[2015] JMSC Civ. 185

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2015HCV04032

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE ADOPTION BOARD

AND

IN THE MATTER OF THE CHILDREN (ADOPTION OF) ACT

In Chambers

Tamara Powell Francis and Michelle Daley for the appellants

Celia Middleton instructed by the Director of State Proceedings for the respondent

September 15 and 23, 2015

ADOPTION - APPEAL FROM DECISION OF ADOPTION BOARD – WHETHER IN BEST INTERESTS OF CHILD THAT SHE BE ADOPTED – ADOPTION LICENCE – SECTIONS 2, 3, 6, 7, 9, 10, 23, 24 OF CHILDREN (ADOPTION OF) ACT

SYKES J

[1] This is one of the rare appeals to the Supreme Court from a decision of The Adoption Board ('Board') denying the applicants the opportunity to move forward with an adoption. In this judgment the court will not refer to the names of the applicants, adoptee and neither will it use to the names of the adoptee's biological mother, biological father, grandmother or siblings. The appeal was heard and allowed on September 15. These are the reasons.

[2] The Board uses the expression adoption licence but this court strongly disagrees with the use of this expression because it is not a legal one in the sense of being an application that exists under the statute. As will be shown the statute makes provision for the Board to receive applications from parents, guardians and adopters but that application is not called an adoption licence. What the statute makes provision for is a licence to take the child abroad by persons who are not resident in Jamaica, citizens of a scheduled country but not the child's relative (as defined in the statute) or guardian. If this is what is meant by adoption licence then perhaps the expression ought not to be used because it gives the erroneous view that a licence is needed for adoption in respect of persons residing outside of Jamaica. This is not so. The licence is permission to take the child abroad and that taking abroad may well be part of the adoption process but the purpose of the licence is to take the child out of Jamaica but that is not the same thing as saying that a licence is needed for adoption.

[3] The Board declined to entertain the application on the premise that the child in question was not a child in need of care and protection and therefore not eligible for adoption. This court concludes that that is an erroneous view and does not give effect to the statutory words which are: 'the best interests of the child.'

Conceptually, the words do not demand that there must be a significant deficiency in where the child is before the child is eligible for adoption. It is entirely possible that the child's present circumstances are adequate but another circumstance has so much in favour of it when compared with the child's present arrangements that it would be in the best interests of the child to be adopted in order to benefit from the second or even third circumstance since it is entirely possible that two or more persons may wish to adopt the child. The final decision may turn on the age of the child, whether the child has special needs, the type of education needed, proximity to health, recreational and other facilities. Unsurprisingly, the court observed that the Board was not able to produce any authority, judicial or academic, in support of this incorrect position.

[4] As the hearing went it became apparent that this incorrect view spawned an unacceptable form of reasoning. The reasoning of the Board goes like this: in order for a child to be eligible for adoption it has to be shown that the present circumstances are deficient in some significant way. While a deficiency is necessary it is not sufficient to justify adoption. The sufficient condition is met when the deficiency is significant enough to lead to the conclusion that the child is in need of care and protection. Unless that threshold conclusion is reached then the adoption is prevented.

[5] Without attempting to be exhaustive, anyone familiar with the concept of care and protection will know that it connotes the idea of a child who has been abused, neglected, or is at risk of being abused or neglected or both. It connotes that the child is with parents or guardians who are unable to meet basic parenting responsibilities to the child such as providing a safe and secure environment, seeing that the child has access to basic health care and is able to receive education. Neither counsel for the Board nor the witness for the Board was able to provide any theoretical or practical justification for the need to form this conclusion before a child could become eligible for adoption.

The law

[6] In resolving this case and in order to respond to some of the submissions made it is necessary to look back, historically, at adoption as well as to examine the provisions of the statute to see exactly what is the role of the Board.

[7] It seems that the Board has developed the practice of turning every application for an adoption into a two stage process. The first stage is regarded as an application for licence which in essence determines whether the adopters/applicants are approved as person to apply for the adoption. The second stage, if successful, ends with an adoption order made by the court. The question is, what does the statute actually say? As will be seen there is no such thing under the statute as an application for an adoption licence in order to adopt a child. The only licence mentioned in the statute is one to take the child outside of Jamaica in the circumstances specified by the statute. Even then, it is not a licence to adopt but part of the process in the event the adopters reside overseas and wish to have the child with them.

[8] What is an adoption? The starting point is to recall that adoption was unknown to the common law. It was not until the twentieth century that adoption was introduced into English law by the Adoption of Children Act 1926. There were some changes effected by the Adoption Act 1950. There was further development in the Adoption Act 1958. These statutes introduced a statutory scheme that regulated the process of adoption. Adoption is therefore a statutory scheme under which the child receives new parents by way of court order and those new parents stand in place of the biological parents as if they were the biological parent of the child.

