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

FA 410 of 2019

BETWEEN:

'ANA TUPOU NISHI Applicant

-and-

KUMAZO NISHI Respondent

Mother's application for variation of access orders to take the child out of Tonga

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr W. Edwards Snr SC for the Applicant
Mrs P. Tupou KC for the Respondent
Hearing: 10 September 2021
Ruling: 10 September 2021

1. On 10 December 2019, after a contested application, I made orders by consent granting custody of the child of the parties, Wakana Nishi, female, born 26 July 2019, to the mother. Orders for access by the father were also made together with an order permitting the mother to take the child with her to Fiji between 14 and 21 December that year for work related purposes.

2. On the 22 April 2020, the father applied for a variation to the access orders. That application was dismissed on the basis that had been no material change to the parties' circumstances or that of the child.

3. Later that year, the parties again returned to court seeking a variation to the access orders. On 28 August 2020, orders were made.

4. On 7 September 2021, the mother filed yet another application for a further variation to the access orders. She sought an order permitting her to take the child with her to England for a period of one year. The basis for the application is that the mother has been granted a scholarship to study for her Masters in finance and economics at the University of Sussex. She applied for the scholarship around November last year. In June this year, she was informed that she had been successful, and she accepted the offer. The final award letter from the British High Commission in Fiji was issued on 4 August 2021. The scholarship period commences on 20 September 2021. The exhibits to her affidavit include an itinerary for travel commencing 15 September 2021, whereby she proposes to fly from Tonga to Auckland, from there to Hong Kong and then to London.

5. Given the proximity between the filing of the application and the proposed date of departure, the matter was listed for an urgent hearing today.

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6. The application was accompanied by an affidavit from the mother and earlier today a reply submission by Mr Edwards which contained some purported further evidence. The exigencies of the application required the Court to also hear directly from the mother.

7. The application is opposed. Yesterday afternoon, Mrs Tupou, who appears for the respondent father, filed a notice of opposition, affidavit by the father and submissions. In essence, the basis for the father's opposition is the risk associated with the Covid-19 pandemic and more recently the rise of what is referred to as a 'Delta' variant in various places around the world including England.

8. Earlier discussions between the parties about the possibility of the father consenting to the proposal on the basis that he also travelled with the mother and child have been overtaken, firstly, by the mother's assumption that the father's proposal included him living with them in London, which she does not wish to do, and secondly, the father's concerns about the Delta variant and increased risk associated with the infectivity of that strain should the child be taken from Tonga to reside in England for a year. Accordingly, he opposes the proposal to take the child away regardless of whether he would travel with them or not.

9. Prior to, and since the mother applied for the scholarship, the world has been plagued by the Covid-19 pandemic. Apart from the advent and uptake of vaccinations at varying rates in different countries, which is hoped to reduce the severity of the suffering of those who contract the virus, the incidents of infection and deaths continue unabated.

10. Given the urgency of this application, there is a limit to the extent this Court can act on scientific evidence made publicly available through various media outlets and perhaps, most reliable, through the World Health Organisation. Nonetheless, it is a matter of such grave and universal concern that a degree of judicial notice is required to make any sensible assessment of the risks associated with the pandemic and this application.

11. According to a London government website:[1]

    (a) on 8 September 2021, the daily number of new people in London tested positive for Covid-19 was 3,536;

    (b) the total number of Covid cases reported up to 8 September 2021 in London is 1,020,916;

    (c) from 28 August to 3 September 2021, 21,900 people tested positive in London - a rate of 243 cases per 100,000 of the population. That compares with 21,873 cases and a rate of 243 for the previous week. In other words, reasonably consistent;

    (d) for England, as a whole, there were 325 cases per 100,000 for the week ending 3 September 2021;

    (e) on 8 September 2021, there were 1,214 Covid patients in London hospitals compared with 1,235 on 1 September with 228 patients on mechanical ventilation compared with 225 the week before;

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[1] london.gov.uk

(f) on 8 September 2021, eight people had died in London hospitals following a positive test for Covid-19 with the total deaths in London hospitals now at 15,482.

12. I need not continue with any further statistical analysis. Those figures paint a clear enough picture, particularly when contrasted with the Covid free status of Tonga as one of only a handful of countries enjoying that protected condition so far.

13. Mrs Tupou submitted that the application should be refused for the following reasons:

(a) the proposed period of one year away from the father is significant, during which he and the child would miss physical contact, on the current access arrangements of 12 hours a week, or for a total of 625 hours;

(b) the child, who has just turned 2, is well and truly in her formative years and and despite a degree of tumult between her parents earlier on in her young life, she has otherwise now settled down into a routine marked by the access arrangements with her father and his family;

(c) if granted, the child would be away from her extended family on both sides;

(d) there was insufficient evidence of required visas, the health of the mother's sister in New Zealand who is proposed to accompany them and proposed living conditions in London. There was some evidence from the mother about arrangements having been made for the child, if permitted to travel, to be cared for on weekdays at the University nursery. Concerns in relation to vias and the mother's sister were answered to a degree by the mother in court today. However, I still take into account that there is no evidence about the proposed living conditions, although I have little doubt the mother would ensure that those conditions would be satisfactory.

14. The father has indicated that he is willing to take custody of the child if the mother still wishes to proceed to England for her studies.

