

**IN THE COURT OF APPEAL OF TONGA**  
**NUKU'ALOFA REGISTRY**

**AC 01 of 2013**  
**[FA 71 of 2012]**  
**[FA 72 of 2012]**

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**BETWEEN:                   OMAR FRANCISCO SAAVEDRA**  
**& MICHELLE SAAVEDRA**

**-           Appellants**

**AND           :           GUARDIAN AD LITEM/ SOLICITOR GENERAL**

**-           Respondent**

**Coram       :           Salmon J**  
**Handley J**  
**Blanchard J**

**Counsel     :           Mr. S. T. Fakahua for the Appellants**  
**Mr. A. Kefu SG for the Respondent**

**Date of hearing       :           9 April 2013**

**Date of judgment    :           17 April 2013**

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## JUDGMENT OF THE COURT

- [1] This appeal is against a decision of the Lord Chief Justice refusing to make an adoption order in respect of a 6 year old Tongan male child. The applicants are United States citizens and residents. An unusual feature of the case is that at the same time an adoption order was made in favour of the applicants in respect of a 1 year old half sister of the boy to whom this appeal relates. (The children have different fathers.)
- [2] When the matter was heard in the Supreme Court the position regarding the male child was not as clear as it became at the hearing before us. The position then was that the natural mother, aged 24, was consenting to the adoption of both children which was supported by the guardian ad litem (the Solicitor General). The natural mother had deposed that she was a single mother, unemployed and unable to undertake the upbringing of the two children and it was a "very huge burden" to maintain them. The applicants, who appear to have been entirely suitable adoptive parents (leaving aside their different ethnicity and residency), were a married couple aged 29 and 31. They had no children of their own. They approached the natural mother in Tonga indicating their wish to adopt the female child. She was willing to give her consent. The natural mother is a member of the Roman Catholic Church but had no objection to the fact that the adoptive parents were members of the Church of Jesus Christ of the Latter Day Saints. The report from the guardian ad litem noted that the applicants lived in Utah "which has a huge Tongan community who are members of the Church of Jesus Christ of the Latter Day Saints". Subsequently the natural mother gave her consent to the adoption of the male child.
- [3] The Chief Justice recorded that the guardian ad litem had been hesitant to recommend the granting of adoption until the applicants had been in Tonga for 6 months. In *Hatch v Solicitor General* [2010] Tonga LR 177 this Court said that the 6 month requirement is to allow a proper assessment of the relationship between applicants and children. But the Chief Justice observed in this case that it is not an inflexible requirement particularly in the case of very young children

who might never have come to know their natural mothers. He said that the requirement that the applicants were sufficiently acquainted with the children they were proposing to adopt was only one aspect of the Court's duty to enquire whether the proposed adoption is in the best interests of the child.

[4] We pause to emphasize that this is indeed the paramount consideration in adoption cases, including inter-country adoptions, and indeed in other cases involving children. Tonga is a party to the United Nations Convention on the Rights of the Child whose guiding principle is that paramount consideration. In particular, as the Chief Justice acknowledged, Article 21, requires State Parties to:

(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;

[5] Consequently, inter-country adoption should be approved only when all other means of caring for a child in Tonga have been exhausted. It is a measure that the Committee on the Rights of the Child has described as "a measure of last resort": *Concluding Observations: Mexico* (UN Doc. CRC/C/15/Add.13,1994), para. 18 cited in Vité and Boéchat, *A Commentary on the United Nations Convention on the Rights of the Child-Article 21: Adoption* at p.45.

[6] The guardian ad litem submitted to the Chief Justice, inter alia, that:

- (i) The applicants and the application were suitable and appropriate;
- (ii) The children were by the time of the hearing familiar with the applicants whom they had come to recognize as their parents, having been living with the female applicant for almost 6 months;
- (iii) The natural mother had confirmed that there was no other person in the family capable of caring for the children.

[7] The Chief Justice, presciently it now seems, despite this last submission was not prepared to accept that the older male child could not be looked after perfectly acceptably within the natural mother's extended family. He had lived for his first 5 years with his grandmother and was still attached to his mother and did not want to go on an aeroplane with the female applicant. The Chief Justice, rightly in our view, considered the fact that the applicants are non-Tongans

and that the child would be taken to an environment quite different from that which he had known all his life, was relevant. He accepted that the applicants were in a position to offer a better standard of living, upbringing and education but said that material well-being is only one of a number of important considerations which must be taken into account before deciding where the child's best interests lie. He concluded that the proposed adoption was not in the best interests of the male child.

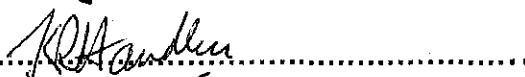
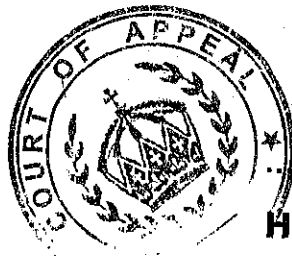
- [8] In the case of the younger female child, however, he made an adoption order, accepting that the natural mother was not able to look after both children. That would impose an unfair and unacceptable burden on her extended family. No challenge is made to that decision. The younger child has since been taken to the United States.
- [9] A direction was given that the natural mother should remain as the sole guardian of the older child who was to be returned to her care. That child has since been living with his mother and grandmother in Tonga.
- [10] The decision was given on 14 December last year and, as we have said, the adoption of the younger child has been implemented. The applicants have brought an appeal to this Court against the refusal of an order in respect of the older child. We called for updating information to be made available to us. Counsel should expect that this will be required in all appeals involving the welfare of a child. The further information helpfully placed before the Court at the hearing by the guardian ad litem, who now opposes the adoption of the older child, has made the case against that adoption much stronger.
- [11] We have carefully considered the submissions made by Mr. Fakahua for the applicants/appellants, largely repeating those made to the Supreme Court, but his task in this Court was a formidable one. The requirements of the United Nations Convention now plainly cannot be met. The further report of the guardian ad litem and affidavits from the natural mother, who now withdraws her consent to the adoption, and from the maternal grandmother, establish that the child is living with the natural mother during the week in order to attend primary school and at weekends and school holidays is sent to the grandmother's home. The report states that the grandmother provides

for his needs and wants during those times and provides most of his financial support. The child appears to be happy, healthy and cleanly kept by the maternal grandmother. She shows genuine care and love towards him. She conveys that she does not want the child to be adopted and states that she can continue to care and provide for him as she did in the past.

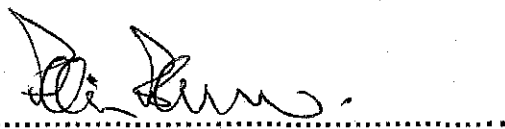
- [12] The child has told the guardian ad litem's representative that he does not want to go and live with the applicants and is happy with his grandmother whom he loves. The guardian ad litem now recommends that the child remain with his natural mother.
- [13] In these circumstances, where the child is being cared for in a suitable manner by his family in Tonga, the appeal must fail and is dismissed. Costs were not sought.



**Salmon J**



**Handley J**



**Blanchard J**