Solicitor General.

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IN THE SUPREME COURT OF TONGA
FAMILY JURISDICTION
NUKU'ALOFA REGISTRY **FA 151 of 2014**

IN THE MATTER OF The Maintenance of Illegitimate Children Act Cap.30

AND
IN THE MATTER OF An application by **Mr** and **Mrs K** for Letters of Adoption.

AND
IN THE MATTER OF **J,** male child born on 3 May, 2009.

Ms H. Aleamotu'a for the Guardian ad Litem
Mrs M. Manavahetau for the Applicants

RULING

1. This is an application by Mr. and Mrs. K for Letters of Adoption in respect of J, a male child born on 3 May, 2009. The Court is being asked to approve the inter-country adoption of J by his maternal grandparents.

2. J is an illegitimate five year old Tongan boy. The applicants agreed with J's mother that they would adopt J from birth. The applicants moved to New Zealand in June, 2012 leaving J in Tonga with his mother. She is now married with one child of her marriage. The

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applicants have maintained regular contact with J. Mrs. K returned to Tonga in June, 2013 and June, 2014 to see J and J travelled to New Zealand and stayed with the applicants between November, 2013 and February, 2014. There has also been a great deal of telephone contact between the applicants and J. The applicants want J to live permanently with them in New Zealand. J's mother supports the application.

The course of the proceeding

3. The application was filed on 16 September, 2014. The Solicitor-General was appointed Guardian ad Litem and promptly prepared a report dated 5 November, 2014 recommending that Letters of Adoption be granted.

4. On 12 November, 2014 Justice Cato adjourned the application so that some authority could be provided that it is acceptable for Letters of Adoption to be issued when the applicants are the grandparents of J or whether the appropriate application should be for guardianship.

5. On 21 January, 2015 the case came before me. The Guardian ad Litem provided me with a decision *In the matter of Lolo Mana'ia Funganitao* FA 152 of 2010 which it was submitted was authority that adoption orders in favour of grandparents should only be made in exceptional circumstances. The Guardian ad Litem submitted that exceptional circumstances existed in this case.

6. Mr. K did not attend the hearing on 21 January, 2015 but I heard from Mrs. K, the mother of J, Ms Manavahetau and Ms Aleamotu'a. I

again adjourned the application so that further evidence could be provided that it is the case, as was submitted to me, that only the issue of Letters of Adoption, and not a Guardianship Order, will allow Mr. & Mrs. K to have J live permanently with them in New Zealand.

7. On 3 February, 2015 the Solicitor-General's office forwarded to the Court a letter advising as follows:

    1. There is currently no official policy or precedent given by New Zealand or Australia with regards to Legal Guardianship Orders and its effects on a resident visa to those respective countries.

    2. However, from experiences encountered by our Office, and the practice that is currently carried out by New Zealand Immigration, resident visas for children who are granted Legal Guardianship Orders are usually denied.

    3. The reason for this is that the nature of a Legal Guardianship Order is temporary and is revoked once a child turns 18, thus falling short of the definition of 'adoption' in New Zealand. New Zealand legislation requires a full adoption before a residence visa can be granted.

    4. According to New Zealand Immigration Officers, the usual practice is, a child that is under a Legal Guardianship Order is granted a visitor's visa. Upon arrival at in [sic] New Zealand, the applicants then apply for the child's

adoption in New Zealand using the Legal Guardianship Order to support their application.

8. As it transpires this information has not materially influenced my decision.

The child

9. J was born at Vaiola Hospital, Tofoa, Tongatapu. It is reported that he is happy and healthy. Shortly after J was born his mother left Tonga to continue her studies in Fiji and J was cared for by the applicants until June 2012. They provided for all of his needs. Since June 2012 he has been cared for by his mother and stepfather but the applicants continue to provide money for his care. I understand that J's natural father has no contact with the mother or J.

10. It was reported by the Guardian ad Litem that Mrs. K had said that J is mistreated by his stepfather. No details of mistreatment have been provided. J's mother denied that there was any mistreatment. She said that J got on well with his stepfather. There is insufficient evidence for me to make any finding that J is mistreated.

The applicants

11. The applicants have been married for 24 years and have three children. All the children are girls. They want a son. At the time of J's birth they approached the mother and asked if they could adopt J and the mother agreed.

12. They are members of the Follower of Christ Church and intend to raise J in that faith. They have submitted reference letters from the Pastor of their Church and others in support of the application.

13. The applicants also say that when they migrated to New Zealand they could not take J with them because they did not have an Adoption Order.

14. The applicants say that they are in a better financial position than the mother to raise J. The male applicant is 45 years old. He is employed and he earns NZD$640 approximately per week. The female applicant is 50 years old. She is also employed and earns NZD$400 - $800 per week depending on the hours available to her. The applicants rent a home in Manukau, Auckland which provides a safe environment. Although the home already has seven occupants I am told J will have his own bedroom. The applicants own three vehicles for personal use and their home is said to be 'close to all necessary requirements' which I take to mean shops, schools and the like.

15. I accept that the applicants are genuine people who love J very much and are capable of providing a stable, secure and loving home for him.

The mother

16. The mother is 23 years old and was born on 9 August 1991 at Vaiola Hospital, Tofoa, Tongatapu. She is the eldest daughter of the applicants and since J was born she has married and has one child

with her husband. She is not working. Her husband does plantation work.

