$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 4th August, 2021

Date of decision: 31st August, 2021

\+ **W.P.(C) 279/2019**

R.K. & ANR ..... Petitioners

Through: Mr. Anubhav, Ms. Preeti Yadav, Mr. Yashwant Singh Yadav & Mr. M.A. Kartik, Advocates.

versus

CENTRAL ADOPTION RESOURCE AUTHORITY ..... Respondent

Through: Mr. Gaurang Kanth, CGSC with Ms. Biji Rajesh, Advocate.
Mr. Sanjoy Ghose, Amicus Curiae

WITH

\+ **W.P.(C) 10064/2019 & CM APPLs. 41610/2019, 16344/2020**

BABY H.A. MINOR THROUGH S.K. ..... Petitioner

Through: Mr. Zeeshan Khan, Advocate.

versus

UNION OF INDIA & ORS ..... Respondents

Through: Mr. Gaurang Kanth, CGSC with Ms. Biji Rajesh, Advocate.
Mr. Sanjoy Ghose, Amicus Curiae

AND

\+ **W.P.(C) 11168/2020**

J.S.S. ..... Petitioner

Through: Mr. Vishwendra Verma, Advocate.

versus

CENTRAL ADOPTION RESOURCE AUTHORITY .... Respondent

Through: Mr. Gaurang Kanth, CGSC with Ms. Biji Rajesh, Advocate.

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present three cases raise important issues relating to international adoption of Indian children. In all three cases, the children, as also their biological parents are in India but the adoptive parents are mostly settled abroad. The adoptions have been carried out under the provisions of the Hindu Adoptions & Maintenance Act, 1956 *(`HAMA')*. However, there are challenges being faced in the movement of the child abroad, including in obtaining passports and visas for the adopted children. Hence these writ petitions.

Brief facts in W.P.(C) 10064/2019

2. W.P.(C) 10064/2019 has been filed on behalf of H.A. i.e., the adopted child, by her adoptive parents, who are U.S. citizens and OCI cardholders. H.A. was born on 22nd May, 2018 to A and R.K., who are family friends of the adoptive parents. On 27th June, 2008, an adoption deed was executed by the adoptive parents at Aligarh, Uttar Pradesh. The child is with the adoptive parents since birth and they have been taking care of the child's requirements, including vaccination etc. The adoptive mother is still living in Aligarh, U.P, India to take care of the child since the No Objection Certificate *(hereinafter, 'NOC')* has not been issued by the Central Adoption Resource Authority *(hereinafter, 'CARA')*.The prayer in the petition is as follows:

"a. issue a writ of mandamus or any other appropriate writ, order, direction of like nature thereby directing the Respondent no 03 to issue visa and direct respondent no 1 & 2 to consider this case under special and exceptional category and provide necessary and immediate assistance.
b. issue a writ of mandamus or any other appropriate writ, order, direction of like nature to the respondents for providing NOC considering the pictures of first birthday, vaccinations certificate from doctor and other facts establishing the role of the petitioner in giving necessary care and attention to the minor child or any other appropriate writ, order, direction of like nature, directing the permit, and thereby enabling the Petitioner."

Brief facts in W.P.(C) 279/2019

3. W.P.(C) 279/2019 has been filed by Mrs. R.K. – wife of Mr. K.S. as Petitioner No.1, together referred to as the adoptive parents, and baby A.K. as Petitioner No.2. A.K. was born on 23rd April, 2016 to K.K. and R.D., who are family friends of the adoptive parents and together referred to as the biological parents. The biological parents gave A.K. in adoption to Mrs. R.K. and her husband through an adoption ceremony which was conducted in accordance with the provisions of HAMA on 22nd September 2016. After the ceremony was conducted, a registered adoption deed dated 23rd September, 2016 was also executed by the biological parents, which was registered with the Sub-Registrar in Himachal Pradesh. In order to affirm the said adoption deed, a suit for declaration was filed by the adoptive parents, seeking confirmation of adoption of baby A.K. before the ld. ACJ, Senior Division, Mukerian, Punjab.

Vide judgment and decree dated 5th April, 2017, the ld. ACJ granted a decree to the following effect:

> *"As a sequel of abovementioned discussion, suit filed by the plaintiffs succeeds and the same is hereby decreed. Plaintiffs are declared to be natural guardian as father and mother of minor A.K. for all intents and purposes from the date of adoption deed (Ex P6/A). Further, the defendants are hereby from taking or claiming the custody of minor A.K., except in due course of law. Parties to the suit shall bear their own costs. Misc. Applications, if any, lying pending are disposed of herewith as not pressed. Unexhibited documents be returned to the respective parties against proper receipt and identification. Decree sheet be prepared accordingly and file be consigned to the record room, Dasuya, after due compilation."*

4. After the decree of declaration was granted, the adoptive parents applied for the passport of A.K. and the same was issued on 13th November, 2017. The adoptive parents are residents of Spain and so they made an application for a visa for the child. The Embassy of Spain, however, opined that the procedure for adoption had not been completed and that the adoptive parents would need to obtain a NOC from CARA to be eligible for a visa. The relevant extract of the communication issued by the Embassy of Spain dated 27th November, 2018 reads as under:

> *"I inform you that your request has been resolved unfavorably.*
> *Your visa application has been denied for the following reason.*

> *After the voluntary investigation be legal character to which has submitted the file it is found that the procedure of adoption has not been completed.*
> *According to the legislation on adoption in India, the applicant needs to obtain a certificate issued by "Central Adoption Resource Authority"(CARA). Stating that there is no objection in which the child leaves the country.*
> *This resolution puts an end to the administrative procedure and against it a contentious-administrative appeal can be filed before the corresponding camber of the Superior court of Justice of Madrid within two months from the day following its notification. Potentially and with a character prior to the contentious-administrative appeal, a reposition resource may be filed with the body that originated the denial within a period of one month."*

5. Accordingly, the adoptive parents approached CARA for issuance of an NOC, which was rejected, leading to the filing of the present petition. The reliefs sought in this petition are as under:

> *"a) Pass an appropriate Order/Writ/Direction to the Respondent for issuance of No Objection Certificate thus enabling the Petitioner No. 2 to leave the Country with Petitioner No. 1 i.e., her adoptive mother, and to join her adoptive father in Spain; and/or*
> *b) Pass any such further or other orders/direction as this Hon'ble Court may deem fit and proper and just in the circumstances of the matter."*

Brief facts in W.P.(C) 11168/2020

6. In W.P.(C) 11168/2020, the child was born on 15th March, 2004. The adoption is by the real uncle (*chacha*) of the child. A registered adoption deed was executed between the adoptive parents and the biological parents on 26th February, 2018 in Basaidarapur, Delhi. In 2018, the adoptive parents returned to the U.S., leaving behind the adopted child with their family. The biological parents are currently in Delhi. Though several communications were made between the Respondent and the Petitioners, CARA is yet to issue an NOC. The child has passed his 10th standard examination in 2020 and wishes to travel to the United States to be with his adoptive parents and to pursue his education. The prayer in the petition is as follows:

> *"Direct the respondent/CARA to issue No Objection Certificate 1n respect to the registered Adoption Deed dated 26.02.2018, hence thereby direction may be passed that the adopted child, Master Damanjeet Singh is the natural son of the petitioners."*

7. The facts of all the above writ petitions show that these are cases of direct adoption i.e., children being given in adoption directly by the biological parents to the adoptive parents, who are either friends or relatives. The adoptive parents in all three cases are living abroad and wish to take the child abroad. In all three cases, adoption has been carried out by conducting ceremonies and registering the adoption deed under the provisions of HAMA. The hindrance faced is due to the non-issuance of an NOC by CARA to take the child abroad.

8. These writ petitions involve the interpretation of provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 along with the Hindu Adoption and Maintenance Act, 1956. These petitions also raise issues as to the mechanism that is to be adopted by the adoptive parents and the child to enable the child to travel abroad and live with the adoptive parents, in accordance with the applicable laws and Conventions.

Submissions on behalf of CARA

9. Mr. Gaurang Kanth, ld. CGSC appearing for CARA submits that the judgments which have been passed previously i.e., both ***CARA v. PKH [LPA 518/2018, decided on 14th January, 2019]*** and ***Divyansh Arora v. UOI & Ors. [W.P.(C) 6759/2016, decided on 14th November, 2017]***, deal with the Juvenile Justice (Care and Protection of Children) Act, 2000 *(hereinafter, 'JJ Act, 2000')*. However, after amendments took place in 2015, specifically, the amendments in Section 41(3) and other related amendments, a decision in respect of inter-country adoption is yet to be taken. He relies upon Articles 1, 2, 4, 5, 14, 15, 16 and 17 of the Convention on Protection of Children and Co-Operation in respect of Intercountry Adoption, 1993 *(hereinafter, 'Hague Convention')* to argue that the said Convention contemplates a proper procedure to enable inter-country adoption. The authorities in both countries i.e., the state of origin and the receiving state must duly approve the adoption, failing which, there is an apprehension that the child may become stateless. Accordingly, the procedure that is to be followed must be in compliance with the Hague Convention.

10. Mr. Kanth, ld. CGSC refers to Articles 15, 23, 29, 33, 37 and 56 of the Hague Convention. It is the submission of Mr. Kanth, that the Hague Convention has a very strict procedure for inter-country adoption. The entire purpose of the Hague Convention is that the authorities in both countries ought to be *ad idem* on the adoption process and procedure. However, under Article 37, if a country has two or more systems of law which apply to different categories of persons, whenever the legal system is referred to, it would refer to the legal system specified by the law of that Country. It is submitted that under this provision, adoptions under the Hindu Adoption and Maintenance Act, 1956 *(hereinafter, 'HAMA')* could be recognized.

11. Mr. Kanth, ld. CGSC further relies on Article 33 of the Hague Convention to argue that if any provision of the Hague Convention is not followed in all respects or there is a risk involved, the Central Authority of the Country can be contacted for taking appropriate measures. The final submission is that there are various situations where if proper verification is not carried out, like in the case of a child who was to be sent for adoption to Australia, as per the judgment in ***W.P.(C) 3576/2019*** titled ***Karina Jane Creed v. UOI & Anr.***, there is a severe apprehension of the child being rendered stateless. Hence, the authorities in India are extremely circumspect if the complete verification has not been carried out, both in India and in the country where the child is to be adopted.