[9] Jamaica introduced its own statute, the Children (Adoption of) Act in 1958 (‘the Act’) which copied some sections from the English Adoption Act of 1958. The adoption order erases the rights and obligations of the biological parents and substitutes the new parents for the biological ones. The new parents are treated in all respects as if they were the biological parents. The essence of what an

adoption is and what it does was captured in the dictum of Lord Simon in **O'Connor v A and B** [1971] 1 WLR 1227 at pages 1235 – 1236:

> The upbringing of its members until they are in a position to assume independent membership must be the concern of any society. Nevertheless, for a number of reasons, societies generally delegate the main responsibility for the upbringing of their infant members to the natural parents. Hence arises a reciprocal primary right in the natural parents to bring up their own child. The right of the child to be decently brought up to adult membership of the society needs no analysis or expatiation. But there will be some natural parents who do not wish to enjoy the rights, with their concomitant obligations, of bringing up their natural child — indeed, wish to surrender such rights and obligations. On the other hand, there will be people who, for various reasons, will wish to enjoy such rights and assume such obligations in respect of a child who is not their natural child. Adoption is the procedure whereby the two classes of adults — those who wish to surrender their rights and obligations in respect of a child and those who wish to assume them — are brought together, so that the latter are legally substituted for the former in relation to the child in question. The legal metamorphosis finds its quintessential expression in section 13 (1) of the Adoption Act 1958 whereby:
>
> > "Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents … of the infant in relation to the future custody, maintenance and education of the infant, … shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in

> and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid (and, in Scotland, in respect of the liability of a child to maintain his parents) the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock."

> The volunteers to perform a social duty primarily imposed on others who are unwilling themselves to perform such duty acquire thereby a right to be considered; and once they actually enter upon the performance of responsibilities towards the child acquire thereby a further right to be considered.

[10] The section 13 (1) referred to by Lord Simon with a few immaterial changes (excluding the bracketed words and substituting 'child' for 'infant') is identical to section 15 (1) of the Jamaican statute. The Board therefore manages the process from application to final adoption order or refusal of order. The Board prepares the paper work that is placed before the court. The Board relies heavily on the officers of the Child Development Agency ('CDA') to the site visits in Jamaica and the interviewing of the relevant persons. The CDA prepares a report that is sent to the Board. It appears that the Board has adopted the practice of not interviewing any of the persons involved. In short, the Board considers only the reports placed before it.

[11] According to section 2 of the Act an adoption order is defined as an order made under section 9. Section 9 (1) says that the Court may 'make an order authorizing the applicant to adopt a child' on 'an application made in the prescribed manner by a person domiciled in the island.' Section 20 (1) states that

the Supreme Court or the Resident Magistrate's Court has jurisdiction to make adoption orders.

[12] Section 3 (1) establishes the Adoption Board. Section 5 (2) states that the duty of the Board is to make arrangements for the adoption of children and to that end receives applications. It is also empowered to do 'such things and make such investigations concerning the adoption of children.'

[13] Section 6 (1) states that an application to the court for adoption cannot be made unless three months have passed between the date the child is delivered into the 'care and possession' (a deliberate avoidance of the word 'custody') to the adopter.

[14] This time line under section 6 is predicated upon the child and the adopter being resident in Jamaica. This conclusion is supported by an analysis of section 10. Section 10 (5) states that subject to subsection (6), 'an adoption order shall not be made unless the applicant and the child reside in the Island.' Section 10 (6) enlarges the three-month period actually stated in section 6 to six months. The provision says that 'an adoption order may be made on the application of a person who, although domiciled in Jamaica, is not ordinarily resident in Jamaica' however in such cases the 'provisions of this Act shall be modified by the substitution in subsections (1), (2) and (3) of section 6 of the words "period of six months" for the word "period of three months".' From this, the position is that where the adopter and the child are resident in Jamaica then there is a three-month period that must elapse between the time the child is placed with the adopter and the time the child is adopted. If the adopter is resident outside of Jamaica then the three month period becomes six months. Obviously, it would be desirable for there to be some documentation evidencing or showing that the Board decided to place the child with the adopter. Equally, it would be desirable that the adopter has some documentation showing how and under what circumstances he or she has care and possession of the child. The placement of the child is not something the adopter applies for. The adopter applies to adopt

and during the process there must be placement of some kind whether for three or six months.