17. The mother supports the application because she says that the applicants can afford to provide for J and offer him a better education, good discipline and Church teachings. She also said in her affidavit:

> That I have my own family now as I have married in August 2012 and have one child of our marriage and my husband is not the natural father of the child in this matter.

Grandparent adoptions

18. In *Funganitao* Chief Justice Scott said at (6):

> Secondly, the courts have frowned on applications for adoption by the grandparents and it has been said that such application should not be granted save in exceptional circumstances (*Re AB (an infant)* [1949] 1 All ER 709 and see also *Parker v Pearce* (1985) 4 NZFLR 150).

19. It is correct that the Courts have, at some times, been reluctant to grant adoption orders in favour of grandparents. However, in my view there is no rule that adoption orders should only be made in favour of grandparents in exceptional circumstances. In adoption cases, as in other cases involving the care and protection of children, the paramount consideration is whether the proposed adoption is in the best interests of the child. This requires the Court to assess all the relevant facts in so far as they bear upon the interests of the child.

The paramount consideration is not to be read down or made subject to notions that certain types of applicant should generally not be granted adoption orders.

20. There are many cases where adoption orders have been made in favour of grandparents and *Re AB (an infant)*, which was cited in *Funganitao*, is such a case, as are *Re T (An Adoption)* [1995] 3 NZLR 373 and *Re Adoption of A* [1992] NZFLR 422.

21. I refer also to *Re M (Adoption)* [1994] 2 NZLR 237 which concerned an application to legally adopt a niece. The adoption was seen by the family as desirable under Māori customary adoption practices. In that case the High Court of New Zealand noted that adoption applications must ultimately be decided on an assessment of their own facts. The Judge recognised, at page 241, that it is perfectly possible, in granting an adoption order, to harmonise the different values which lie behind legal approaches to adoption on the one hand and customary concepts on the other.

22. In *Re Adoption of A* an adoption order was granted for maternal grandparents to adopt a child of 18 months. The applicants were Māori and the decision to adopt was taken from a Māori customary perspective.

23. In *Re T (An Adoption)* the Court was concerned with an application by a Samoan couple to adopt their grandson. Tompkins. J referred to *Re Adoption of A* and noted that in a Māori and Pacific Island context the perceived disadvantage of grandparent adoption, namely the legal readjustment of family relationships, is not so apparent.

24. I therefore approach the present application on the basis that there is no requirement that the applicants show exceptional circumstances relevant to the application before they can obtain the order sought.

Inter-country adoption

25. Tonga is party to the United Nations Convention on the Rights of the Child ('the Convention'). In *Saavedra v Solicitor General* [2013] TOCA 7 (CA) the Court of Appeal heard an appeal from a decision of the Supreme Court refusing to allow the adoption of a five year old Tongan boy by an American couple. The Court of Appeal upheld the Supreme Court's decision and in reliance upon Article 21 of the Convention stated at [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" ...

26. A literal application of the Court of Appeal's statement of the law would mean that this Court should not approve applications for inter-country adoption unless the child cannot, in any suitable manner, be cared for in Tonga. A rigid approach has the potential to conflict with the principle that the best interests of the child shall be paramount. This principle is expressly recognised in the opening sentence of Article 21. One can think of situations where the local adoption of a child by people who are not relatives (or perhaps not Tongan) might be an inferior option for the child than adoption by relatives

overseas.[1] However, this is not an issue that I need resolve here as in this case there is no intention of adopting J out of his family.

The best interests of J

27. There is a lot to be said in favour of allowing Mr. & Mrs. K to adopt J. They clearly love him very much. I accept that they have the ability to care for him and that they will do so. They have a home which is safe and secure. It is likely that in New Zealand they will be able to offer J a higher standard of living and education than he might otherwise receive in Tonga. What is being sought reflects traditional Tongan practices and will strengthen the bond that already exists between J and his grandparents. It will also give effect to the wishes of the applicants and the mother. Furthermore, living in Auckland, where there is a large Tongan community, J's connection to his culture will not be entirely severed. These are all important considerations.

28. But there are other matters that count against the application. Since at least June 2012 J has been in the day to day care of his mother and stepfather. He now has a sibling. The period since June 2012 represents a large part of J's life and he must now have bonded closely to his mother, stepfather and sibling. The Guardian ad Litem describes J as 'very well groomed and healthy. He seemed very active and happy'. J's mother and stepfather have provided well for J up to now and there is nothing before me to suggest that this will not continue.

[1] This was expressed by Lord Chief Justice Scott to the workshop of Family Violence and Youth Justice conducted by the Pacific Judicial Development Programme, Nuku'alofa, September 2013.

29. What the Court is faced with is a situation where it must choose between two suitable options for J; life in Tonga with his mother, stepfather and sibling or in New Zealand with his grandparents.

30. The matter would to my mind be finely balanced but for the fact that I am bound by the decision in *Saavedra*. As noted, the Court of Appeal has said that inter-country adoption is a matter of last resort only to be considered 'when all other means of caring for a child in Tonga have been exhausted'. J has a suitable home in Tonga. The making of the order sought is not a measure of last resort to provide for J's care. Accordingly I refuse the application for Letters of Adoption.

31. I say nothing about the possibility of the applicants obtaining a Guardianship Order in respect of J but note that this decision does not preclude them making such an application.

The Result

32. I dismiss the application for Letters of Adoption.

DATED: 12 February 2015.

O. Paulsen
CHIEF JUSTICE