12. According to Mr. Kanth, ld. CGSC in terms of Section 56(4) of the Juvenile Justice (Care and Protection of Children) Act, 2015 *(hereinafter, 'JJ Act, 2015')*, all inter-country adoptions must be carried out only in terms of

the Act and no waiver is permitted. This position has also been recognized by the Supreme Court in ***SLP No. 13627/2019*** titled ***Karina Jane Creed v. UOI & Ors.*** Thus, it is his submission that once this ruling has been given by the Supreme Court, for the purpose of inter-country adoption, parties would have to follow the procedure prescribed under the JJ Act, 2015.

13. Reference is also made to Article 51(c) of the Constitution of India, which requires that treaty obligations be recognized and given effect to and nothing contrary to the same be permissible. In support of this submission, paragraph 23 of the judgment of the Supreme Court in ***Commissioner of Customs, Bangalore v. GM Exports & Ors., (2016) 1 SCC 91*** is relied upon to argue as to the manner in which treaty obligations are to be given effect to.

14. Mr. Kanth, ld. CGSC has thereafter taken the Court through the provisions of the JJ Act, 2000 and the JJ Act, 2015. As per Section 41(3) of the JJ Act, 2000, the adoption agency is fully empowered to prescribe guidelines for adoption and the said guidelines would be mandatory. It would not be permissible to bypass the said guidelines. It is submitted that an important feature of the JJ Act, 2000 is that the Hague Convention is not mentioned in the Preamble to the Act, as the Hague Convention was ratified only in 2003. In contrast, the JJ Act, 2015 specifically refers to the Hague Convention.

15. Various definitions under the JJ Act, 2015 are also referred to, including Sections 2(7), 2(34), 2(52) and 2(60). As per Section 56 of the JJ Act, 2015, all adoption would be strictly in terms of Section 56. However, this would not affect any adoption under HAMA. The significance of Section 56(4) would

be that all inter-country adoptions must be done only in terms of the adoption regulations prescribed by the authority. It is submitted that an overall reading of Section 56 shows that HAMA adoptions are permitted only in respect of domestic adoptions and not inter-country adoptions.

16. Finally, reliance is placed upon the report of the Amicus Curiae, wherein the report of the Steering Committee of CARA, which met on 23rd June, 2016, is annexed. The Steering Committee recognized issues facing inter-country adoption and suggested various solutions therein. In conclusion, it is submitted by Mr. Kanth, ld. CGSC that in the present case, none of the procedures under the JJ Act, 2015 have been fulfilled. All the adoptions are governed by the JJ Act, 2015. Strictly going by Section 56(4) of the JJ Act, 2015, the inter-country adoptions would not be permissible, except as per the provisions of the Act.

17. Ms. Biji, ld. counsel appearing for Mr. Gaurang Kanth, ld. CGSC submits that insofar as all adoptions prior to the coming into force of the JJ Act, 2015 i.e., 15th January, 2016, are concerned, on compliance of minimum requisite documents, after proper verification of such cases by the State Government, the NOC is granted. Insofar as the Hague Convention is concerned, she submits that Articles 29 and 37 would be relevant since any inter-country adoption, if not in compliance with the provisions of the Hague Convention, would not be recognized.

18. In W.P.(C) 11168/2020, Ms. Biji, ld. counsel submits that the adoptive parents have not applied to CARA through the proper procedure which is prescribed. Reliance is placed upon the Adoption Regulations, 2017

prescribed by CARA, which require a proper procedure to be adopted, including requiring the agency of the foreign country where the parents are living to file an application before CARA.

Submissions on behalf of the Petitioners

19. In W.P.(C) 279/2019, Mr. Anubhav Yadav, ld. Counsel for the Petitioners has submitted that the child has been issued a passport and Aadhar card in the name of her adoptive parents. The adoption deed in this case dates back to 23rd September, 2016 and the Civil Court has already granted a decree recognizing the adoption on 5th April, 2017. The adoption deed is a registered document, registered as No. 125 on 23rd September, 2016 in Una District, Himachal Pradesh in front of the *Namberdar*.

20. Ld. counsel submits that the child is not covered by the JJ Act, 2015, since the child is not one who is in need of care and protection or in conflict with law, as required under Section 1(4) of the Act. He further submits that the adoptive father of the child is living in Spain and when the visa was applied for, for the child, the Embassy of Spain sought an NOC from CARA. Hence, the present writ petition was filed.

21. Reliance is placed upon Section 2(14) of the JJ Act, 2015, which defines *"child in need of care and protection"*. It is submitted that sub-section (iii) would not cover the child in question as none of the conditions – (a), (b) or (c) are satisfied or alleged against the adoptive parents. Secondly, it is submitted that as per Section 56 (1) of the JJ Act, 2015, Section 56 applies only in the case of orphaned, abandoned or surrendered children, who are all

defined under the Act under Sections 2(42), 2(1) and 2(60), respectively. The children in the present batch of petitions would not fall under any of these categories.

22. It is submitted that the adoption can be done outside the JJ Act, 2015 and the child can live with the adoptive parents, as both Sections 56(1) and (2) do not have any application. Under Section 56(3), for any adoption under HAMA, the JJ Act, 2015 would not apply. In so far as inter-country adoption and regulations from Section 60 onwards are concerned, it is the submission of counsels for the Petitioners that Section 56(3) protects adoptions under HAMA and hence, the JJ Act, 2015 would have no applicability whatsoever.

23. Finally, it is submitted that CARA itself is conscious of the difficulties being faced by parents in inter-country adoptions. Reliance is placed upon the *Amicus* brief, wherein the report of the Steering Committee of CARA, which met on 23rd June, 2016, is annexed. This report deals with CARA's policy on inter-country adoptions and suggests an amendment in the JJ Act, 2015, in view of Section 56 (4) of the Act. Reliance is placed on ***Jasmine Kaur v. Union of India & Anr., 2021 (1) HLR 399*** by the Petitioners, which, according to the Respondents, is being challenged by them in the Supreme Court.

24. Mr. Verma, ld. counsel appearing in W.P.(C) 11168/2020 submits that in this case, the adoption is amongst relatives. The adoption deed is a registered adoption deed, with the Sub Registrar in *Basai Darapur*, New Delhi. He submits that the correspondence which is placed on record would reveal that CARA is not clarifying as to what is the objection which they have

in the present adoption, inasmuch as all the requisite documents, including the adoption deed, birth certificate etc., have all been submitted to CARA.

25. Mr. Zeeshan Khan, ld. Counsel appearing in W.P.(C) 10064/2019 has explained the difficulties faced by the adoptive parents in his case. He relies upon the submissions made by the other Petitioners.

Summary of Report of Amicus Curiae

26. Mr. Sanjoy Ghose, ld. Senior Counsel was appointed as amicus in the matter on 11th April, 2019 in W.P (C) 279/2019 and on 21st August, 2020 in W.P (C) 10064/2019. Mr. Ghose has filed a report dealing with various aspects of the JJ Act, 2015 and HAMA. Excerpts of his report are set out below:

> *"12-11. A summary of the preceding discussion is as under:*
>
> *i. This is not a case of repugnancy or conflict between the provisions of two special laws, being HAMA and JJ Act, 2015.*
>
> *ii. Both these legislations legislate on the subject matter of adoption of children, wherein HAMA, on one hand, contemplates adoptions by Hindus, Buddhists, Jains and Sikhs, allowing only, direct and private adoptions, meaning thereby, that the child to be adopted needs to be actually given, in adoption by the biological parents and taken in adoption by the prospective adoptive parents, subject to other restrictions and conditions set out under HAMA; JJ Act, 2015, o' the other hand, introduces the concept of secular, adoption, wherein adoption is no longer limited to only Hindus, Buddhists, Jains and Sikhs, while providing for the process to be followed for the adoption of (in-country and inter-country) orphaned /abandoned/surrendered, children.*

iii. *It is not the case of CARA that JJ Act, 2015 prohibits/bars cases of Inter-Country Direct Adoptions. It is, in fact, the case of CARA that neither JJ Act, 2015 nor Adoption Regulations, 2017 nor Hague Adoption provide for Inter-Country Direct Adoptions. If this submission of CARA is to be relied upon and developed further, it would create an anomalous state of affairs in India wherein a valid adoption under HAMA would not be recognised by JJ Act, 2015. Had that been the intent of the legislature, such an adoption would not have been expressly exempted from meeting the requirements of JJ Act, 2015 (as set out in Section 56(3), JJ Act, 2015)*

iv. *It is therefore, pertinent to note that while JJ Act, 2015, Adoption Regulations, 2017 and the Hague Convention, display an inclination towards institutionalised adoptions, they do not provide for a mechanism for adoption of a child who was been willingly and voluntarily given in adoption by its biological parents to the adoptive parents and do not prohibit the validity and legality of such a direct adoption carried out under HAMA.*

v. *Therefore, it is submitted that as on date, that there are two active and valid pieces of legislations in India that provide for adoption of children, and neither of the two legislations ousts the validity of an adoption made under the other.* ***However, it cannot be denied that there does exist a lacunae with respect to Inter-Country Direct Adoptions which needs to be reconciled, keeping the best interest of the child in mind.***

vi. *It is arguable that JJ Act, 2015 applies only to orphan, abandoned or surrendered children, and does not apply to adoption of children living with*

their biological parents. However, in the context of inter-country adoptions, Section 56(4) is categorical that all inter-country adoptions shall be done only as per the provisions of the Act and the adoption guidelines.

vii. *The procedure prescribed under Section 59 of the JJ Act, 2015 applies to inter-country adoption of orphan, abandoned, and surrendered children. Therefore, arguably this procedure has no application to independent direct inter-country adoptions. However, since Section 56(4) does not distinguish between an adoption made directly and an adoption made through an adoption agency, it is submitted that the same extends to all forms of inter- country adoptions.*

viii. *One way to resolve this conundrum is to read down Section 56(4) and give a harmonious interpretation to sub-clause (3) and (4) of Section 56. However, this would still leave out the issue of non-Hindu Inter-Country Direct Adoptions, however, the same does not affect the case at hand.*

ix. *In direct adoptions, the Central Authority would have a different role since there is no need for matching, however, it still needs to issue an NOC for smooth inter-country adoptions to take place between Contracting States of the Hague Convention in the absence of which the process would be unnecessarily prolonged and cause distress to the child.*

x. *Arguably, the Central Authority/CARA should issue an NOC, only after being satisfied of the criteria laid down in JJ Act, 2015, keeping in mind the best interests of the child."*

27. The Amicus has concluded in his report as under:

a. Neither the JJ Act, 2015, the Adoption Regulations, 2017 or HAMA prescribe any procedure for inter-country direct adoptions between non-relatives;

b. For adoptions under HAMA, the adoption could be amongst relatives, however HAMA does not have any provision in respect of inter-country adoptions;

c. There is a conflict between Sections 56(3) and 56(4) of the JJ Act, 2015 and ambiguity as to whether HAMA adoptions would be covered under Section 56(4) or not.

d. In respect of direct inter-country adoptions under HAMA, safeguards ought to be laid down to ensure that direct inter-country adoptions are not misused for exploitation of children.

e. Amendments are required in HAMA and/or the JJ Act, 2015.