[15] The three and six month period of section 6 could be called a 'probationary period.' It gives the adopter and the Board a block time period during which the adopter is to say whether or not he or she intends to adopt the child or for the Board to say whether it will not allow the child to remain 'in the care and possession of the adopter.' If the adoption is not going forward then either side gives notice to the other. Where notice is given on either side, the adopter 'shall, within seven days of the date on which the notice was given, cause the child to be returned to the Board for the purpose of restoring the child to the parents or guardian.' Section 6 (2) authorises the Board 'to keep the child under close supervision during the said period of three months [or six months] in accordance with regulations made under this Act.'

[16] The statute also has a mechanism to bring things to a head in case the adopter has not indicated one way or the other whether he or she will continue with the adoption. That is found in section 6 (3) which states if, at the end of the three-month period no notice has been given by either party then the adopter 'shall within three months from the date upon which that period so expired apply to the Court for an adoption order in respect of the child or shall give notice in writing to the Board of his intention not to apply for such an order' and where notice is given that the child will not be adopted or where the application is refused then the Court shall order the adopter to return the child to the Board within seven days on which the notice was given or the date upon which the application is so refused.

[17] It is clear then that the placement of the child with the adopter before an adoption order is made is authorised by statute. It may be that it is this placement that is called a licence but the statute does not use any such language and so there is no legal requirement for any adopter to apply for a licence. There is therefore no legal foundation for the Board to say to anyone that they must apply for licence or for the Board to transform an application for adoption into an

application for licence. As a matter of loose language one may speak of the Board granting permission for the child to be placed with the adopter but that is all it is – loose language. It is not the language of the statute.

[18] In fact, when one looks that the entire statute the Board is really a go-between – between the adopter and the parents or guardians of the child. The Board itself has no child to be offered for adoption. As section 5 says, the duty of the Board is (a) 'to make arrangements for the adoption of children and for that purpose to receive applications from parents, guardians and adopters' and (b) to do such things and make such investigations concerning the adoption of children for the consideration of the Court as may be prescribed under section 8.'

[19] Any decision of the Board like any other statutory functionary is subject to judicial review unless there is specific provision to the contrary or there is provision for any method of review. Under section 7, the person who has made representations for adoption to the Board and the Board has taken the view that adoption would not be in the best interests of the child has the right to appeal to the Judge in Chambers. Other decisions by the Board are subject to judicial review.

[20] Under section 8 the Minister may make regulations for regulating the conduct of negotiations entered into by or on behalf of the Board with persons having care and possession of children who are desirous of causing children to be adopted. The section goes on to speak to parents or guardians placing the child at the 'disposition' of the Board with a view to the child being adopted. There is provision setting out what needs to happen before the child is placed at the 'disposition' of the Board. Before delivering the child to the adopter the particular case shall be considered by a 'case committee' which is a subcommittee of the Board. The case committee produces a report. The Board is required to obtain all kinds of reports including health report on child 'and the adopter for the purpose of ensuring, so far as may be, the suitability of the child and the adopter respectively.' The child cannot be placed with any adopter unless the adopter has been interviewed by the case committee or by some person on their behalf.

Also a representative of the case committee must inspect any premises in the Jamaica where the adopter intends to reside permanently. Even with all this, no 'delivery into the care and possession of an adopter' can take place 'until the committee have considered the prescribed reports.' All this reinforces the conclusion that the Board has not children of itself to place. It makes arrangements and enters into negotiations between the adopters on the one hand and parents/guardians of the child on the other hand.

[21] The statute gives the parents/guardians veto power over the adoption. The parents/guardian are required to give consent and generally, no adoption is possible without the consent of the parents or guardians (sections 8 (1) (a) (i), (ii), 10 (4), 13 and 14). Section 10 (4) says that subject to section 11, no adoption order shall be made without the consent of the parent or guardian of the child. However, the court is given the exceptional power to dispense with consent.

[22] Thus far there is no mention of any need for an application for any licence. The first mention of the word 'licence' is found in section 23 (2).

[23] The purpose of sections 23 and 24 was to bar from Jamaica's jurisprudence the outcome in the case of **In Re Adoption Application 52/1951** [1952] Ch 16. In that case an adoption application was made by a husband and wife under the Adoption Act 1950. The relevant law required that the applicants had to be both domiciled and resident in England or Wales. The court found the couple had not met the residential requirement. This made adoption by persons resident outside of England and Wales near unto impossible. The result was that the adopters, aided and abetted by the judiciary began stretching the residency requirement almost to breaking point. At the root of the problem was the connotation of resident. As Harman J said in **In Re Adoption application 52/1951** at page 25:

> Residence denotes some degree of permanence. It does not necessarily mean the applicant has a home of his own, but that he has a settled headquarters in this country

[24] Despite this requirement, the judges and lawyers engaged in the kind of practice described by Harman J in **In Re Adoption Application 52/1951** at page 24:

> In the last two years apparently, the practice … has been to hold that an applicant satisfies the requirement that he should be resident in this country if he is physically within the borders of the country at the moment when the order is made. On the other hand it has been assumed that even if the applicant has his residence, all his roots, his home and his avocations here, an order cannot be made in his favour if he is out of the country on the day when the judge happens to be asked to make the order. Indeed, it was lately suggested to me that a university don who had left the country for some two months in order to deliver some lectures would not be qualified to have an order made in his favour, because he was not resident here on the day when the application was made. I cannot believe that a view which leads to such a conclusion is right.

