

Mr. Sisifa

  
14/09/16

IN THE COURT OF APPEAL OF TONGA  
FAMILY JURISDICTION  
NUKU'ALOFA REGISTRY

AC 3 of 2016  
[FA 105 of 2015]

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**BETWEEN** : 1. VAITULALA LEGER  
2. VELMER ANN LEGER  
- Appellants

**AND** : SOLICITOR GENERAL  
- Respondent

**Coram** : Moore J  
Blanchard J  
Hansen J  
Tupou J

**Counsel** : Mr. S. Tu'utafaiva for the Appellants  
Mr. S. Sisifa SC for the Respondent

**Date of Hearing** : 7 September 2016

**Date of Judgment** : 14 September 2016

## JUDGMENT OF THE COURT

### **Introduction**

[1] The appellants (Mr and Mrs Leger) applied to adopt a three year old girl, Victoria. In a ruling made on 16 March 2016 Lord Chief Justice Paulsen declined the application. Mr and Mrs Leger appeal against his decision.

[2] The appeal requires this Court to give close consideration to its decision in *Saavedra v Solicitor General* [2013] Tonga LR 60 in which it was noted (at [5]) that an inter-country adoption 'should be approved only when all other means of caring for a child in Tonga have been exhausted'. Mr and Mrs Leger are resident in New Zealand. Victoria's mother and many members of her extended family live in Tonga. The Lord Chief Justice acknowledged an argument that an adoption would be in Victoria's best interests but, because there were satisfactory childcare options available for her in Tonga, saw himself as required by *Saavedra* to decline the application.

### **Further background**

[3] Mr and Mrs Leger were married in New Zealand in 2010. Mr Leger is a Tongan, aged 29 years. He is Victoria's uncle, the

brother of her mother. Mrs Leger's father is Tongan. Her mother is Maori. She was born in New Zealand and is now 40 years of age. They live in rented accommodation in Auckland which they share with members of Mrs Leger's extended family. Both have well-paid jobs. They are members of the Catholic Church and active in the Tongan community in Auckland.

[4] Victoria's mother lives in Tonga with her parents and other members of her extended family. When she became pregnant she agreed with her brother and sister-in-law that they would have the care of the child when she was born. Mr and Mrs Leger have been unable to have children of their own. The natural father of the child was uninterested in her upbringing. Her mother believed it would be best for her to be brought up by Mr and Mrs Leger in New Zealand.

[5] Victoria's mother moved to New Zealand to prepare for her birth. She lived with Mr and Mrs Leger. After Victoria's birth she was named and customarily adopted by Mr and Mrs Leger. She and her mother remained with them for three months. They then returned to Tonga though for six months

when she was two Victoria lived and was cared for primarily by the Legers in New Zealand while her mother remained in Tonga.

[6] At all other times Victoria has lived in Nuku'alofa with her mother, her maternal grandparents and other members of the extended family. There are ten in all living at the property. Only one member of the household is employed and that on a casual basis. Mr and Mrs Leger send approximately TOP\$200 per fortnight to help meet the costs of Victoria's upbringing and have regularly visited her in Tonga.

[7] The Solicitor-General, who was appointed guardian ad litem to represent Victoria, supported the application as in her best interests. His report, supported by a letter reporting on a visit to the home of Mr and Mrs Leger in Auckland, described them as honest and genuine in their application, hardworking, very fond of Victoria and capable and willing to provide her with a suitable home as well as "the appropriate necessities required for her wellbeing".

### The Chief Justice's decision

- [8] The Lord Chief Justice accepted that Mr and Mrs Leger would provide Victoria with a safe and secure home. He said they were clearly in a more financially secure position than the natural mother and her family in Tonga. He noted the view of all concerned that Victoria would have a better life in New Zealand and greater opportunities to obtain an education.
- [9] Paulsen CJ also noted that an adoption would not sever Victoria's links to her Tongan culture, language and heritage. Mr and Mrs Leger have strong ties to the Catholic Church and the Tongan community in Auckland. Both speak Tongan. Family connections would be maintained through a large extended family in Auckland.
- [10] The Lord Chief Justice concluded that, "on the face of it" there was an argument that adoption is in Victoria's best interests. However, he said, that is not the end of the matter. Referring to the dicta in *Saavedra* quoted at [2] above and to a further observation (at [5] of *Saavedra*) that an inter-country adoption is only to be granted as "a measure of last resort",

he held that grounds for granting Letters of Adoption had not been made out. There being no suggestion that Victoria is not well cared for while residing in Tonga with her natural mother and members of her family, the Lord Chief Justice said he could not be satisfied that an adoption "is the last resort to provide for Victoria's case". (at [21])