Analysis and Findings:

28. Adoption of children can be of various kinds. Adoptions which are directly from the biological parents of the child are called *'Direct Adoptions'*. In the case of children who are adopted, not through the biological parents but through any external third-party agency, such adoptions are called *'Indirect Adoptions'*. Prospective adoptive parents could either be related to the child and the family or could be complete strangers who may fall in any of the following two categories: -

(i) Indian citizens; or

(ii) Non-resident Indians, persons of Indian origin or even foreigners.

The former would be *'domestic adoptions'* and the latter would be *'inter-country adoptions'*.

29. India acceded to the United Nations Convention on the Rights of the Child, 1990 on 11th December, 1992 and ratified the Convention on Protection of Children and Co-operation in respect of Inter-Country Adoption, 1993 i.e., the Hague Convention, on 6th June, 2003. The first statute which was enacted to regulate adoptions in India was the Juvenile Justice (Care and Protection of Children) Act, 2000, which was has now been repealed by Section 111(1) of the Juvenile Justice (Care and Protection of Children) Act, 2015.

30. In India, there are provisions relating to adoption in two statutes:

I) The Hindu Adoption and Maintenance Act, 1956; and

II) The Juvenile Justice (Care and Protection of Children) Act, 2015 and the regulations framed thereunder.

Adoption under the Hindu Adoption and Maintenance Act, 1956

31. This Act applies to the following categories of persons:

> *"**2. Application of Act -** (1) This Act applies-*
> *(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,*
> *(b) to any person who is a Buddhist, Jaina or Sikh by religion, and*
> *(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been*

> *governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed. …"*

32. The explanation in Section 2 extends the ambit of the Act to children under various conditions whose parents or a single parent is a Hindu, Buddhist, Jaina or Sikh and who has been brought up as a Hindu, Buddhist, Jaina or Sikh or who has converted to Hindu, Buddhist, Jaina or Sikh, whether legitimate or illegitimate, subject to the conditions set out therein. Chapter II deals with adoptions. All adoptions, in order to be valid, must satisfy the conditions contained in Chapter II. The adopted child would then be deemed to be the child of the adoptive parents.

33. As per Section 9(5) of HAMA, before granting permission to a guardian to give the child in adoption, the Court must be satisfied that the adoption is for the welfare of the child. Due consideration would be given to the wishes of the child, having regard to the age and understanding of the child. It is to be ensured that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption, except such as the Court may sanction. Receipt or making of any payment or reward for adoption, attracts punishment of imprisonment up to six months, or fine, or both under Section 17 of HAMA.

34. Sections 15 and 16 of HAMA read as under:

> ***"15. Valid adoption not to be cancelled –*** *No adoption which had been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.*
>
> ***16. Presumption as to registered documents relating to adoption –*** *Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."*

35. Thus, as per the provisions contained in Chapter II and Sections 15 and 16 extracted above, upon satisfaction of the various conditions as contained therein, the adoption would be valid under the provisions of HAMA. If there is a registered adoption deed, as per Section 15, the same would be presumed to be in compliance of HAMA, so long as it is signed by the person giving the child in adoption and the person taking the child in adoption. The proviso to Section 11 makes it clear that performance of *datta homam* is not compulsory for a valid adoption. Recently, in ***JS & Anr. V. CARA & Anr. [W.P.(C) 3187/2021, decided on 26th July, 2021]***, in respect of adoption under HAMA, a ld. Single Judge of this Court has observed as under:

> *"13. For the Hindus, their personal law recognizes adoption. Therefore, the adoption ceremony known as "Datta Homam", where the biological parents voluntarily surrender and hand over the child to the recipient, following religious ceremonies, was*

> *considered sufficient to result in a valid and legal adoption. The relationship of the biological family to the child given in adoption extinguishes when this ceremony is conducted. However, this right to adopt has been brought under the Hindu Adoptions and Maintenance Act, 1956 ("HAMA", for short) which lays down certain limitations on who can adopt and who can be adopted [Sections 7, 8, 9 & 10] and what are the other conditions for a valid adoption [Section 11]. Therefore, even under the HAMA the giving and taking of the child must actually occur, even if the "datta homam" is not performed. A registered document purporting to record an adoption made and signed by the person giving and the person taking is to be presumed to have been in compliance with the requirements of HAMA unless disproved [Section 16]. HAMA is applicable only to Hindus as defined in Section 2, and specifically provides that it applies to any other person who is not a Muslim, Christian, Parsi or Jew by religion". 14. There are a large number of adoptions that have taken place socially amongst the Hindus without the necessity of approaching the court for validating an adoption. The JJ Act has recognised these adoptions even in the case of Non-Resident Indians (NRIs) and Overseas Citizens of India (OCIs) [Section 59 of the Act]."*

Adoption under the Juvenile Justice (Care and Protection of Children) Act, 2015

36. In India, until the year 2000, adoptions were being considered and approved under the Guardians and Wards Act, 1890. The JJ Act, 2000 was then enacted, as per which, the process of adoptions was sought to be streamlined. This Act was limited in its application to children who were

orphans, abandoned, neglected or abused children and a mechanism was put in place for enabling the adoption of such children. The same was to be monitored by the Child Welfare Committee *(hereinafter, 'CWC')* constituted under Section 29. Upon the CWC declaring the child as free for adoption, the same was duly approved. However, the JJ Act, 2000 did not have any provision relating to inter-country adoptions. The regulations of 2006, which were framed under the JJ Act, 2000, also did not provide for inter-country adoptions.

37. In view of various incidents of abuse of children in institutions and other surrounding circumstances, as also the ratification of the Hague Convention, the JJ Act, 2015 was enacted. As per Section 1(4) of the JJ Act, 2015, the provisions of the Act apply to all matters concerning children *`in need of care and protection'* and *`children in conflict with law*'. Section 2(14) defines a *''child in need of care and protection''*. The first category of children who are *in need of care and protection* are those who do not have parents or guardians and have no home, settled place of abode or means of subsistence, who are found indulging in begging, living on the streets, who are vulnerable and likely to be inducted into drug abuse or trafficking, who are victims of armed conflict, civil unrest or natural calamities etc. The second category of children who are in need of care and protection are those who either have parents or guardians but are covered by Sections 2 (14) (iii), (iv), (v), (vi), (vii) or (xii). All these sub-sections relate to children who reside with their parents or guardians, who have physically or mentally abused the child or children with parents or guardians who are unfit to take care of them, are incapacitated, who have abandoned or surrendered the

child or parents who cannot be found after reasonable inquiry. This category can be collectively referred to as *`abused children'*. The terms *"abandoned child"*, *"surrendered child"* and *"orphan"* are defined under Sections 2(1), 2(60) and 2(42), respectively. Under Section 2(13) of the JJ Act, 2015, a *"child in conflict with law"* is a minor who has or is alleged to have committed an offence.

38. From a reading of Section 1(4) of the JJ Act, 2015, it is clear that the Act provides for the adoption of children *in need of care and protection* and children *in conflict with law* and lays down various standards and conditions under which their welfare, including adoption, is regulated. Insofar as direct adoptions are concerned, direct adoptions from the biological parents of the child are permitted under Section 56(2) of the JJ Act, 2015.

39. The Adoption Regulations, 2017, which were framed under the provisions of the JJ Act, 2015 provide a detailed procedure for adoptions, both, in respect of orphans, abandoned or surrendered children, as also children of relatives under Section 2(52) and children of a spouse from an earlier marriage who have been surrendered by the biological parents for adoption by the step-parent. Regulation 5 prescribes the eligibility criteria for prospective adoptive parents. In Chapter II, Regulations 6 and 7 deal with adoptions relating to orphans, abandoned or surrendered children. Chapter III deals with the adoption procedure for resident Indians. Chapter IV deals with the adoption procedure for non-resident Indian, OCI and foreign prospective adoptive parents. Regulation 14 specifically provides that non-resident Indian prospective adoptive parents would be treated at par with Indians living in India for adoption of orphaned, abandoned or surrendered children. Regulation 20 specifically provides for adoption by OCI

cardholders or foreign nationals who reside in a convention country i.e., a country which has ratified the Hague Convention.