[25] The English Adoption Act 1958 introduced provisions to minimise or eliminate this kind of judicial activism. Thus sections 23 and 24 were directed at avoiding this kind of creativity and established a statutory regime for taking children abroad where the adopter does not reside in Jamaica. Section 23 (1) and (2) contains two types of prohibitions.

[26] Section 23 (1) reads:

> It shall not be lawful for any person, in connection with any arrangements made for the adoption of a child who is a citizen of Jamaica, to permit, or to cause or procure, the care

> and possession of the child to be transferred to a person who is not a citizen of a scheduled country or the guardian or a relative of the child and who is resident outside the Island.

[27] This means that no person can make any arrangement in connection with an adoption of a Jamaican child for that child to be handed over to a person who is not citizen of a scheduled country. The section also targets persons who are the guardian or relative of the child. Even if the person who is getting the child is the guardian or relative, that person still cannot get the child if that person is resident outside of Jamaica. The provision is yet another one that supports the view that the default position in Jamaican adoptions is that the child and adopter are resident in Jamaica.

[28] Section 23 (2) reads:

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

[29] Section 23 (2) targets citizens of scheduled countries. It stands in stark contrast with subsection (1). Whereas subsection (1) established an absolute prohibition on handing over the child to citizens of non-scheduled countries, section 23 (2) permits handing over of the child to citizens of scheduled countries who reside outside of Jamaica but for that to happen, lawfully, such a person must have a licence granted by the Resident Magistrate. There is an exception to this rule and it is where the person is the guardian or relative of the child. If they are the guardian or relative of the child then no licence is needed even if the person resides outside of Jamaica.

[30] For the purposes of section 23 guardian means a person appointed by deed, will or court order. Relative means grandparent, brother, sister, uncle, aunt whether full or half blood or by affinity and where there is an adoption then any person who would have been the relative of the child if the child, in wedlock, were born to the adopter.

[31] Section 24 (1) says that a Resident Magistrate may grant a licence 'authorizing the care and possession of a child for whose adoption arrangements have been made to be transferred to a citizen of a scheduled country resident outside of the island.'

[32] So there it is. The regime under the Jamaican adoption act does not establish any procedure for application for a licence to adopt. It is one process with different stages. Section 6 assumes that the child is placed with the adopter after the application has been made and approved and the process has started and both child and adopter are living in Jamaica. Where the child and the adopter are living in Jamaica, the probationary period is three-months. Where the adopter is living in a scheduled country the probationary period is six months. If the adopter is not a citizen of a scheduled country then he or she cannot adopt a Jamaican child unless he or she comes and lives in Jamaica. How long that needs to be is another matter.

[33] Let us be clear then. There is no such thing in Jamaican law as applying for a licence to adopt. There is one application and that is for the adoption of a child. The process begins and all sorts of reports are secured. If the child and adopter are living in Jamaica then it goes along one path. If the adopter is living outside of Jamaica in a scheduled country then another path is followed if the adopter wishes to take the Jamaican child outside of Jamaica. In the latter case, a licence is needed. When the primary provision and the prescribed forms in the Third Schedule are read it seems to this court that the better name for this licence, if one must be given, is transfer abroad licence or a licence for the transfer of the child abroad because that is what the licence does. The sole object of the licence is to permit the adopter to take the child abroad and if this licence is granted then

the child can be taken from Jamaica. If this happens then the six month period referred to in section 10 (6) and section 6 is activated.

[34] It was noted earlier that section 7 provides that where the Board are of the 'opinion that the adoption of the child' by an applicant 'would not be in the best interest of the child' the Board shall notify the person accordingly who may appeal to a Judge in Chambers.

[35] Part 60 of the Civil Procedure Rules ('CPR') states that an appeal to the Supreme Court is made by issuing a fixed date claim form with grounds of appeal annexed. Rule 60.8 (1) states that unless stated otherwise the appeal is by way of rehearing. Rule 60.8 (2) says that the court may receive evidence on matters of fact. Rule 60.8 (3) permits the court to draw inferences of fact which might have been drawn in the proceedings that led to the appeal. Under rule 60.8 (4) (a) the court is empowered to give any decision or make any order that ought to have been made by the tribunal or person whose decision is appealed. In addition, the court may make such further or other order as the case requires.

