaving their primary attachment figure in the face of the already significant loss of their biological parents would be injurious to their psychological health.
>
> (d) In addition, given their ages in terms of cognitive and psychological development, there would be a risk that they would be vulnerable and not settle easily in New Zealand, in other words, it is not in their benefit to do so psychologically.
>
> (e) Poverty and lack of educational opportunities are not enough to constitute a valid reason for an adoption, particularly whereas here Ethiopia does have free education, even though these children are not accessing it.
>
> (f) Education and economic advantage, alone, are insufficient to amount to best interests of the children and such advantages can be completely undermined by unhappiness and distress, caused by separation from known, loving attachment figures and language and custom.

[99] The children have, as noted above, expressed a strong desire to come to New Zealand. But the Judge considered that caution is required in relation to the weight to be given to the wishes of the children, "because it is not clear that the

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54 At [93].
55 At [94].
56 At [95].

children have a well-informed or good understanding of what moving to New Zealand would actually entail".[57]

[100] The Judge also noted the understandable reluctance of the children to leave their aunt, Ms May. She considered that it was not entirely clear that the children understood that Ms May would not be able to come with them.[58] In these circumstances, the Judge considered the children's wishes are not well-informed enough for reliance to be placed on the fact that they consent to the adoption.[59]

[101] For the reasons summarised above, the Judge declined to make a final adoption order in relation to the children.[60]

Leave to appeal to this Court

[102] Ms Norman then applied to the High Court for leave to appeal to this Court, under s 60 of the Senior Courts Act. The application identified a number of issues that were said to justify a second appeal.

[103] The Judge considered that one of the issues identified was of sufficient importance to justify a second appeal, and was capable of bona fide and serious argument.[61] That question was whether the High Court erred "in finding the creation of a new family should be considered the purpose of an intrafamily intercountry adoption, or inappropriately precondition[ed] its assessment of the best interests of the children on this purpose".[62] She did not consider that the other issues identified in the application met the relevant threshold for a second appeal.

[104] Counsel for the appellant sought leave from this Court to argue a number of the issues in respect of which the High Court had declined to grant leave. However, we consider that application was unnecessary, and need not be addressed by this Court. If leave to appeal is granted under s 60 of the Senior Courts Act, the appeal is not

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57 At [96].
58 At [98].
59 At [99].
60 At [100].
61 Leave judgment, above n 4, at [41].
62 At [42].

confined to questions of law. Rather, it is an appeal by way of re-hearing that is not restricted to the question(s) identified as justifying the grant of leave.[63]

[105] That approach makes good sense in the present case: it would be artificial to consider aspects of the question of whether or not an adoption order should be granted in isolation from other factors bearing on that decision.

[106] We have therefore received and considered submissions from the parties addressing all matters relevant to the question whether an adoption order should be made in respect of the children in this case.

Submissions on appeal

[107] Mr Keith challenged a number of aspects of the reasoning of the High Court. The fundamental premise of his argument was that the court should have focussed on whether adoption was in the best interests of the children having regard to all relevant factors, including the benefits of acquiring New Zealand citizenship, socioeconomic advantages and other advantages. He submitted the Judge had erred in:

(a) proceeding on the basis that an adoption order should be made only if the children were in need of a new family, in particular in the intrafamily adoption context;

(b) treating the benefits of acquiring New Zealand citizenship and other socioeconomic advantages as either an irrelevant or contrary factor;

(c) focussing on the suitability of their current carer, Ms May, rather than on the children's wider circumstances, safety and prospects, when assessing whether the children can be cared for in a suitable manner in Ethiopia; and

(d) failing to give proper weight to the views of the children, and acting on the basis of concerns and assumptions in relation to the understanding

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63 *Horsfall v Potter* [2017] NZSC 196, [2018] 1 NZLR 638 at [70]–[72].

on the part of Ms Norman and the children of what the proposed adoption would entail, and whether it would be in their best interests.

[108] Mr Keith placed particular emphasis on the need to interpret and apply the Act consistently with arts 12 and 21 of the UNCRC, which are set out at [62]–[63] above. He argued that these provisions underscore the centrality of the best interests of the children, including all aspects of their wellbeing.

[109] Ms Wevers recorded that the Attorney-General's principal concern in the proceedings was to assist the Court, and to ensure that the matters of fact and law raised by the proposed adoption are properly tested before the Court. She submitted that:

(a) The High Court correctly summarised the applicable legal principles and did not make any error in its approach to the proposed adoption.