40. The procedure for inter-country adoption, which is prescribed under Section 59 of the JJ Act, 2015, is elaborated in the Adoption Regulations, 2017 under Regulations 12, 15, 16, 17, 18 and 19. The procedure involves prospective adoptive parents getting a Home Study Report prepared in their country of habitual residence and getting registered on the Child Adoption Resource Information and Guidance System (CARINGS). The foreign adoption agency/central authority/government department prepares the Home Study Report and on finding the prospective adoptive parents eligible, sponsors their application to CARA for adoption from India. CARA scrutinizes the Home Study Report and determines the prospective adoptive parents' eligibility. Profiles of two children are sent to the prospective adoptive parents who can finalize one within 96 hours. A Child Study Report and Medical Examination Report are prepared and signed by the prospective adoptive parents. These documents are scrutinized by various authorities, both in India and in the receiving country. Within 10 days from receipt of acceptance of child by the prospective adoptive parents, CARA issues an NOC and letter of approval or permission of the receiving country**.** Within 10 days of receiving the NOC from CARA, the Specialised Adoption Agency files an application in the Court having jurisdiction and a passport is issued for the child within 3 days from the date of receipt of the adoption order. The prospective adoptive parents receive the child in person from the Specialised Adoption Agency as soon as the passport and visa are issued to the child and within 2 months from the adoption order**.** Post-

adoption, the authorized foreign adoption agency/central authority/government department ensures the submission of progress reports of the child for 2 years from date of arrival of child in the receiving country, on a quarterly basis during the 1st year and 6-monthly basis in the 2nd year. An undertaking is given by the prospective adoptive parents that they would allow personal visits by the representatives of the authorized foreign adoption agency/central authority/government department.

41. In inter-country direct adoption amongst relatives under Section 60 of the JJ Act, 2015, there is no need for declaration of the child as legally free for adoption. A relative living abroad, who intends to adopt a child from his relative in India is required to obtain an order from Court and then apply for an NOC from CARA. On receipt of such court order and an application from the biological or adoptive parents, CARA will issue an NOC under intimation to the immigration authority of India and of the receiving country of the child. After receiving the NOC, the adoptive parents shall receive the child from the biological parents. Akin to the conditions for adoptions under HAMA, while issuing an order for adoption, the concerned Court is to ensure that the adoption is for the welfare of the child, due consideration is given to the wishes of the child, having regard to the age and understanding of the child and that there is no monetary exchange involved in the adoption. Regulations 53 to 55 of the Adoption Regulations, 2017 provide more detailed guidelines for inter-country direct adoptions by relatives. The procedure involves preparation of a Home Study Report in the country of habitual residence of the prospective adoptive parents, getting registered on the Child Adoption Resource Information and

Guidance System (CARINGS), preparation of a family background report and obtaining an adoption order from the competent court.

Decisions on inter-country direct adoptions

42. The Supreme Court had the occasion to consider adoptions by foreign parents in the case of ***Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244***. Considering the complicated situations which arose in inter-country adoptions, the Supreme Court had expressed a desire for establishment of an agency which could process and validate adoptions in the country. This, along with the provisions of Hague Convention, led to the establishment of CARA.

43. In ***Lakshmi Kant Pandey (supra)***, the Supreme Court, prior to the enactment of the JJ Act, 2000, considered inter-country adoption of a child and clearly held that in the case where the child's biological parents are available and they are willing to give the child in adoption, the biological parents would have the best interests of the child in mind. Thus, the Supreme Court concluded that inter-country direct adoptions do not require any third-party monitoring or regulation. The relevant portion of the judgment in ***Lakshmi Kant Pandey (supra)*** reads as under:

> *"15. We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural*

> *safeguards should be forged for protecting their interest and promoting their welfare."*

44. In ***Anokha v. The State of Rajasthan and Ors., (2004) 1 SCC 382***, the Supreme Court reiterated the position that procedural safeguards would not apply in the case of inter-country direct adoptions i.e., adoptions from the biological parents to the adoptive parents. It is relevant to note that ***Anokha (supra)*** was decided after the enactment of the JJ Act, 2000. The relevant portion of the judgment in ***Anokha (supra)*** reads as under:

> ***"8.*** *In our view, the High Court and the District Judge erred in not considering the material produced by Respondents 2 and 3 in support of their application and in rejecting the application under the Guardians and Wards Act, 1890 solely on the basis of the Guidelines. The background in which the Guidelines were issued was a number of decisions of this Court, the first of which is Lakshmi Kant Pandey v. Union of India [(1984) 2 SCC 244 : AIR 1984 SC 469] . This is borne out from the stated object of the Guidelines as set out in paragraph 1.1 thereof which "is to provide a sound basis for adoption within the framework of the norms and principles laid down by the Supreme Court of India in the series of judgments delivered in L.K. Pandey v. Union of India[(1984) 2 SCC 244 : AIR 1984 SC 469] between 1984 and 1991".The original decision of the Court was taken on the basis of a letter written by one Laxmi Kant Pandey complaining of malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The judgment has considered the problem at great length after affidavits were filed*

not only by the Indian Council of Social Welfare but also by foreign organisations and Indian organisations which were engaged in offering and placing Indian children for adoption by foreign parents. The decision has referred to three classes of children: (i) children who are orphaned and destitute or whose biological parents cannot be traced; (ii) children whose biological parents are traceable but have relinquished or surrendered them for adoption; and (iii) children living with their biological parents. The third category has been expressly excluded from consideration as far as the decision was concerned "for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents" [Ibid., SCC p. 264, para 11 of the Report] . The reason is obvious. Normally, no parent with whom the child is living would agree to give a child in adoption unless he or she is satisfied that it would be in the best interest of the child. That is the greatest safeguard.

…

12. *The Guidelines have formulated various directives as given by this Court in the several decisions and do not relate to regulation of the adoption procedure to be followed in respect of the third category of children, namely, children with their biological parents who are sought to be given in adoption to a known couple as is the situation in this case. It is only where there is the impersonalized attention of a placement authority that there is a need to closely monitor the process including obtaining of a no-objection certificate from the Central Adoption Resource Agency (CARA), Ministry of Welfare, the sponsorship of the adoption by a recognised national agency and the*

> *scrutiny of the inter-country adoption by a recognised Voluntary Coordinating Agency (VCA). Indeed CARA has been set up under the Guidelines for the purpose of eliminating the malpractices indulged in by some unscrupulous placement agencies, particularly the trafficking in children."*

45. In ***Dr. Jaswinder Singh Bains v. CARA, 2012 SCC OnLine Del 646,*** the adoptive parents were permanent residents of Canada who had adopted a child by executing an adoption deed, conducting a religious ceremony to solemnize the adoption, and obtaining a decree from the Civil Judge (Senior Division), Patiala, declaring the adoptive parents to be guardians of the child. Subsequently, when the adoptive parents initiated the required process in Canada, the Family Services of Greater Vancouver requested CARA for issuance of an NOC. However, CARA did not respond. Accordingly, a writ petition was filed. Considering the judgment of the Supreme Court in ***Laxmi Kant Pandey (supra)***, the ld. Single Judge of this Court held that an NOC from CARA was not required as the adoption was directly from the biological parents. The submission of CARA too was that its mandate is limited to rehabilitating orphaned, abandoned and surrendered children under the adoption guidelines notified by Government of India. The relevant paragraph of the judgment reads as under:

> ***"4.*** *Upon issuance of notice, the respondent has filed a counter affidavit sworn by Mr. Jagannath Pati, Joint Director CARA. The respondent refers to the decision of the Supreme Court in the case of Anokha (Smt.) v. State of Rajasthan, (2004) 1 SCC 382 in its counter affidavit. <u>The respondent,</u>*

> *after placing before this Court the various legal provisions applicable in the matter of cross border adoption, in the ultimate paragraph has stated that it is mandated to work for the rehabilitation of orphaned, abandoned and surrendered children under the adoption guidelines notified by Government of India. It is stated that the present case does not fall under any such category, as in this case the adoption has taken place voluntarily by the biological parents of the child. Therefore, the respondent is not able to process this case of direct adoption."*

Thus, in ***Jaswinder Bains (supra)*** it was CARA's stand that inter-country adoptions in respect of children who are not *orphaned, abandoned and surrendered* do not fall within its jurisdictional mandate, as per the JJ Act 2000.

46. In ***Swaranjit Kaur v. UOI & Ors. 2012 SCC OnLine Del 6464***, this Court was dealing with a case involving prospective adoptive parents located in Canada. An adoption deed was entered into between the biological parents and the adoptive parents, which was also approved by the competent Civil Court. For the purposes of issuance of a passport, an NOC was required from CARA, however, CARA had not issued an NOC, leading to the filing of the writ petition. This Court, following the judgment in ***Dr. Jaswinder Singh Bains (supra)***, held that since the adoption was an inter-country direct adoption, CARA had no role to play.

47. In ***PKH v. CARA, 2016 SCC OnLine Del 3918,*** this Court was considering a case where the adoption took place prior to the coming into force of the JJ Act, 2015. The child was from Punjab and the adoptive parents

were residing in Canada. The child was given away in adoption by the biological parents. CARA Canada had also given a favourable home study report. Following the judgments in ***Anokha (supra)*** and ***Swaranjit Kaur (supra)***, it was held that an NOC from CARA is not required in the case of an inter-country direct adoption. However, it was noted that since there was a Home Study Report and a decree of declaration in this case, Articles 5 and 17 of the Hague Convention were satisfied. Further, an NOC was directed to be issued by CARA to facilitate the issuance of a passport for the child. The relevant findings of the Court are as under:

> *"ANSWERS TO THE ISSUES RAISED IN DR. ABHA AGRAWAL (SUPRA) AS WELL AS IN THE PRESENT CASE AND CONCLUSIONS*
>
> ***91.*** *The survey of the domestic law and international conventions leads to the following conclusions:*
>
> *a. As the adoption deed in the present case has been executed under HAMA, 1956, before the Act, 2015 came into force and the adoption deed has been held to be legal, valid and genuine by the Additional Civil Judge (Senior Division), Zira in a civil suit filed by the adoptive parents against the natural mother, the adoption in the present case is governed by the Act, 2000 and not by Act, 2015.*
>
> *b. The Act, 2000 read with the Rules, 2007 and the Guidelines, 2015 expressly lays down a procedure for adoption only in relation to a child who is an orphan or abandoned or surrendered, and does not cover inter-country direct adoption.*

c. The Act, 2000 read with the Rules, 2007 and the Guidelines, 2015 provides that a child is surrendered when the parents wish to relinquish him/her to the CWC and a formal act takes place by which the child is surrendered by the natural parents to the CWC. Once the surrender is complete, the parents have no role in the future of the child and the CWC alone decides the best course for the child's future before the child is adopted.

d. A child given in direct adoption cannot be termed as a "surrendered child", since there is no relinquishment of the child, by the parents to the CWC.

e. The Supreme Court in Lakshmi Kant Pandey (supra) as well as Anokha (supra) and the High Court of Delhi in Dr. Jaswinder Singh Bains (supra) and Swaranjit Kaur (supra) have categorically and conclusively held that all inter-country direct adoptions are outside the scope of the rules set out for adoptions under the Act, 2000 and the Rules/Guidelines framed there-under.

f. In view of the aforesaid binding precedents, there is no scope for incorporation of the concept of parens patriae in inter-country direct adoption cases under the Act, 2000, specially when the adoption deed has been declared to be legal, valid, genuine and binding by a competent court.

g. Rule 26 of the Guidelines, 2011 is a procedural provision and it does not advance the case of the respondent-CARA.

