

**MINISTER OF WELFARE AND POPULATION DEVELOPMENT v  
FITZPATRICK AND OTHERS 2000 (3) SA 422 (CC)**

**Headnote : Kopnota**

The provisions of s 18(4)(f) of the Child Care Act 74 of 1983 (which absolutely proscribed the adoption of a child born of a South African citizen by a non-citizen or by a person who has the necessary residential qualification for the grant of South African citizenship but has not applied for a certificate of naturalisation) are too blunt and all-embracing to the extent that they provide that under no circumstances may a child born to a South African citizen be adopted by non-South African citizens. To that extent they do not give paramountcy to the best interests of children and are inconsistent with the provisions of s 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996 (which provides that '(a) child's best interests are of paramount importance in every matter concerning the child') and hence invalid. There are no grounds justifying the limitation in terms of s 36 of the Constitution. (Paragraph [20] at 429D - E/F.)

If non-South African citizens apply for the adoption of a child born to a South African citizen, the provisions of the Child Care Act enable the children's court to prevent the abuses and other concerns raised in support of a suspension in terms of s 172(1)(b)(ii) of the Constitution of the operation of an order of invalidity, namely (a) the inability of the Department of Welfare and Population Development (the Department) to facilitate thorough background investigations of non-citizens; (b) insufficient legislative protection against trafficking in children; and (c) inadequate provision to give effect to the principle of subsidiarity. Accordingly, the public interest, 'the interests of justice and good government' will not be served by an order suspending the declaration of invalidity. (Paragraphs [34] and [36] read with para [23] at 433E/F - F, 434G - G/H and 430D - E/F.)

The declaration of invalidity made in *Fitzpatrick and Others v Minister of Social Welfare and Pensions* 2000 (3) SA 139 (C) confirmed but the order suspending the operation of the order reversed.