(b) Both the Family Court and the High Court had concluded on the evidence before them that the proposed adoption was not in the best interests of the children.

[110] Ms Wevers accepted that the question of whether, as a matter of fact, the proposed adoption is in the best interests of the children needs to be reconsidered in light of recent new evidence. She sought to draw all relevant factors to the Court's attention, and test the propositions advanced by Ms Norman, in order to support the Court's assessment of the children's best interests. She acknowledged that a proposed intrafamily adoption may, as a matter of fact, raise different considerations from a "stranger" adoption.[64] We were greatly assisted by the thoughtful and balanced submissions presented by Ms Wevers.

[111] Both parties identified a preliminary issue in relation to the jurisdiction of this Court to make an adoption order in respect of Wendy, in circumstances where she has turned 20 since the date of the High Court judgment. We begin by addressing that issue.

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64 See for example, *K v Attorney-General*, above n 44, at [52]–[53].

Can the Court make an adoption order in respect of Wendy?

The issue

[112] An adoption order can only be made in respect of a "child". As noted above, for the purposes of the Act, a child is defined as a person who is under the age of 20 years.[65] That definition is expressly extended to include any person in respect of whom an interim adoption order is in force, notwithstanding that the person has attained the age of 20 years.

[113] Wendy is no longer a child within the (extended) definition in the Act: she is 20 years old, and no interim adoption order is in force in respect of her. Thus, on the face of the Act, no adoption order can be made in respect of Wendy.

[114] Mr Keith submits that such an order can be made by this Court because:

(a) Such an order could have been made by the Family Court at first instance, as Wendy was under the age of 20 when the matter became before the Family Court in 2019.

(b) This Court's remedial powers extend to the making of orders as if made by the Court at first instance, as at the time of the first instance decision. Under r 48(4) of the Court of Appeal (Civil) Rules 2005 (Rules), this Court may give any judgment and make any order which ought to have been given or made.

(c) The Act does not preclude the exercise of that remedial power. If it is ambiguous on the point, it ought to be interpreted to enable an effective remedy to be granted that is consistent with the UNCRC.

[115] Ms Wevers submits that any power this Court may have under r 48(4) of the Rules to make back-dated orders, or orders "nunc pro tunc" ("now for then"), must depend on the terms of the legislation under which the relevant order is to be made. The Act identifies the limited circumstances in which an order can be made in respect

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65 Adoption Act 1955, s 2.

of a person who is not under 20 years at the time the order is made. Neither the text nor the purpose of the Act support any broader exception.

Discussion

[116] We agree with Ms Wevers' submission that the starting point must be the statute. In this case, the Act draws a clear line at the age of 20. No adoption order may be made in respect of a person above that age, unless an interim order was made in respect of that person prior to their turning 20. The Act expressly addresses the question of when an order can be made in respect of a person aged 20 or older and creates a single clearly defined exception. The text of the Act strongly points against any broader power to make orders in respect of a person aged 20 or older.

[117] Mr Keith's suggestion that an order can be back-dated is also difficult to reconcile with s 14 of the Act, which expressly provides that an order is effective on the date it is made.

[118] We also accept Ms Wevers' submission that these textual indications are consistent with the purpose of the Act. As discussed in more detail below, we consider that the Act is intended to ensure that children under 20 are able to receive parental care from adoptive parents, in circumstances where they are not otherwise receiving such care and the proposed adoption is in their best interests. Mr Keith is right to point out that the effects of an adoption last beyond the age of 20: the change in status and relationships is an enduring one. But the primary focus of the Act is on ensuring appropriate parental care for persons under 20. That purpose can no longer be served in respect of a person who has turned 20.

[119] That reading of the Act is consistent with the approach adopted by the Hague Intercountry Adoption Convention, which ceases to apply if all the agreements necessary for an adoption to proceed, including the agreement of the Central Authorities of the State of origin and the receiving State, have not been given before the child attains the age of 18 years. It is irrelevant that the process began before the child turns 18, if it is not substantially completed by that date. Because the core purpose of the Hague Intercountry Adoption Convention can no longer be served

after the child turns 18, it ceases to apply to that child even if the adoption process was under way at that time.