> *h. In view of CARA, Canada's approval for adoption and its favourable home study report as well as the decree of declaration passed by Additional Civil Judge (Senior Division), Zira, this Court is of the opinion that the requirements of Articles 5 and 17 of the Hague Convention are satisfied in the present case.*
>
> *i. Consequently, in cases of inter-country direct adoption like the present case, NOC from respondent-CARA is not required under the Act, 2000 and the Guidelines, 2011.*
>
> *j. The Regional Passport Officer/MEA cannot insist on issuance of an NOC by respondent-CARA before processing the petitioner's application for issuing a Passport to the adopted child.*
>
> *…*
>
> *RELIEF*
>
> ***95.*** *Accordingly, the present writ petition and applications are disposed of with a direction to respondent-CARA to grant an NOC to the petitioner for taking her adopted child namely, M.H., to Canada within a period of two weeks. Ministry of External Affairs/Regional Passport Officer is also directed to issue her a passport within two weeks thereafter. …"*

The said judgment has been challenged before a ld. Division Bench of this Court in ***LPA 518/2018*** titled ***CARA v. PKH***, however, as per Ld. Counsels, no stay has been granted in this matter.

48. In ***Jasmine Kaur v. Union of India and Ors. [CWP 10555/2019, decided on 28th July, 2020]***, the Punjab & Haryana High Court was dealing

with a case involving a child who was given away in adoption by her biological parents to her aunt (*maasi*). The adoption was conducted as per Sikh rites and ceremonies, in accordance with the provisions of HAMA. The High Court was considering the following three issues:

> *"**7.** After hearing learned counsel for the parties at length, three issues arise in the present writ petition:*
>
> ***1.** Whether the adoption under HAMA, 1956 is valid and whether Section 56 of the J.J. Act, 2015 is applicable in the facts of the present case and the adoption in the present case can only be made under the J.J. Act, 2015?*
>
> ***2.** Whether an NOC from CARA, i.e. respondent No. 3 is mandatory as per the mandate of Section 60 of the J.J. Act, 2015 for direct inter-country relative adoption?*
>
> ***3.** Whether respondent No. 2 can refuse to issue a passport beyond the statutory provisions of Section 6 of the Passports Act, 1967?"*

49. After analyzing the JJ Act, 2015, as well as the provisions of HAMA, it was held that:

> *"**10.** A perusal of the J.J. Act, 2015 shows that it is a special provision for a limited class of children, those who are in conflict with law, in need of care and protection, orphaned, surrendered or abandoned. In the present case the adoptive parents are Sikhs. The child is being given over by the biological parents of sound mental health. The biological mother is the real sister of the adopted mother. The child is neither an orphaned nor surrendered nor in conflict with the law. Thus, the*

J.J. Act 2015 does not apply for adoption of the particular child in question."

…

14. *The argument of learned Additional Solicitor General of India, Mr. Satya Pal Jain, that the judgment pertains to a period before the amendment of the J.J. Act, 2000 and is before the enactment of J.J. Act, 2015, came into operation is correct but the same does not help in any manner as the applicability of the Act under the Juvenile Justice (Care and Protection of Children) Act, 2000 and the Juvenile Justice (Care and Protection of Children) Act, 2015 remains the same. In fact, its application under J.J. Act, 2015 is even more specific to only special children.*

…

16. *Further, the aim and object of the J.J. Act, 2015 was formulated for protection of such children who are found to be in conflict with law or required rehabilitation. Thus, Section 56(4) and (5) of the J.J. Act, 2015 is only for such children. Sub Section (2) of Section 56 of the J.J. Act, 2015, which talks of adoption of a child by a relative from another relative, is an option/remedy provided to those to whom HAMA, 1956 will not apply, i.e. they are neither Hindu, Buddhist, Jain or Sikh, as the case may be or is not Muslim, Christian, Parsi or Jew by religion, although it does not bar and in a way gives option even to a Hindu, Sikh, Jaina etc. to apply under this Act. Therefore, it also does not mean that those religions covered under the definition of a 'Hindu' as per the HAMA, 1956 cannot apply under the J.J. Act, 2015. Here, it needs to be emphasized that J.J. Act, 2015 is a secular Act and rather gives choice to even those covered under the HAMA, 1956 to apply for adoption under the J.J. Act, 2015,*

as also clarified by the Apex Court in the case of Shabnam Hashmi vs. Union of India and others MANU/SC/0119/2014 : 2014(1) RCR (Civil) 1052 holding that Juvenile Justice (Care and Protection of Children) Act, 2000 has been enacted for adoption of children irrespective of their religion/caste and the said Act cannot be negated by any other personal law and the individuals are free to either submit to their personal law or adopt children under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. Para 11 of the said judgment reads thus:

> *"11. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such*

> *time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date."*

50. The P&H High Court also considered the judgment of the High Court of Kerala in ***Sivarama K. & Ors. v. State of Kerala & Ors., 2020 (1) Kerala Law Journal 641,*** wherein it was held that if the child was not an orphan, abandoned or surrendered child, the JJ Act, 2015 would have no applicability. The High Court observed as under:

> *"29. On the giving of the child by the biological parents and the taking of the child by the adoptive parents, which is evidenced by Ext. P-1 registered adoption deed, the child can never be labelled as an orphan, abandoned or surrendered child, as interpreted by the fourth respondent. If such a view is taken, it would render the HAM Act otiose and redundant and make it appear that the former enactment is repugnant with the J.J. Act, which never is the intention of the lawmakers. Such a narrow and oppressive interpretation cannot be given, particularly when the legislature has consciously included Sec. 56(3) in the J.J. Act, the later enactment, with the intention to permit adoptions under the HAMA Act. There may be instances where a person may qualify to adopt a child under the provisions of both the HAMA Act and the J.J. Act. In such an eventuality, especially where is no repugnancy between the two statutes, it would be the choice of such person to opt for the HAMA Act or the J.J. Act, 2015, adoption. No authority can compel such person to resort to only the J.J. Act, 2015."*

51. In conclusion, the Court held that in view of Section 56(3), the JJ Act, 2015 would not apply even in the case of inter-country adoptions, when the adoption is under HAMA. The conclusions are set out herein below:

> *"**17.** In the present case, there is no dispute that the adoption has been taken by the persons who are Sikhs and, therefore, have a right to adopt the petitioner under the HAMA, 1956. Even though, they are British citizens, their religion remains the same and, therefore, their right to adopt under the HAMA, 1956 cannot be taken away. In these circumstances, their adoption would be considered as valid. Their adoption is also protected by Section 56(3) of the JJ Act, 2015 itself, which clearly stipulates that the provisions of the Act shall not be applied for the adoption of the children under the HAMA, 1956. Once having applied under HAMA & adoption having been registered under HAMA, 1956, the said adoption cannot be challenged on the ground that the same should have been made under J.J. Act, 2015 as also in view of Section 15 of HAMA, 1956 which clearly states that a valid adoption of a minor child is irreversible and cannot be revoked. Thus, it was neither mandatory nor necessary to apply for adoption of the child in question under the J.J. Act, 2015."*

CARA was then directed to issue an NOC and the Ministry of External Affairs was directed to issue a passport for the child.

52. Recently, in ***JS & Anr. v. CARA & Anr. [W.P.(C) 3187/2021, decided on 26th July, 2021]***, a ld. Single Judge of this Court was considering a case where an NOC was sought from CARA to enable the adoptive child to be

taken to the U.S. In the said judgment, the ld. Single Judge considered the scheme of the JJ Act, 2015 and the 2017 Regulations framed thereunder.

53. The Court noted the difference between adoption procedures for Hindus governed under HAMA and for persons from other religions. The conclusions of the Court were:

a) Customary adoption by performing ceremonies is recognized under Hindu law. Even if the customary procedure is not followed and a registered adoption deed is executed, so long as the conditions under HAMA are satisfied, there is a presumption of legal adoption.

b) Insofar as Muslims and Christians are concerned, their personal law does not recognize adoption. HAMA does not apply in respect of Muslims, Christians, Parsis or Jews. However, adoption in these communities is permissible which is clear from a reading of Sections 58 and 59 of the JJ Act, 2015.

c) For adoptions to be recognized under the JJ Act, 2015 the Adoption Regulations, 2017 must be followed. For children to be taken abroad, the central agency in each country must issue an NOC.

54. In ***JS & Anr. (supra)***, both, the biological parents and the adoptive parents were Christians who had sought to conclude the adoption under HAMA. The said adoption deed was declared to be void. However, to protect the welfare of the adopted child, the Court recognized various factors and arrived at the conclusion that the child was not trafficked and that the adoptive parents had taken good care of the child. The Court then issued a declaration

that they were the adoptive parents and directed CARA to issue an NOC to enable the child to be taken abroad.