[36] In this case there is statutory provision limiting the powers of the court under Part 60 and so this appeal will be treated as full rehearing of the matter. This court is now placed in the same position as the Board and is authorised to make the decisions that the Board may have made.

The background

[37] As these reasons for judgment progress the court will interweave the evidence before this court and the Board with the Board's reasoning to show where and why the court differs from the Board. While this court accepts that under the appeal procedures it has a free hand to make its own determination the court is mindful of the fact that the Board considers these matters far more frequently than this court and if the court is disagreeing with the Board then courtesy dictates that the points of disagreement be indicated.

[38] At the meeting of January 17, 2015 the Board noted that '[t]he applicant's family history does not indicate a stable appropriate environment. The child is not currently at risk.' On the face of it, it would seem that the Board was using these two factors to lean against the adoption but it has turned out that was not the case. The real reason was that the child was not at risk.

[39] The matter was next considered on March 21, 2015. At that meeting the Board concluded that 'this case seems to be pursued for migration purposes and the child is in a stable environment in Jamaica.'

[40] In the letter of August 5, 2015 written to the applicants the Board stated that it took all the documentation that was submitted; that it took into account the best interest of the child and consideration was given to section 7 of the Jamaican adoption statute and sections 2 and 3 of the Child Care and Protection Act and concluded that:

> *In applying the sections outlined above, it is clear that the paramount interest of the child is to be with their (sic) parents. However, unless there are adverse reasons for this not to be the case, then alternative care arrangements would be made.*
>
> *In the assessment that was carried out, there weren't any issues why the child could no longer continue living in the current situation. The child was not in need of care and protection or in any danger.*
>
> *It is noted that the information revealed that the child is not at risk and the Adoption Board saw no compelling reason why the child should be adopted.*
>
> *The best interest and welfare of the child has not been established why she needs to be adopted.*

[41] The Board found it possible to arrive at these conclusions in the face of the following undeniable, unchallenged and unchallengeable facts:

a. the child has never lived with the biological father;

b. the child spent the first six months of her life with her biological mother and has never, in the last 15 ½ years lived with her mother;

c. the male applicant has been, on the evidence, the sole or main source of income that has supplied the needs of the child for her entire life including life in the womb;

d. the child lives in one bedroom house with two beds;

e. the inference from all the material is that this child has no other source to turn to for material assistance;

f. her mother does not work consistently and has three other children none of whom lives with her;

g. her biological father has one other child and he has consistently said he cannot look after the child.

The Board's reasons

[42] The court will show that the conclusions arrived at by the Board is not supported by the evidence that was before it. During this review of the evidence the court will not take into account material that was not before Board.

[43] Among the documents the Board took into account was the South Carolina Adoption Home Study Report of June 26, 2014 which recommended that parenting workshops should be undertaken as well as counselling because there were challenges in the marital relationship of the applicants. It is agreed that up to the Board's decision there was no evidence before the Board that those sessions were undertaken by the adopters.

[44] The Board failed to take into account the total picture presented by that report. It is true that the report noted the frailties of the relationship but the report also noted the male applicant was a responsible person as was his wife. Both were

hard workers without any criminal convictions – not even traffic tickets. The report noted that the male applicant's mother cares for the couple's son when both parents are at work. This shows that there is support from the male applicant's extended family. Importantly, the report did not note any tension between the female applicant and her in laws. This is important because the female applicant is a Caucasian Russian woman who has married into a black family from Jamaica and now has a biracial child. Both persons are therefore recent immigrants to the United States who have hard practical experience of adjusting to a new society and culture in the context of an interracial, cross cultural union and an off spring of that union. If the Board was worried about how the child would adjust to a new society the Board should have recognised that the very applicants have had that experience and despite the challenges have not been swept away by the difficulties that come with integrating in a new culture.

[45] There were three references attached to the South Carolina report. All positive. They described the couple as hard working, disciplined and committed to each other. The report noted that the applicants were hard working, financially responsible, kept a clean and attractive home, loved their son, had dependable employment and indicated a desire to advance themselves professionally.

[46] The South Carolina report noted that the child would experience cultural differences, new family environment combined with the challenges of being an adolescent. The report stated that there would need to be considerable adjustment in the family. The report also noted that the relationship was new and had challenges. The investigator observed that strong family values were part of the make up of the couple and that they both had supportive families and friends – a very important consideration when one is considering inter racial and cross cultural unions. In looking at things in the round, the investigator recommended the adoption.