[120] Rule 48(4) of the Rules does not confer on the court a power to make orders that are not permitted by the relevant legislation. There are circumstances in which the courts can made an order nunc pro tunc. Such an order retroactively validates a course of action as if the order had been made at the proper time. But as this Court observed in *Upper Hutt City v Burns*:[66]

> … of course, whether such an order can be made in any particular case depends upon the authority of the Court in that instance. That usually turns on the statute the Court is concerned with. … The Minister's powers and obligations … must depend on the words of the statute conferring the declaration making powers. It is simply a matter of construction.

[121] The Supreme Court of Canada has held that courts in Canada have inherent jurisdiction to make orders nunc pro tunc. However, the Supreme Court emphasised that nunc pro tunc orders will not be available if they are precluded by either the language or the purpose of a relevant statute.[67]

[122] We need not determine the circumstances in which r 48(4) of the Rules permits this Court to make an order back-dated to the date of a first instance hearing. For present purposes, the key point is that any such power is limited by the statute that makes provision for the kind of order that the Court is asked to make. It is in our view very clear from both the text and the purpose of the Act that no adoption order can be made in respect of a person aged 20 or older.[68]

[123] We have not overlooked Mr Keith's submission that legislation should, so far as possible, be interpreted in a manner that is consistent with New Zealand's international obligations, and that provides an effective remedy to give effect to a person's rights under international instruments to which New Zealand is a party. But this submission faces several difficulties.

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66 *Upper Hutt City v Burns* [1970] NZLR 578 (CA) at 600.

67 *Canadian Imperial Bank of Commerce v Green* 2015 SCC 60, [2015] 3 SCR 801 at [85]–[87] and [94].

68 The same view was recently expressed by the High Court in *Solomon v Attorney-General* [2020] NZHC 2521 at [17], differing on this point from the Family Court in *An application by P* FC Feilding FP 015 1/01, 31 May 2002.

[124] First, we accept unhesitatingly that there is a presumption in favour of interpreting legislation in a manner that is consistent with New Zealand's obligations under international instruments such as the UNCRC. But the words of the domestic legislation must be capable of being interpreted in the manner contended for.[69] In this case, we do not consider that the Act can reasonably be read in the manner proposed by Mr Keith.

[125] Second, the UNCRC defines a child as a person below the age of 18. The UNCRC is not directly relevant to adoption applications in respect of 18 and 19 year olds, and provides no guidance on the boundary issue that we are addressing. It is difficult to see how the UNCRC can be read as providing support for the making of adoption orders in relation to a person aged 20.

[126] Third, we do not consider that the UNCRC provides any helpful guidance on whether the power to make an adoption order should extend to a person who no longer qualifies as a child at the time the order is made, if an application for such an order was made at a time when they did qualify as a child. The UNCRC sheds no light on this boundary issue.[70] We do not consider that the effective remedy principle provides any real assistance here. It is of course the case that the courts should seek to provide effective remedies to give effect to the rights of individuals under international conventions to which New Zealand is a party. That is one aspect of the interpretative principle referred to earlier. But that principle provides no support for the provision of a remedy where the rationale for such a remedy is spent as a result of the passage of time. In this case, the primary purpose of an adoption order can no longer be served in respect of Wendy. So making such an order is no longer an effective and appropriate remedy.

[127] In these circumstances, we consider that no adoption order can be made in respect of Wendy. However, in case we are wrong, we will consider below whether, if she had not yet turned 20, it would have been appropriate to make such an order.

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69 *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; and *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [34].

70 As noted above, the Hague Intercountry Adoption Convention does not provide for an intercountry adoption process to continue if the child turns 18 before that process is substantially completed. So the wider international law framework for intercountry adoptions does not support the approach contended for by Mr Keith.

When should an adoption order be made under the Act?

The issue

[128] The issue on which the High Court granted leave to appeal was whether the High Court erred in finding the creation of a new family should be considered the purpose of an intrafamily intercountry adoption, or inappropriately preconditioned its assessment of the best interests of the children on this purpose. Mr Keith says that the Courts below erred in treating as a precondition, or significant factor, whether the children were in need of a new family. Rather, he emphasises the need to ask whether making an adoption order serves the best interests of the children.

[129] This issue is closely linked to the question of whether immigration law is relevant to determination of an application for adoption. The High Court proceeded on the basis that the Act should be applied in a way that is mindful of the statute book as a whole, and the jurisdiction of the Family Court should not be misused to circumvent the Immigration Act. Mr Keith says that the immigration consequences of making an adoption order are relevant only to the extent that they inform the inquiry into the best interests of the relevant child.

Discussion

[130] At the risk of stating the obvious, an adoption order should be made under the Act if, and only if, making the order would give effect to the purpose of the Act. As explained above, we consider that in contemporary circumstances the purpose of the Act is best expressed in the terms recommended by the Law Commission: the fundamental purpose of adoption is to provide a child who cannot, or will not, be cared for by his or her own parents, with a permanent family life. The Act is relevant where (and only where) each limb of that purpose is engaged:

(a) the child cannot, or will not, be cared for by his or her own parents; and

(b) the proposed adoption will provide the child with a permanent family life.

[131] If both of these limbs of the Act's purpose are engaged, then adoption is, in principle, capable of achieving the objectives of the Act. It is then necessary to apply the specific criteria in the Act to determine whether adoption is the appropriate response in the case before the court. In particular, it is then necessary to ask whether the proposed adoption is in the best interests of the child.

[132] The Courts below were right to ask whether making an adoption order would be consistent with the purpose of the Act. It seems to us, however, that when asking this question, it is important to consider each limb of the purpose separately. If they are run together, the question of whether the concern at which the Act is aimed (absence of parental care) is present may be overshadowed by an evaluation of the adequacy of current care arrangements, and whether they amount to a "permanent family life" for the child, albeit without parents. It seems to us that this is what happened in the present case. The High Court Judge approached the case on the basis that the "first and critical question is whether the children can be cared for in a suitable manner in Ethiopia".[71] However, we consider that the first question should be whether the concern at which the Act is aimed is present: is the child in respect of whom an order is sought a child who cannot, or will not, be cared for by his or her own parents? If so, then the next question is whether the proposed adoption is capable of providing the child with a permanent family life. If so, then the purpose of the Act is engaged and the court can, and should, go on to apply the specific criteria in the Act.

[133] In particular, the court must then consider whether making the proposed adoption order would serve the best interests and welfare of the child. It is at this stage of the inquiry that alternative methods of providing a permanent family life for the child should be considered, including any form of family life that is currently available to the child, albeit in the absence of parental care. If the existence of some other form of permanent family life is treated as a decisive (and disqualifying) factor at an earlier stage, with the result that the best interests inquiry is not reached, there is a risk that decisions about proposed adoption will be made in a way that does not serve the paramount consideration: the best interests of the child.

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[71] High Court judgment, above n 3, at [84].

[134] Put another way, it seems to us that the approach adopted in the Courts below could preclude making an adoption order in circumstances where:

(a) a child has been deprived of the care and support of their parents; and

(b) adoption under the Act is the most appropriate way in which alternative care for the child can be provided, in the best interests of the child, as required by the UNCRC; but

(c) if an adoption order is not made, some level of care in a permanent home could be provided for the child in their home country.

[135] On the approach adopted in the courts below, it would follow from sub-para (c) above that an adoption order should not be made. That was essentially the approach suggested by the Attorney-General, who submitted that intercountry adoption is available only if there is no suitable carer for the child in their country of origin. We do not think that approach is consistent with the purpose of the Act, or with the approach contemplated by the UNCRC.

[136] Our preferred approach also ensures an appropriate interplay between adoption legislation and immigration legislation. Immigration legislation gives way where an adoption order is made precisely because our statute book proceeds on the basis that if the purposes of the Act are engaged, they prevail over the purposes of the Immigration Act. The private and public interests in protection of the family life of the New Zealand resident who adopts the child, and protection of the family life of the child who is adopted, override the immigration restrictions that would otherwise apply to a person who is not a New Zealand citizen and who wishes to come to New Zealand on a permanent basis. To the extent that some Family Court and High Court decisions might be read as treating immigration legislation as a relevant consideration in the adoption context, we respectfully disagree. The focus of the inquiry should be on the questions identified at [132]–[133] above. If those questions are answered in the affirmative, it necessarily follows that the adoption is not a device that is being abused to circumvent the Immigration Act.

[137] The approach outlined above also ensures that adoption under the Act is not misused in a manner that prejudices the relationship between children and parents who are caring for those children despite difficult material circumstances. As the CRC Committee noted in its General Comment 14, "financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care … but should be seen as a signal for the need to provide appropriate support to the family".[72] On our approach, a child in these circumstances can be and (with support) will be cared for by their own parents, so making an adoption order would not be consistent with the purpose of the Act.

[138] The inquiry into the welfare and best interests of the child contemplated by the Act (and by the UNCRC) is intensely fact-specific. A broad and comprehensive assessment is required. Every dimension of the child's wellbeing is relevant, including the child's material, physical, educational and emotional needs. We accept Mr Keith's submission that the socioeconomic advantages of adoption may be taken into account as relevant benefits. We also accept his submission that other benefits of becoming a New Zealand citizen, and associated rights and protections (such as obtaining formal identity documents), may also be relevant advantages, as the English Courts have recognised.[73] Indeed, none of this was in dispute: the Attorney-General accepted that socioeconomic and educational advantages, and other advantages from living in New Zealand, are relevant to the best interests assessment. But of course those factors are not decisive: they go in the mix along with all other aspects of wellbeing, not least the child's physical and psychological wellbeing and emotional needs.

[139] We do not consider that the principles that govern the making of an adoption order are different in the intrafamily context. But the intrafamily context will often be highly relevant to an assessment of the effects of an adoption order on the interests of the child.

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72 *General Comment No 14*, above n 22, at [62]. See also Nigel Cantwell *The Best Interests of the Child in Intercountry Adoption* (UNICEF Office of Research, Florence, 2014) at 73.

73 *FAS v Home Secretary* [2015] EWCA Civ 951, [2016] 1 WLR 407 at [42]–[43]; and *In re B (A Minor) (Adoption Order: Nationality)* [1999] 2 AC 136 (HL) at 141.

Should an adoption order be made in this case?

[140] We turn to apply the approach outlined above to the circumstances of the children.

Is an adoption order consistent with the purposes of the Act?

[141] The children are not being cared for by their own parents. They have in effect been abandoned by their parents, who may well no longer be alive.

[142] Although the children are receiving day-to-day care from Ms May, and material support from Ms Norman, there is no-one exercising legal guardianship in respect of the children. The difficulties this has contributed to in terms of educational opportunities, and the potential future difficulties in terms of education and healthcare, were identified in the Child Study Report: see [23] and [29] above. Despite the care that they are receiving, the short point remains that these are children without parents or other legal guardians. So the first criterion identified above is met.

[143] We consider the second criterion is also satisfied: adoption by Ms Norman would provide the children with a permanent family life. As Doogue J found, this is a genuine adoption application. It is not simply an immigration stratagem.[74] Ms Norman intends the children to live with her as part of her family. She is their aunt. She has been supporting them for many years, and intends to continue to support them regardless of the outcome of the application. She is in regular contact with them. She plainly cares for them, and is prepared to go to considerable lengths to translate that concern into practical steps for their benefit.

Applying the criteria set out in the Act: Tessa, Sam and Ana

[144] All of the criteria for the making of an adoption order set out in ss 4 to 10 and 11(a) of the Act are satisfied in relation to Tessa, Sam and Ana. That brings us to an assessment of the welfare and best interests of those three children, as required by s 11(b). Is it in their best interests to remain in the care of Ms May in Ethiopia, or to be adopted by Ms Norman and come to live with her in New Zealand?

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74 High Court judgment, above n 2, at [80]–[81].

[145] As Judge Grace and Doogue J held, the children currently have the benefit of a close and loving relationship with their aunt, Ms May, and a relationship with other members of their extended family in Ethiopia. On the other hand, Ms Norman is hardly a stranger to the children. She has met them in person on a number of occasions when visiting Ethiopia. She is in regular contact with them using the mobile phone app WhatsApp. She supports them materially and contributes to their emotional support. We share the concern of the Courts below about the emotional impact on the children of separation from Ms May, who has cared for them since they were born. But they will be living with another family member to whom they are also attached. They are not young children: they are capable of taking active steps to maintain a long-distance relationship with Ms May and other family members in Ethiopia. In the future they may well be able to travel to visit their family there.