55. In ***Karina Jane Creed v. Union of India & Anr., [W.P.(C) 3576/2019, decided on 10th May, 2019],*** the Petitioner was an Australian citizen residing in India for four years. She had applied for adoption of Indian children which was not granted as CARA had not issued an NOC for grant of VISA before the Australian High Commission. The Australian High Commission had taken the position that an NOC from CARA would be required in terms of Section 59(11) of the JJ Act, 2015. The Court in those circumstances held that the requirement of an NOC is a mandatory requirement under Section 59(12) of the JJ Act, 2015. The Court also observed that in the said case the children in question had earlier been moved for adoption by an Italian couple. Under those circumstances, since the Australian High Commission had not furnished its NOC for adoption of the children, the writ petition was dismissed. This judgment was upheld by the ld. Division Bench of this Court in ***LPA No. 351/2019*** titled ***Karina Jane Creed v. UOI & Anr.*** The Supreme Court, in the SLP, being ***SLP No. 13627/2019*** titled ***Karina Jane Creed v. UOI & Ors.*** observed as under:

> *"In India all inter-country adoptions are governed by the provisions of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'JJ Act'). Section 56(4) of the JJ Act provides:-*
>
> > *"56(4) All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority."*

Inter-country adoption of an orphan or abandoned or surrendered child can only be effected in accordance with Section 59 of the JJ Act.

A foreigner living abroad if interested to adopt an orphan or abandoned or surrendered child from India might apply to authorized foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, in the manner as provided in the adoption regulations framed by the CARA as provided in Section 59(3).

The authorized foreign adoption agency, or Central Authority, or concerned Government department, of the foreign country has to prepare a home study report of the prospective adoptive parents and upon finding them eligible sponsor their application to CARA for adoption of a child from India.

A foreigner or a person of Indian origin or an overseas citizen of India who has habitual residence in India can apply for adoption of a child from India to CARA along with No Objection Certificate from the diplomatic mission of his country in India.

In view of the statutory provisions of the JJ Act and in particular Section 59(12) thereof the relief prayed for in the writ petition cannot be granted. The writ Court could not have waived the statutory requirement of Section 59(12) of the JJ Act. As observed by learned Single Bench of Delhi High Court, there is little doubt that the petitioner would have brought up the children well, with love and affection and the children too would have been lucky to have the petitioner as an adoptive parent. We have every sympathy for the petitioner but regret our inability to help her."

Interpretation of the Juvenile Justice (Care and Protection of Children) Act, 2015

56. The relevant provisions of the JJ Act, 2015 are Sections 56 and 60, which are set out hereinbelow:

> ***"56. Adoption -*** *(1) Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder and the adoption regulations framed by the Authority.*
> *(2) Adoption of a child from a relative by another relative, irrespective of their religion, can be made as per the provisions of this Act and the adoption regulations framed by the Authority.*
> *(3)* ***Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956****.*
> *(4)* ***All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority.***
> *(5) Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of a child to another person in a foreign country without a valid order from the Court, shall be punishable as per the provisions of section 80.*
> *…*
> ***60. Procedure for inter-country relative adoption.*** *-(1) A relative living abroad, who intends to adopt a child from his relative in India shall obtain an order from the court and apply for no objection certificate from Authority, in the manner as provided in the adoption regulations framed by the Authority.*

> *(2) The Authority shall on receipt of the order under sub-section (1) and the application from either the biological parents or from the adoptive parents, issue no objection certificate under intimation to the immigration authority of India and of the receiving country of the child.*
> *(3) The adoptive parents shall, after receiving no objection certificate under sub-section (2), receive the child from the biological parents and shall facilitate the contact of the adopted child with his siblings and biological parents from time to time."*

57. A perusal of Section 56 of the JJ Act, 2015 shows that the same clearly applies only in respect of *orphans, abandoned and surrendered* children. This view is fortified by the decisions in ***Dr. Jaswinder Singh Bains (supra)*** and ***Swaranjit Kaur (supra)*** which were decided under the JJ Act, 2000. Thus, if the biological parents themselves are giving the child in adoption, the provisions of Chapter VIII of the JJ Act, 2015 would not be applicable at all, unless the adoption is between relatives under Section 60 of the JJ Act, 2015. Section 56(2) is merely an enabling provision which permits persons from all religions to adopt a child from one relative to another as per the provisions of the JJ Act, 2015 and the Adoption Regulations, 2017. Thus, this provision permits all persons, irrespective of their religion, who intend to adopt a child to do so in terms of the Act.

58. Section 56(3) begins with the phrase *"Nothing in this Act".* This phrase has been interpreted by the Supreme Court in ***Union of India & Anr. v. G.M. Kokil & Ors., 1984 SCR (3) 292*** to mean that this is a clear exclusionary provision. In the context of adoption therefore, if any child has been adopted

in accordance with the provisions of HAMA, resort to the provisions of the JJ Act, 2015 would not be required for the adoption to be valid. An adoption carried out in compliance with the conditions laid down in HAMA would be valid by itself, without recognition by CARA or any state agency. Such an adoption could be:

(a) through customary /religious practices or ceremonies;

(b) through a registered adoption deed; or

(c) through a Court order recognizing either (a) and (b).

59. Once such an adoption has taken place, validating the same under the provisions of the JJ Act, 2015 would not be required. This is the irrefutable position insofar as domestic adoptions are concerned. Confusion has arisen in view of Section 56(4) in respect of inter-country adoptions. Section 56(4) begins with the words "*All inter-country adoptions".* The question therefore is whether in respect of inter-country adoptions conducted under HAMA, the provisions of the JJ Act, 2015 and the Regulations thereunder have to be complied with? Section 56(5) renders the taking or sending of a child to a foreign country without a valid Court order as a punishable offence. Section 60 provides for the procedure for inter-country adoptions from a relative by a relative living abroad.

60. Thus, Sections 56(3), (4) and (5) read along with Section 60 raise several questions:

i. Whether the JJ Act 2015 and the Adoption Regulations, 2017 extend to adoptions in respect of children who are not orphaned, abandoned, surrendered or abused?

ii. Section 60 of the JJ Act, 2015 only provides for inter-country adoptions by relatives from relatives. How would adoptions between non-relatives take place?

iii. If the JJ Act, 2015 has no applicability for adoptions under HAMA, should the provisions of the JJ Act, 2015 be mandatorily extended to all inter-country adoptions, including those under HAMA?

61. A conjoint reading of Sections 56 and 60 clearly shows that there is a lacuna or a vacuum in the law. In view of the clear wording of Section 56(3), adoptions under HAMA would not be governed by the JJ Act, 2015. Thus, Section 56(4) would not be applicable for adoptions under HAMA. The term "*Nothing in this Act"* would take within its ambit Section 56(4) as also Section 60 of the JJ Act, 2015 and exclude their applicability *qua* adoptions under HAMA. Thus, insofar as adoptions under HAMA are concerned, whether domestic or inter-country, direct or indirect, the JJ Act, 2015 and the Adoption Regulations, 2017 would not be applicable. However, this would not mean that Hindus governed by HAMA cannot adopt under the JJ Act, 2015. Section 56(2) is an enabling provision and thus, even persons governed by HAMA have the option of taking a child in adoption in accordance with the JJ Act, 2015 however, the same is not mandatory or compulsory. There is also some ambiguity as to whether under the JJ Act, 2015, intercountry adoptions between non-relatives is permissible. However, for the present purposes, only adoptions under HAMA are being considered in these petitions.

62. The facts in ***Karina Jane Creed (supra)*** are also distinguishable from the facts of the present case on the following counts:

i. The adoption in ***Karina Jane Creed (supra)*** was not under HAMA;

ii. The adoption in ***Karina Jane Creed (supra)*** was governed strictly by the provisions of the JJ Act, 2015;

iii. The provisions of the JJ Act, 2015 being mandatory in nature, no relaxation or waiver could have been granted in ***Karina Jane Creed (supra)***.

In the present case, in view of Section 56(3) of the JJ Act, 2015, adoptions under HAMA are exempted from the JJ Act, 2015 and hence, all three writ petitions are clearly distinguishable from the judgment in ***Karina Jane Creed (supra).***

63. The Supreme Court in ***Anokha (supra)*** has held that for inter-country direct adoptions, the JJ Act, 2015 would not be applicable as the children are not orphans, abandoned or surrendered children. Thus, there are several gaps in the JJ Act, 2015 and the Regulations thereunder. This gap is, in fact, recognized by CARA in its Policy on Inter-Country Direct Adoptions. The said policy concluded that suitable provisions for inter-country direct adoptions ought to be inserted into the Adoption Regulations framed under the JJ Act, 2015. The relevant observations of the said policy read as under:

> *"a) Suitable provision on inter-country direct adoption may be inserted in Adoption Regulations framed under JJ Act, 2015;*

> *b) Opinion may be sought from Law Ministry about possible amendments in HAMA in the light of Section 56(4) of JJ Act that all inter-country adoptions shall be done only as per the provisions of this Act and the Adoption Regulations framed by the Authority;*
> *c) Any direct adoption done prior to 15th January, 2016 (date of enforcement of JJ Act, 2015) may be disposed of on compliance of minimum requisite documents after proper verification of such adoption cases by State Government concerned."*

64. The above policy recognized that there was a need to provide for a mechanism in the case of inter-country direct adoptions between non-relatives under the JJ Act, 2015, as also inter-country adoptions under HAMA. A decision was also taken in respect of direct adoptions done prior to the date when the JJ Act, 2015 came into force i.e., prior to 15th January, 2016, that after certain minimum compliances are made, the NOC could be issued by CARA and the adoptions could be recognized. The compliances prescribed in respect of adoptions prior to 15th January, 2016 are as under:

a. State verification report/Family background report and source verification of the child (or CWC certificate) and antecedents of biological parents;
b. Home Study Report of the PAPs with support documents;
c. Permission letter/Article 5/17 from receiving country or permission letter from Embassy of the receiving country in case of OCI/Foreigner living in India;
d. Committee's approval to proceed with the case.

65. One further question that arises is whether Section 60 of the JJ Act, 2015 would be applicable to the Petitioners in W.P.(C) 11168/2020, where the adoption is from the biological parents to the *Chacha* who is the adoptive parent, and whether the rejection of the NOC by CARA is valid or not.

66. The statutory scheme of the JJ Act, 2015 shows that HAMA adoptions are not governed by the provisions of the JJ Act, 2015, in view of Section 56(3). The Adoption Regulations, 2017 also do not provide for adoptions by biological parents or relatives to third-party adoptive parents. There is therefore a clear legal vacuum in the current regulatory framework for inter-country direct adoptions. This position is also confirmed by all the counsels, including ld. counsel for CARA, as also by the report of the ld. Amicus Curiae.