[47] The Board had a follow up report dated March 5, 2015. In that report the investigator noted that the applicants no longer had two part time jobs but had

one job each which resulted in more time for each other. They even took a family vacation in December 2014. This is sharp contrast to the first report where the female applicant stated that they did not even have time to go out on a date.

[48] The recommended parenting and counselling sessions have not yet been done. The Board seized upon this to say that the relationship was strained and that there was no closeness between the couple as the female applicant stated that her husband gave her flowers and cup cakes for Valentine's Day for which she was surprised. The report did have these words but the Board chose to ignore the context because had the full context of the report been taken into account the Board could not possibly have come to the conclusion that the relationship had hardly improved since the initial report.

[49] This is the full picture. The female applicant expressed the view that her husband was more family oriented and was home more. She noted – and now comes the sentence about Valentine's Day – she was surprised and pleased that he brought her flowers and cup cakes for Valentine's Day. The very next sentence reads – *And when she had to work through dinner hour on her birthday, he took her out for lunch – something they do not often do.* The female applicant even related how they had a significant difference of opinion about whether another car should be bought and how that difference was worked out through dialogue. What was being shown was the improvement in the relationship and how the absence of the strain of part time jobs resulted in better emotional responses which has led to improved family life.

[50] The South Carolina investigator, in her follow up report, stated that she spent one half hour with the female applicant and over an hour with the couple and their child. The female applicant told the investigator that she had much affection for her husband's family in Jamaica and she felt included in the family. She stated that her husband provided support for her in her time of need. She also stated that she and the child communicated by texts and somehow, despite these express words in the report, the Board found it possible to conclude that there was no communication between the child and the female applicant.

[51] In the same follow up report, the female applicant stated that she felt closer to her husband because there was more family time – the consequence of the applicants having only one full time job each. The investigator noted that from her observation the family had begun to 'cohere around this adorable child' – the son.

[52] The male applicant expressly noted that this wife (his third) was more loving and caring than the previous ones because even when they had a dispute she did not withdraw from the relationship. He stated that she was a good mother to their son.

[53] In light of this it is difficult to understand how the Board could have concluded that the relationship was strained. The Board completely ignored the investigator's opinion that '[the applicants] are able to offer a safe, stable and welcoming home' to the child. The report explicitly stated that '[p]ost-placement visits will be schedule at 6 weeks after placement and subsequent to [the child's] medical check-up, and again at 12 weeks post-placement. Reports will be sent to the Child Development Agency.' This means that there is built into the process reporting mechanism that can assist the Board in monitoring the child while she is placed with the applicants.

[54] The Board has not said it found the South Carolina investigator's report wrong or severely compromised. Neither has it said that the Jamaican investigator's report was muddle-headed and clearly wrong. In the face of two professionals who recommended the adoption, in the face of two investigators who met, observed and spoke with the relevant parties the Board decided that the recommendations meant nothing because the child was not in need of care and protection which meant that an adoption was not in the best interest of the child.

[55] Having listened to the submissions of counsel and the witness for the Board this court has formed the view that the premise of the Board is that no adoption should be allowed unless the child is at risk. This means that it really did not matter what the applicants did. Even if the applicants had done all the counselling sessions it would have been for nothing because the child was not

considered to be at risk. This conceptual approach does not ask whether it is in the best interest of the child to be adopted but rather, how deficient is the child's present circumstance and until it has dropped to the depths of the child being in need of care and protection that no adoption can take place. Implicit in this is the incorrect idea that the present circumstances of the child must not only be one of deprivation but very significant deprivation before adoption is considered.

[56] The best interests of the child are not just material circumstances. There are intangibles such as the mental, emotional and spiritual health of the child. There is also another aspect of the intangibles which are a socially and intellectually healthy environment which exposes the child to persons, things, ideas and places that can spark or enhance the desire to reach beyond his or her present circumstances. These are quality of life matters. There is a futuristic element. At sixteen years old there is the question of further education, careers and the like. Where is she more likely to get better assistance with these decisions? No reasonable person could remotely suggest that her grandmother and biological parents would be able to provide that kind of insight that would be helpful. The applicants are more likely to be able to provide that kind of assistance. The female applicant, as will be referred to below, is tertiary level educated and played a musical instrument.

[57] The child is now almost 16 years old and entering final year of high school. In another eight months, unless she goes to sixth form she will be entering the world of work or furthering her education outside of high school or join the ranks of the unemployed. She will be further forming her own view and opinions about the world. She will now be considering what is in her best interest. She will be considering what opportunities there are and how best she can take advantage of them. In fact, in another 731 days (2016 being a leap year) she will be an adult.

[58] There is a court order of June 25, 2015 where the birth mother consented to the male applicant having custody of the child with liberal access to both biological parents.

[59] The child's biological parents have not had tertiary level education and there is no evidence that her grandmother had gone on to that level of education. The female applicant learnt to play a musical instrument, she is a graduate of a university in her home country. She has travelled outside of Russia and the United States of America. She is fluent in Russian and English with a working knowledge of French and German. She speaks Spanish and Italian at what she calls 'communication level.' The house at which the applicants live has four bedrooms and two bathrooms and the combined income of both parents exceed US$30,000.00 annually. When that home environment is contrasted with the child's present environment where neither biological parent has steady income, neither biological parent seemed to have received exposure to the arts and other refining elements of education, the grandmother did not seem to progress beyond secondary level and is unemployed can it be seriously doubted whether the applicants can provide a better experience for the child socially, intellectually, financially and emotionally than the home where the child presently is?

[60] The male applicant has not been to university but he is a leader in his community. He organises football tours between the teams from his community and neighbouring community. He is regarded as dependable, reliable, hard working and ambitious. By contrast there is no evidence that the child is exposed to persons who exhibit the qualities of the applicants.

[61] There is another report called the 'Case Committee Report' which states that the biological mother has four children in all, none of whom reside with her. The report also states that the biological mother 'seems to want to have an easy-going care-free lifestyle' and 'is presently unemployed but is skilled in the field of cosmetology.' She has no fixed address. The report also says that the biological mother is 'unable to respond to any of her children's needs as she is relying on her family members to survive.' In other words the biological mother has not transformed herself into hard working, steadily employed person despite having a skill from which she can earn. Is this the kind of exposure that is in the best interest of the child? What values of hard work, thrift and rising above difficult

circumstances would the child be learning and observing daily? This is the parent that the Board says the child is better off with.

[62] The Board placed a great deal of emphasis on the fact that the child loves her biological parents and has a good relationship with them. It is appropriate to take that into account but that should have been balanced against the fact of the unchallenged evidence that the male applicant has looked after this child, as the biological father put it, 'even before birth.' There is no evidence that the biological father despite his difficult circumstances has exerted the same drive, energy and determination as the male applicant. Bear in mind that when the child was born the male applicant was 25 years old and the biological father was 22, yet the evidence is that it was the male applicant who took up the financial and emotional support of the biological mother and then the child. Yet the Board concluded that the child's best interest is served by being with her biological father and mother.

[63] Somehow the Board found itself able to say that the desire to adopt the child was motivated more by migration and economical need rather than the child in need of adequate love and parenting care. This court is of the view that this conclusion does a great disservice to the male applicant who from age 24 years to age 40 has given the child unsolicited financial and emotional support. When he was in Jamaica the child was with him for 5 ½ years. He has returned to Jamaica from time to time to see and interact with the child. Here is a man who had done more for the mother of the child and the child than any other person and yet the Board discounts all that and says that the male applicant is not motivated by his desire to give the child adequate love and parenting care.

[64] The Board almost borders on accusing the male applicant of deception when it said that the 'entire application centres around the male applicant being the main applicant and under disguise of his wife as joint person' applicants. From a reading of all the document there is no doubt that the male applicant is the driving force behind the adoption. The context is such that that would be the expected thing. The child is his second cousin. The female applicant only came

in contact with the child through her husband. On this view what is so strange about the male applicant being the main person? It makes sense. One would have thought that a written document (which is present in this case) showing that the female applicant supported the adoption would be helpful yet the Board did not see that as a positive thing. According to the Board their conclusion about the male applicant was justified because he spoke more about himself and what he would do for the child than what he and his wife would do. Why is that a negative thing in the context of this case? He has been emotionally and financially involved with the child for all her life. The female applicant came into the child's life some four years ago. The entire circumstances clearly make it more likely than not that the male applicant would be the main person behind the adoption.

[65] The Board sought to say that the male applicant was not trusted by his wife and she was a jealous woman. What was the context? In the South Carolina report of 2014 the female applicant said that she thought he was influenced too much by others and she would like to see him form his own opinions. The court now quotes directly from the report: *She also mentioned* ***that in the past 'he always had a back-up woman.'*** (emphasis added).

[66] Taking the back up woman comment first. When the two reports are read together, it is clear that the back-up woman comment was in the context of the previous females not being as generous in their behaviour when there was a difficulty in the relationship. That was pointing to lack of trust between the male applicant and the previous women. By contrast the male applicant said that he trusts his present wife, she is good mother and an effective partner. The context of both comments was that the couple was asked what they saw and the strengths and weaknesses in each other. The Board should have used more analysis here. The female applicant is from Russia and the male applicant is from Jamaica. They met in the United States in South Carolina. How would the female applicant know about the back-up woman unless he told her? Not only that, she said that that was in the past. There is not one bit of evidence to suggest that the female applicant is saying that that is the position in their marriage now.

[67] Regarding the jealousy comment the comment was made earlier in the relationship and quite likely related to how secure his wife felt in the relationship.

[68] The court has to mention another conclusion by the Board that is completely at variance with the evidence. The Board stated that 'the child enjoys a loving relationship with her biological parents **who are very much in her day to day life**.' The only part of this statement that is accurate is that the child enjoys a loving relationship with her biological parents. The part about being involved in her day to day life is simply not accurate. The very report which provided the information about the biological parents showed that the biological mother had no fixed address, had three other children none of whom lived with her and the biological mother wanting to live a carefree life. How does a mother with no fixed address and who wishes to live a carefree life become involved in the day to day life of her child is not easy to see. The child lives in St James and the biological father lives in Westmoreland. There is no evidence of daily or even weekly contact between the biological parents and the child. By contrast the child told the CDA officer that she speaks to the male applicant twice per week.

[69] Based on the evidence presented, the only known source of income for the household where the child lives is the money sent by the male applicant. It appears to be sufficient to support not only the child but the grandmother, who is unemployed, and the 16 year old cousin. It therefore appears (and the court puts it no higher) that in all probability the male applicant's contribution is so significant that it supports the other persons in the house where the child is.

Detailed evidence not before the Board

[70] The report before the Board did not go into detail regarding the physical environment of the child but there was enough to suggest that it might have been challenging. The information the Board had was that the child lived in a one room building with two beds.

[71] The court, thus far has deliberately refrained from emphasising the actual physical environment of the child. This was so because the court wanted to make the point that when considering what is in the best interests of the child there are physical, material and economic considerations as well as the intangibles such as the moral, the intellectual, the social ambience, the cultural exposure that all combine to make life what it is. The court focused on the intangible such as the character and personality of the applicants; their struggles, their progress, the support system they have, their community in order to show that they have the strength of character, the pedigree, the grit to take on the challenge of a teenager in a new culture and give it their best shot. They are not persons of perfection.

[72] The description of the child's present living circumstances is best captured by her biological mother. The mother says that the house has no running or piped water. The source of water is rainfall which is used for drinking and domestic purposes. There is no bathroom and the child as well as the other occupants bathe in full view of passers-by. The toilet is a hole in the ground. Cooking is done outside and when it rains the cooking takes place inside the single room structure.

[73] The biological father was a joint deponent in the affidavit provided by the mother. He added that he is on the road seeking jobs. He does odd jobs at construction sites and elsewhere.

[74] Both parents testified in the affidavit and on oath before this court that they are fully aware that adoption will sever their parental rights in respect of the child but they are satisfied that the applicants can provide the home and opportunities that they have not been able to provide. The court would add that there is nothing to show that the biological parents' circumstances are likely to improve significantly any time soon.

[75] Miss Lisa Hill, the CDA officer, took account of report about the applicants which included strong and positive recommendations. She took account of the child's present circumstances. She recommended the grant of an adoption licence. In the court's view Miss Hill got it right and the Board got it very wrong.

[76] As can be seen the conclusion that it is better for the child to be with her parents when the evidence is that for the first 16 years she spent only the first 6 months of her life with them is not capable of justification based on the actual evidence. To say that a child who is using a hole in the ground for toilet facilities and bathing area that is open to the public is living in circumstances that should continue is perplexing. To deny a 16 year old who is coming to the end of her school life the opportunity to be adopted by the applicants, one of whom has been supporting the child all her life is difficult to understand. To deny a child the opportunity to break the very evident cycle of persistent poverty, early pregnancy (as has happened to her mother who has gone on to have three more children none of whom lives with her) and reduced economic, social and educational opportunities on the ground that she is not at risk is not easy to appreciate. But this is exactly what the Board has done by its decision.

[77] Under cross examination the witness for the Board was not able to point to anything that would make the child worse off than she is now. She even conceded that she had no reason to doubt the male applicant's genuine love and affection for the child. Short of mental and emotional abuse it is not easy to imagine what more should have been missing from this child's life before it could be said that her present circumstances were far from ideal. Each case is intensely fact sensitive and so it should be.

[78] The child also indicated in the interview with the CDA officer that she understood the implications of the adoption and she was fully prepared to be adopted. Again all this was in the documentation placed before the Board.

Disposition

[79] Appeal allowed. Decision of the Board set aside. Counsel to draft orders including consequential orders to give effect to these reasons for decision. No order as to costs.