### **Discussion**

[11] It is important to note at the outset that the circumstances in *Saavedra* were materially different from those that arise for consideration in this case. The child was six and had no prior association with the applicants. They were American citizens and, while they lived in a city (Salt Lake City) with a large Tongan community, the child's connection with his family and Tongan culture and language would be severed by an adoption. This Court endorsed (at [7]) as relevant the view of the Chief Justice that the child would be taken to an environment quite different from that he had known all his life, and which continued to offer him a loving, stable and secure home environment (at [11]). Further, by the time of the hearing the mother had withdrawn her consent to the adoption and the child himself was resistant to the move. This

Court had no difficulty accepting that the child's best interests would be served by his remaining in Tonga.

[12] As the Court in *Saveedra* noted (at [4]) the United Nations Convention on the Rights of the Child, to which Tonga is a party, recognises that when considering adoption the best interests of the child is the paramount consideration. It will be helpful if we set out Article 21 in its entirety;

***“Article 21***

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

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

- (b) *Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;*
- (c) *Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;*
- (d) *Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;*
- (e) *Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.*

[13] Reading Article 21 as a whole, it is clear that each of the specific measures agreed has the objective of advancing the paramount goal of serving the interests of children who are being considered for adoption. This is underlined in *Concluding Observations of the Committee on the Rights of*



*the Child, Mexico (UN Doc. CRC/C/15Add. 13,1994), at para 16:*

*"The Committee emphasizes that the best interests of the child must be a guiding principle in the application of the Convention and that the authorities should undertake all appropriate measures to the maximum extent of their available resources to ensure that sufficient resources are allocated to children, particularly children living and/or working in the streets, children belonging to minority groups or indigenous communities and other vulnerable children".*

[14] The Committee went on at para 18 to make the remarks quoted in *Saavedra* (at [5]), which in context read:

*"In the framework of the adoption process, due consideration should be given to the provisions of article 12 of the Convention, [as to the child's right to be heard]. Furthermore, intercountry adoption should be considered in the light of article 21, namely as a measure of last resort".*

[15] It is distinctly arguable that in characterising inter-country adoption as a measure of last resort, the Committee sacrificed accuracy for brevity. It may have been more

accurate to say (as it had earlier acknowledged) that an inter-country adoption should take place only if it would be in the best interests of the child.

[16] The specific provisions of Article 21 cannot have been intended to displace the paramount requirement to have regard for the child's best interests. That is also the way *Saavedra* should be read. In the circumstances of that case the interests of the child were plainly best served by his remaining in Tonga. But in cases such as the present, where an inter-country adoption carries distinct benefits for the child and none of the disadvantages normally associated with a move to another country, in particular the loss of family ties and the child's inheritance of Tongan culture and language, the interests of the child are likely to favour approval of the application. The fact that satisfactory care arrangements are available in Tonga will always be a factor to be considered, and will often be decisive. The importance to a child of retaining and fostering ties with his or her culture, heritage and language cannot be overstated. Ultimately, however, a judgment must be made which is informed by all of the factors which bear on the best interests of the child. And in a

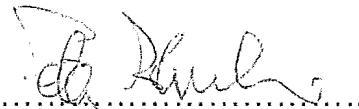
proper case that judgment may require approval of an inter-country adoption notwithstanding the availability of satisfactory care arrangements in Tonga. This is undoubtedly such a case.

**Result**

[17] The appeal is allowed. The application for Letters of Adoption in respect of Victoria Rolein Nakita Leger is approved.



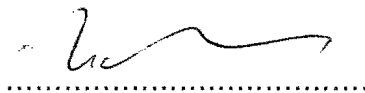
**Moore J**



**Blanchard J**



**Hansen J**



**Tupou J**