The Hague Convention

67. The main purpose of the Hague Convention is to ensure that the interests of the children are safeguarded and to prevent abduction, sale and trafficking of children in inter-country adoptions. The Convention recognizes inter-country adoptions effected under different systems of domestic law of a member country. It also recognizes that inter-country adoptions should not be done for any extraneous reasons, especially for financial considerations.

68. The Hague Convention provides for a system of Central Authorities in all Contracting States which are responsible for discharging the duties imposed under the Hague Convention. These Central Authorities are obligated to cooperate with one another through the exchange of general information concerning intercountry adoption; eliminate obstacles to the application of the Convention; and deter all practices contrary to the purpose

of the Convention. Chapter II of the Hague Convention, comprising of Articles 4 and 5, stipulates the requirements for inter-country adoptions as under:

> ***"Article 4***
>
> *An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –*
>
> *a) have established that the child is adoptable;*
>
> *b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;*
>
> *c) have ensured that*
>
> *(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,*
>
> *(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,*
>
> *(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and*
>
> *(4) the consent of the mother, where required, has been given only after the birth of the child; and*
>
> *d) have ensured, having regard to the age and degree of maturity of the child, that*
>
> *(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,*
>
> *(2) consideration has been given to the child's wishes and opinions,*

(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
(4) such consent has not been induced by payment or compensation of any kind.

Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State –
a) have determined that the prospective adoptive parents are eligible and suited to adopt;
b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and
c) have determined that the child is or will be authorised to enter and reside permanently in that State."

69. Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, are required to apply to the Central Authority in the state of their habitual residence. The Central Authority, upon being satisfied that the requirements stipulated under Articles 4 and 5 have been met prepares a report and transmits the same to the Central Authority of the State of origin. The Central Authority of the State of origin, after satisfying itself that the child is adoptable, sends another report to the Central Authority of the State where the prospective adoptive parents habitually reside. Both Central Authorities are responsible for ensuring that the child can enter the receiving state and reside there permanently.

70. As per Article 37 of the Hague Convention, inter-country adoptions done under different systems of domestic law of a member country are recognized by the Hague Convention. Article 37 reads as under:

> ***"Article 37***
> *In relation to a State which with regard to adoption has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State."*

Thus, inter-country adoptions under HAMA are protected under the Hague Convention as it recognizes inter-country adoptions under different systems of law.

71. As per Article 24 of the Hague Convention, recognition of an inter-country adoption can only be refused if the same is contrary to public policy. Article 24 reads as under:

> *"**Article 24***
> *The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child."*

72. The Hague Convention, under Article 28, also recognizes that the Convention would not affect any domestic law in the country where the child originates from if it requires the adoption to take place in that State or if it prohibits the child's transfer to the receiving State prior to the adoption. Article 28 reads as under:

> ***"Article 28***
> *The Convention does not affect any law of a State of origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child's placement in, or transfer to, the receiving State prior to adoption."*

73. Thus, the letter and spirit of the Hague Convention requires the following:

a. That the child is established as being adoptable;
b. That the inter-country adoption is in the child's best interest;
c. That consent from all persons concerned is obtained and that the consent is free, without involvement of any compensation or monetary exchange;
d. If the child is of a higher age/maturity, the child is required to be counselled. The Child's wishes have to be taken into consideration;
e. That the competent authority has determined that the prospective adoptive parents are suited to adopt the child and are eligible;
f. That counselling has been given to prospective adoptive parents as deemed necessary;
g. That an application has been moved before the central authority.
h. That the central authority of the country of origin and of the receiving country would ensure that the child can enter the receiving state and reside there permanently.

74. While the Hague Convention fully protects inter-country adoptions made under personal laws, owing to difficulties in the recognition of such

adoptions by foreign countries, who are not familiar with customary usages and practices, there is material under the Hague Convention which points towards the requirement of recognition by a Central Authority. One such material available on record is an Information Brochure which reads as under:

> *"22. Adoptions which are arranged directly between birth parents and adoptive parents (i.e., private adoptions) are not compatible with the Convention.*
>
> *23. Independent adoptions, in which the adoptive parent is approved to adopt in the receiving State and, in the State of origin, locates a child without the intervention of a Central Authority or accredited body in the State of origin, are also not compatible with the Convention."*

75. It is in view of this position under the Hague Convention, that NOCs are usually sought even in the case of inter-country direct adoptions which may otherwise be valid under personal laws such as HAMA.

76. While there is thus no doubt that the provisions of the Hague Convention recognize adoptions under different systems, including HAMA, as valid, the provisions of the Hague Convention which require a NOC from a Central Authority in the local country, so as to ensure proper verification of the adoptive parents, the welfare of the child and the continued well-being of the child, cannot be ignored. It appears that since there are no specific provisions dealing with inter-country adoptions under HAMA, CARA erroneously states in its website as under:

> *"Inter-country adoptions cannot be done under HAMA as these fall under private and direct adoption and is not supported by Hague Convention*

> *on Adoptions (Para 22 & 23 of Ch 6 of Hague Convention Information Brochure)"*

The above message on CARA's website would be contrary to Art. 37 of the Hague Convention as the said provision recognizes adoptions under different systems of law, though it requires the verification by a Central Authority to prevent misuse and abuse.

77. Even the ld. Amicus Curiae has dealt with the requirement under the Hague Convention and has opined:

> *"11.4.7. It is submitted that Para 22-23 of the Information Brochure on the Hague Adoption Convention (as extracted above), also state that independent and private adoptions, directly carried out between the biological parents and adoptive parents are not compatible with the Hague Adoption Convention. However, for a holistic understanding of the restrictions placed on direct and private adoptions under the Hague Convention, it is pertinent to take note of Para 1 of the said Information Brochure (as extracted above), which categorically states that <u>the said restriction on private and independent adoptions has been placed for the purposes of and with the intent to prevent the abduction, sale and traffic in children and their illicit procurement</u>.*
>
> *11.4.8. Therefore, it is submitted that while it is correct to state the Hague Convention does not encourage direct and private adoptions, the said restriction has been put in place only with the intent to protect the adopted child from incidents of abduction/trafficking etc."*

78. In view of the prevalent regime under the Hague Convention, though HAMA adoptions are not governed by the JJ Act, 2015, there is a clear need to create a mechanism to enable inter-country adoptions under HAMA. There is a clear vacuum and gap in this area. It is in light of this legal position that the court has to consider the way forward.

79. An analysis of the various judgments, the JJ Act, 2000, the JJ Act, 2015 and the regulations thereunder, as also the Hague Convention, leads this Court to the following conclusions:

(1) The provisions of the JJ Act, 2015 apply in respect of orphaned, abandoned, surrendered or abused children.

(2) In view of the clear exclusion in Section 56(3), the JJ Act, 2015 would not apply in respect of valid adoptions under HAMA - whether domestic or inter-country. Thus, domestic and inter-country adoptions where the parties are Hindus and the adoption has already been validly carried out in terms of the provisions of HAMA, do not fall within the purview of the JJ Act, 2015.

(3) In view of Art.37 and other provisions of the Hague Convention, adoptions under HAMA are duly recognized.

(4) Persons belonging to communities other than those governed by HAMA may resort to the provisions of the JJ Act, 2015 for effecting adoptions. In addition, persons who are governed by HAMA also have the option of effecting adoptions under the JJ Act, 2015 in view of Section 56(2).

(5) Courts have verified various factors such as credibility of the adoptive parents, consent of the biological parents, nature of documents executed, Court orders if any, financial status of the adoptive parents, home study reports, duration for which the child has already been living with the adoptive parents, the condition of the child etc. After taking all these factors into consideration, upon satisfaction that the welfare of the child is taken care of, Courts have either directed CARA to issue an NOC or directed issuance of a passport for the child to travel with the adoptive parents to a foreign country.

(6) The Hague Convention encourages issuance of an NOC for recognition of inter-country adoptions.

(7) In the existing framework of the JJ Act, 2015 and the Regulations thereunder read with HAMA, there is a clear gap in the law as to the manner in which -

- inter-country adoptions under HAMA are to be recognised; and
- adoptions already recognized under HAMA are to be given effect to for the purposes of inter-country adoptions by biological parents or relatives, to third parties or otherwise.

Role & Functions of CARA

80. CARA was the specialized Agency which was established by virtue of the directions given by the Supreme Court in ***Laxmikant Pandey (supra)***. The functions of CARA as per Section 68 of the JJ Act, 2015 are as under:

> *"68. The Central Adoption Resource Agency existing before the commencement of this Act, shall be deemed to have been constituted as the Central Adoption Resource Authority under this Act to perform the following functions, namely: —*
> *(a) to promote in-country adoptions and to facilitate inter-State adoptions in co-ordination with State Agency;*
> *(b)* ***to regulate inter-country adoptions****;*
> *(c) to frame regulations on adoption and related matters from time to time as may be necessary;*
> *(d)* ***to carry out the functions of the Central Authority under the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption****;*
> *(e) any other function as may be prescribed."*

81. From the above it is clear that one of the functions of CARA is to regulate inter-country adoptions. An additional function of CARA is to carry out functions of the Central Authority under the Hague Convention in respect of inter country adoptions. There is no doubt that domestic adoptions which are valid under HAMA require no supervision from any agency in view of Section 56(3). The Hague Convention recognizes HAMA adoptions under Article 37 but also stipulates acquiring of an NOC from the Central Authority in case of inter-country adoptions. Thus, in India, a framework would have to be put in place to enable issuance of an NOC in respect of inter-country adoptions which are validly undertaken under the provisions of HAMA.