[146] It seems to us that the approach adopted in the Courts below may have led to insufficient weight being given to the stark difference in living conditions and opportunities for the future that would be provided for the children if they are adopted by Ms Norman. The difference is not merely one of degree, with life in New Zealand offering somewhat better living conditions and economic opportunities. The children currently live in very crowded conditions. They have a limited and inadequate diet. There is no money for other necessities such as clothing. There is a real and continuing threat to their security. They are deprived of education. They have limited access to healthcare. Aspects of this deprivation are directly linked to the absence of their parents, and the lack of any other legal guardian. The Child Study Report paints a grim picture of a life involving significant hardship that is led largely inside the house/compound: a situation exacerbated by the increased insecurity in the area and the recent kidnapping of Sam. The children are deprived of many of the rights relating to family life and development identified at [57] and [71] above. They are not able to flourish and develop to their fullest potential — their opportunities to flourish and develop are extremely curtailed. The frustration of the children's potential will inevitably have a significant adverse impact on their psychological and emotional wellbeing, in addition to the obvious material consequences.

[147] If the children are adopted by Ms Norman, they will have a loving, safe, supportive home with her and her husband here in New Zealand. They will be clothed

and fed and cared for. They will become New Zealand citizens. They will have formal identity papers. They will be able to travel. They will have a right of abode in New Zealand. They will have access to all the social, educational, healthcare and welfare opportunities that New Zealand citizens enjoy. They will have a real prospect of leading fulfilling lives as contributing members of a community. All of these are, as we explained above, relevant factors in assessing where their best interests lie.

[148] The intrafamily nature of the proposed adoption is also very relevant to this assessment. The children will be able to maintain their family links and cultural identity through Ms Norman and her family, and through their connections with the wider Ethiopian community in New Zealand.

[149] We were advised from the bar that there are educational facilities known as "M classes" in New Zealand that can be accessed by Ethiopian children, which provide a form of transitional education to enable them to participate in mainstream education and training opportunities.

[150] As against that, we agree with the Courts below that the transition to New Zealand will undoubtedly be difficult. Each of the children will face significant challenges in adapting to New Zealand, learning English, and pursuing their aspirations for the future. But this is an experience Ms Norman has already been through, and is well placed to assist with. We think that considerable weight should be given to Ms Norman's assessment of where the interests of the children lie. She has experienced life in Ethiopia. She is familiar with the conditions in which the children are currently living. She understands the relationship they have with Ms May. And she has experienced the transition to New Zealand as an adult. Her assessment is that it is in the best interests of the children to come here and live with her: that is why she is seeking to adopt them.

[151] Significant weight should also be given to Ms May's assessment of the interests of the children. It seems to us that although she has limited information about life in New Zealand, she has a realistic appreciation of the limited opportunities and significant difficulties facing the children in Ethiopia.

[152] Finally, but very importantly, we turn to the views of the children. Section 11(b) of the Act requires us to take their views into account, consistent with art 12 of the UNCRC. Their views should be given careful consideration having regard to their ages (currently 19, 17 and 15). The Courts below were right to observe that the information the children have about life in New Zealand is limited, and they are unlikely to fully appreciate the scale of the challenges they will face in adapting to life here. But the children have a good understanding of the conditions in which they currently live. As matters currently stand, they perceive essentially no hope for themselves in terms of education, employment or any significant existence outside the home. We consider that substantial weight needs to be given to their view that despite all the risks and uncertainties involved, they would be better off coming to live with their aunt Ms Norman in New Zealand.

[153] The factor that weighs most heavily against making an adoption order in relation to the three younger children is that this seems likely to result in their separation from their sister Wendy. As noted at [31] above, the children provide each other's primary support. They are close-knit. They do most things together. It will be emotionally challenging for the three younger children to be separated from their oldest sister. Following the hearing, we formed the view that we did not have sufficient information about the views of the younger children, Wendy and Ms May on the proposed adoption in the event that Wendy could not accompany her sisters and brother. We asked the parties to take steps to obtain further information about that specific issue.

[154] The parties agreed that further interviews should be conducted with the four children and Ms May by Ms Kee-Sue, the social worker employed by Oranga Tamariki who had previously interviewed the children. Ms Kee-Sue conducted those interviews by WhatsApp on 21 January 2021, with the assistance of an interpreter. She spoke to Ms May and each of the children separately. We were provided with transcripts of the call. They expressed a clear preference for Wendy to come to New Zealand as well. But if that is not possible, then each of Ana, Sam and Tessa confirmed that they would still want to be adopted by their aunt Ms Norman and move to New Zealand.