15. I have also considered Mrs Tupou's submission on the applicable legal principles Section 15 of the *Guardianship Act* is self-explanatory on an application such as this. The paramount consideration is the welfare of the child.

16. The authorities referred to by Mrs Tupou - *Samita v Samita* [1991] Tonga LR 4 and *Pupungatoa and Fonua, In re Application for Guardianship Order* [2016] TOSC 1 - were of limited assistance because they refer to principles concerning not separating young children from their mothers or siblings. That does not apply directly in this case which is concerned about separating this child from her father and extended families.

17. However, the reference by Mrs Tupou to the recent decision of in re *Sam (a pseudonym) and an application for revocation of letters of adoption* [2021] TOSC 73 was of assistance, although the English decisions referred to there do not descend to any particular guidelines when trying to assess a relocation application such as the present and what is or is not in the best interests or welfare of the child.

18. In *D v S* [2002] NZFLR 116 at [30], the New Zealand Court of Appeal recognized that *"freedom of movement is an important value in a mobile community"*. However, the same Court in *Kacem v Bashier* (2011) 2 NZLR 1 noted that "*the primary consideration is the best interests of the children – a parent's freedom of movement is relevant only within that overall context.*" Once the Court has considered the non-exhaustive principles and other factors that are relevant to a particular case, weight and priorities can be given to the principles and factors that would best achieve the welfare of that particular child. Tipping J noted that the competition in a relocation case is likely to be declining the application for relocation because the children's interests are best served by promoting stability, continuity and the preservation of certain relationships as against allowing it on the grounds that the interests of the child are thereby better served.

19. In that case, and by reference to the New Zealand *Care of Children Act*, Elias CJ placed emphasis on the value to the child of the parental relationship; the importance of the continuing child/parent relationship; the responsibility on parents and guardians for the child's care, development and upbringing being maintained; continuity of relationship with the child's wider family; cooperation between parents and guardians exercising day to day care and the value of preserving and strengthening family relationships which are important to a child's identity and the development of the child's relationship with one or both parents.

20. Whilst Tonga does not have a similar Act, the same sentiment or theme is reflected in the *Guardianship Act* and in previous decisions of this Court, and I have drawn some guidance from those features of the New Zealand legislation.

21. Here, the Court is faced with weighing up, on the one hand, the mother's desire to further her education, and on the other, that she wishes to do so at a time when the Covid-19 pandemic is on foot. As well intended as her desire may be, there is no definite evidence of the pandemic abating anytime soon. That would see her leaving this country, where to date, there have been no report of cases of Covid-19, to go to another where there are very severe problems with the pandemic. Notwithstanding the UK's recent relaxation of some restrictions, experience in other countries would tend to suggest a very real probability of recurring lockdowns and periodic reinstatement of other measures required to respond to recurring outbreaks of the virus and its ongoing mutations. In other words, there is unlikely to be a linear path to complete freedom anytime soon for any country currently fighting Covid-19.

22. Whilst I appreciate the mother's willingness to expose herself to what she regards as a calculated risk, her confidence or faith in the UK health care system and that Government's responses so far, the reality is that, for the child, the choice is between a current zero risk environment in Tonga and a very real risk of exposure to infection in England. The quantification of that risk is impossible other than that the statistics referred to above suggest that, for now, it remains very real.

23. On the other side of the scale, as it were, if the application is granted, the father and child will lose physical contact for a year at a time when the child, as a toddler, has the ability, because she is not going to school yet, to spend quality time with her father when permitted by the access arrangements, which I

consider is vital to her relationship with him, her development and her sense of identity and place within both families. In that regard, I do not consider that video calls, as proposed by the mother, however frequent, can in any way replace the value and the quality of those direct physical connections, especially with a young child where tactile affection is enormously important. For any parent to not be able to hug their child for a year is very difficult and certainly very difficult to condone and support on an application such as this.

24. And so, ultimately, the application turns on the realities of the Covid-19 pandemic. There is no indication before me that the mother's course of study cannot be undertaken at some point in the future. I appreciate the inconvenience likely to be caused if she has to forego the current scholarship, but given that she was successful on this occasion, there is good reason to believe that were she to apply again, she may enjoy similar success. The real question is timing. The other variable which has not been explored is whether the course or some other similar course of higher level education could be undertaken online if the mother is intent on undertaking it whilst Covid-19 conditions remain.

25. On balance, the answer is quite clear. I have come to the conclusion that this Court should not be instrumental in permitting a course which is likely to expose the child to a real risk of harm, however well managed (or hoped) that risk might be in England. It is objectively nonetheless a real risk as opposed to the comparatively risk-free conditions here in Tonga.

26. For those reasons, the application is not in the welfare of the child, and it must be refused.

27. After hearing from counsel on costs, I consider that the application was largely driven by the mother's personal interests at a time when she was well aware of the risks associated with her desire, even though her higher education achievements may indirectly benefit the child at some point in the further. On the other hand, the father's position vacillated between being prepared to agree to the mother's request if he could also accompany them, and notwithstanding the extant Covid conditions in England, to more recently refusing consent due to the rise of yet another strain of the virus. As such, the applicant was required to bring the matter to Court for determination, even though she did so very late in the piece. Accordingly, I consider it appropriate to order the applicant to pay half the respondent's costs to be taxed in default of agreement.

NUKU'ALOFA
10 September 2021

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE