

FITZPATRICK AND OTHERS v MINISTER OF SOCIAL 2000 (3) SA 139 (C)

Headnote : Kopnota

Section 18(4)(f) of the Child Care Act 74 of 1983 requires that an applicant for the adoption of a child born of a person who is a South African citizen must also be a South African citizen resident in the Republic, or must be a person with the necessary residential qualifications for the grant of South African citizenship, who has made application for a certificate of naturalisation.

Section 18(4)(f) of the Child Care Act, insofar as it constitutes an absolute proscription of the adoption of South African children by persons who are not South African citizens, not only offends against certain of the fundamental rights in the Constitution of the Republic of South Africa Act 108 of 1996, but also impinges upon inter-country adoptions, as provided for in art 21 of the United Nations Convention of the Rights of the Child (the Convention). Whilst the Child Care Act has to be amended to allow for inter-country adoptions, care has to be taken to allow the same only 'if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin', as contemplated in the Convention. It would be unwise to strike down the citizenship criterion in s 18(4)(f) of the Child Care Act without affording Parliament an opportunity of rendering the section constitutionally acceptable. Given the international ramifications of the matter, and the need for Parliament to be given an opportunity to redraft the section, the Court held that the present was a proper situation for a suspension in terms of s 172(1)(b)(ii) of the Constitution of the declaration of invalidity. (At 141H/I - I/J, 142F - G, 143C - D, 143G - 144A/B and 144F - H.)