[155] Wendy was asked if she thought that it would be in the best interests of her three younger siblings to go to New Zealand without her, if she could not go, and said it would be "better for them to come, not stay here." She explained that:

> As you know, here life is very hard. There is no peace. It's very difficult. There is no work, there is no schooling, as I told you the other day. There is fear of security that will happen again like what happened in the past, so it's safe and better for the children to come over there.

[156] Wendy said she would maintain her relationship with the other three children by phone, and it would be easy for them to speak every week or every fortnight. Staying in contact would not be hard. And she would hope that in the future when things get better, they would come to see her.

[157] Ms May expressed similar views. Asked if it would be in the best interests of the three younger children to go to New Zealand without Wendy, her answer was "Yes, I seriously believe so." The reasons she gave included the absence of peace where they currently live, with killings and kidnappings "every day". She confirmed that she would maintain contact with the children by voice and video call, with the assistance of Ms Norman, and would hope that in the future they would be able to come to visit her in Ethiopia.

[158] Our overall assessment is that the welfare and interests of the three younger children, assessed comprehensively and in light of all relevant facets of their wellbeing, will best be promoted by making an adoption order under the Act. In the absence of their parents, that is the best available option for providing the three children with a permanent family life that will enable them to develop and flourish.

The best interests of Wendy

[159] We would have reached the same conclusion in respect of Wendy, if she were under 20. It would be in her best interests — and in the best interests of her three younger siblings — if she also could be adopted by Ms Norman and come to New Zealand. Although she is older, and more capable of leading an independent existence, she is equally in need of a family environment that fosters her ability to develop and flourish. A 20-year-old can still benefit significantly from parental care,

support and affection, and we believe that Ms Norman would be well placed to meet that need for Wendy.

[160] However, we have concluded that we cannot make an adoption order in respect of Wendy, because of her age. She (and her fellow siblings) are thus in the unfortunate position that, because it has taken so long (more than three years) for this matter to be finally decided by the New Zealand courts, the outcome that we consider would have been appropriate when the application was first made can no longer be achieved. As noted at [11] above, the Attorney-General may wish to draw this unfortunate result to the attention of the Minister of Immigration, to consider whether the interests of the three children, who are now New Zealand citizens, and the fact that Wendy would be a New Zealand citizen but for the time taken to resolve these proceedings, provide a basis for the exercise of the Minister's discretion to grant a visa that would enable Wendy to come to New Zealand with her fellow siblings.

Relief

[161] For the reasons set out above, we allow the appeal by Ms Norman in relation to Tessa, Sam and Ana. We consider that we have sufficient information to be satisfied that the requirements of the Act are met, and that final adoption orders should be made. Neither party suggested that this matter should be referred back to the Family Court. Further delay is undesirable. We will therefore make final adoption orders in this Court in respect of the three younger children.

[162] We would be grateful if counsel could prepare a draft of the formal orders to be made under the Act. Those orders should set out the full names of the children. We suggest that the orders also set out their birth dates using the Gregorian calendar, to facilitate the preparation of formal identity documents.

[163] Ms Norman seeks an order for costs. We understand that her counsel in this Court are acting on the basis that they will be paid out of any costs awarded, but will not otherwise seek payment from Ms Norman. In particular, legal aid was not sought because counsel did not want Ms Norman to be burdened with further debts to the Legal Services Agency.

[164] This was not a truly adversarial proceeding. As we mentioned earlier, counsel for the Attorney-General appeared in order to assist the Court and to ensure the evidence and submissions were properly tested, rather than to oppose the making of adoption orders. We do not consider that it would be fair to make an order for costs against the Attorney-General in those circumstances. Our sympathy and respect for the generous approach to payment adopted by counsel for Ms Norman, and our gratitude for the assistance they provided to the Court, do not justify making a costs order that would not otherwise be appropriate.

Result

[165] The application for leave to adduce updating evidence on appeal is granted.

[166] The appeal is allowed in relation to Tessa, Sam and Ana.

[167] The appeal is dismissed in relation to Wendy.

[168] The parties are directed to confer in relation to the preparation and sealing of final adoption orders under the Act in respect of Tessa, Sam and Ana. Leave is reserved to apply to the Court for approval of the orders for sealing.

[169] There is no order as to costs.

Solicitors:
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