82. Though the JJ Act, 2015 and the Adoption Regulations, 2017 have a detailed procedure for inter country adoptions, since HAMA adoptions are not governed by the said provisions, the same procedure need not be adopted

inasmuch as adoptions under HAMA have already satisfied various conditions as required in HAMA. Since there is no clear procedure prescribed for adoptions under HAMA, adoptive parents and children are repeatedly required to file writ petitions or other proceedings before various Courts. Such proceedings delay the finalization of the adoption and is a time-consuming affair which often disrupts the life of the adoptive parents and the well-being of the child. The facts of the present three cases show the manner in which the adoptive couples are separated. For instance, in W.P.(C) 279/2019, the adoptive mother is living in India with the child, while the adoptive father is living in Spain. Such sacrifices are being made by adoptive couples for the well-being of the child as obtaining a visa/passport has become a challenge in the absence of a NOC from CARA.

Permanent Mechanism/solution for inter-country adoptions under HAMA:

83. The above discussion clearly highlights the need for a permanent solution to deal with inter-country adoptions under HAMA in light of the Hague Convention. As of now, there exists no provision under HAMA dealing with inter-country adoptions. While it could be argued that the procedure under HAMA regulates both domestic and inter-country adoptions, there is a need to have a relook at the statute post the ratification of the Hague Convention. CARA, which is an agency set up under the JJ Act, 2015, *per se* would not have jurisdiction in respect of adoptions under HAMA as the JJ Act, 2015 does not apply in respect of HAMA adoptions. However, currently, CARA is the only agency dealing with inter-country adoptions. Thus, apart from any amendments in the law which may be required, there is also a need

to create a specialized agency for inter-country adoptions under HAMA or to vest the said jurisdiction with CARA itself.

84. The Juvenile Justice (Care and Protection of Children) Amendment Act – 2021, also does not deal with the category of inter-country adoptions being dealt with in the present judgment i.e., inter-country direct adoptions under HAMA. The Central Government would accordingly need to find a permanent solution to the problems being faced by the biological parents, adoptive parents and above all the children who are being adopted under the provisions of HAMA, especially when the said children have to be sent abroad and the requirements under the Hague Convention would have to be fulfilled.

Reliefs/Directions

85. In view of the fact that currently no permanent mechanism exists for inter-country direct adoptions under HAMA, bearing in mind the welfare of children, which is of utmost importance in cases of adoptions, as also to ensure that there is no trafficking of children, the Ministry of Women & Child Development, Govt of India, is directed to place a report before this Court as to the manner and mode of creating a permanent mechanism to deal with inter-country adoptions under HAMA, both direct and indirect and place the said report before this Court within a period of two months.

86. However, until a proper permanent framework is put in place, to ensure the welfare of the adopted children and to provide a timely mechanism for the biological/adoptive parents as also the child, in view of the experience of CARA in dealing with inter country adoptions, it is deemed appropriate to

direct CARA to act as the Authority for the purposes of enabling inter country adoptions under HAMA.

87. There is no existing procedure currently under CARA for adoptions under HAMA. However, there is a shortened procedure that already exists in respect of adoptions which were effected prior to the coming into force of the JJ Act, 2015. In respect of such adoptions, the requirements are considerably reduced, as set out in paragraph 64 above. A similar shortened procedure could be followed for issuance of an NOC in case of inter country adoptions which are already recognized under HAMA.

88. Thus, whenever any inter-country adoption takes place under HAMA and a NOC is required for any purpose, including for issuance of a passport or VISA, upon an application being filed before CARA, a special Committee would be appointed to verify the following particulars:

a. The background and antecedents of the biological parents or Family background report and source verification of the child (or CWC certificate).
b. Verify the consent of the biological parents and that of the child, if needed based upon the age and maturity, for the adoption;
c. Details of any religious ceremony conducted;
d. Details of the adoption deed and its genuinity/validity;
e. Court order, if any, recognizing the adoption;
f. Home Study Report of the prospective adoptive parents with support documents;

g. Permission letter from receiving country or permission letter from Embassy of the receiving country in case of OCI/Foreigner.

The Committee would then record its satisfaction and issue the NOC within one month. CARA would also be entitled to monitor the progress of the child for two years from the date of arrival of the adopted child in the receiving country.

89. Broad guidelines may be framed by CARA in this regard, on the basis of the above directions. CARA is directed to create a specific form on its portal incorporating the above guidelines within a period of four weeks. CARA is also directed to carry out the necessary changes in its website, in accordance with the conclusions in this judgment.

90. In all the three writ petitions presently being considered, the biological and the adoptive parents are Hindus who are governed by HAMA. The relief *qua* each of the writ petitions is discussed below.

W.P.(C) 279/2019:

91. In this petition the adoption deed dated 23rd September, 2016 is duly registered. The ld. ACJ, Senior Division, Mukerian, Punjab, vide judgment and decree dated 5th April, 2017, has already granted a decree of declaration recognizing the adoption. The operative portion of the decree reads as under:

> *"6. I have heard the ld. Counsel for the plaintiffs and gone through the record placed on file with their able assistance.*
>
> *7. Perusal of file reveals that plaintiffs have placed on record birth certificate of minor Avleen Kaur as Ex. P7 which clearly reveals that defendants no. 2 and 3 have been recorded as*

biological parents of minor Avleen Kaur. Further original adoption deed vide which minor Avleen Kaur was adopted by plaintiffs has been placed on record as Ex. P6/A.

8. As per Section 12 of Hindu Adoption and Maintenance Act 1956 whenever a child is adopted by adoptive parents, his ties with the biological parents gets severed automatically from the date of adoption and he is considered as a child of adoptive parents for all intents and purposes. Since it has been categorically proved by the plaintiffs that they have adopted minor Avleen Kaur adoption deed Ex. P6/A, therefore they have become adoptive parents of Avleen Kaur and now they are natural guardian of minor Avleen Kaur. Therefore, plaintiffs are definitely entitled to the declaration as claimed for.

9. As a sequel of abovementioned discussion, suit filed by the plaintiffs succeeds and the same is hereby decreed. Plaintiffs are declared to be natural guardian as father and mother of minor Avleen Kaur for all intents and purposes from the date of adoption deed (Ex. P6/A). Further the defendants are hereby restrained from taking or claiming the custody of minor Avleen Kaur, except in due course of law. Parties to the suit shall bear their own costs. Misc. Applications, if any, lying pending are disposed of herewith as not pressed. Unexhibited documents be returned to the respective parties against proper receipt and identification. Decree sheet be prepared accordingly and file be consigned to the record room, Dasuya, after due compilation."

92. The child has been living with the adoptive mother i.e., Petitioner No.1 in India for the last three to four years. The adoptive father lives in Spain. Parties have already waited for a long time for being able to take the child to

Spain. Under these circumstances, any of the adoptive parents, along with the child, may appear before a Committee constituted by CARA, for this purpose, on 15th September, 2021, with the original adoption deed dated 23rd September, 2016, copy of the order passed by the ld. ACJ dated 5th April, 2017, documents relating to the background of the adoptive parents, including a home study report, if available. After interacting with the parties, if any further documents are required, reasonable time would be granted for the said purpose. In any event, after verifying the documents, the NOC shall be issued by CARA within one month. Considering that the adoption has taken place almost five years ago, the Committee would ensure that no undue burden is placed upon the adoptive parents and cooperation would be extended to ensure that the child is able to obtain a VISA from the Embassy of Spain to travel and live with the adoptive parents.

W.P.(C) 11168/2020

93. In this petition, the adoption is by the real uncle (*chacha*) of the child. A registered adoption deed has been executed between the adoptive parents and the biological parents on 26th February, 2018 in Basaidarapur, Delhi. As of 2018, the adoptive parents have returned to the U.S., leaving behind the adopted child with their family. Since the adoptive father is the *chacha* of the child, the Committee shall verify the background of the biological parents. After interacting with them as also with the adoptive parents through any online platform, if any further documents are required, reasonable time would be granted for the said purpose. In any case, after verifying the documents, the NOC shall be granted by CARA within a period of one month.

94. In this case, the registered adoption deed dated 22nd July, 2018 has been signed between the biological and the adoptive parents and the child has been living with the adoptive mother in Aligarh, U.P., while the adoptive father is living in the U.S. The Committee of CARA shall verify the background of the biological parents and the adoptive parents, as also the genuinity of the registered adoption deed. If a home study report is required, the same shall be called for. After interacting with the parties, if any further documents are required, reasonable time would be granted for the said purpose. In any case, after verifying the documents, the NOC shall be granted by CARA within a period of one month.

95. If any of the adoptive parents are located abroad, the Committee may interact with them through any virtual mode to record their satisfaction. Parties in these writ petitions shall accordingly appear before the Committee constituted by CARA for this purpose on 15th September 2021.

96. In terms of the directions issued above;

a. The Secretary, Ministry of Women and Child Development, Government of India shall file a report before this Court as to the manner and mode of creating a permanent mechanism to deal with inter-country adoptions under HAMA, both direct and indirect and place the said report before this Court within a period of two months.

b. There are several errors on the website of CARA in respect of HAMA adoptions. CARA shall carry out corrections in its website and place a report before this Court within eight weeks;

c. CARA shall also frame guidelines for the processing of NOCs for inter-country adoptions under HAMA and make available forms for this purpose on the portal. Let the draft guidelines and the timelines for activating the portal be placed on record by means of a status report within two months. Details of the special Committee constituted to deal with HAMA adoptions shall also be specified in the report;

d. A status report in respect of each of the writ petitions and the processing of grant of NOCs be also filed at least one week before the next date of hearing.

97. Copy of this judgment be communicated by Mr. Gaurang Kanth, ld. CGSC who is also the counsel for CARA to the Secretary, Ministry of Women and Child Development, Government of India and to Member Secretary & CEO, CARA. Registry to also communicate this judgement to the said parties on their respective email addresses – secy.wcd@nic.in and ceo-cara@gov.in.

98. The petitions are disposed of in the above terms. All pending applications are also disposed of. The Petitioners are permitted to approach this Court in case further reliefs are required. The Court records its appreciation for the assistance rendered by the ld. Amicus Curiae Mr. Sanjoy Ghose and all counsels for the parties. List for receiving of compliance/status

reports on 9th November, 2021. These matters shall be treated as part-heard for the purpose of compliance.

PRATHIBA M. SINGH
JUDGE

AUGUST 31, 2021/*Rahul/T*