

**THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Adoption Case No. 23 of 2010

IN THE MATTER OF: THE CHILD "M"

AND IN THE MATTER OF: THE ADOPTION ACT 1958 (UK)

Conference: 25 February 2011

Before: Justice R L B SPEAR

Applicant : Mrs M G Nari

PRELIMINARY RULING

15 MARCH 2011

1. This file was quite recently allocated to me. I have now had the benefit of reading the material already filed and also hearing from Mrs Nari on behalf of the applicants. I appreciate that the applicants, the parents of the child, and the child herself will have become frustrated at the delays that have already arisen in this proceeding. It is hoped that this preliminary ruling may permit a greater understanding of the difficulties that this application presents to this Court and so that expectations might become more realistic.
2. This is an application by a married couple from Noumea, New Caledonia, to adopt a 13 year old girl of Ni Vanuatu nationality. The adoption is not opposed. Indeed, consent has been given by both natural parents of the child. What is proposed is, essentially, an open adoption. The intention of all parties is that the child would move from Vanuatu to New Caledonia and, from that point on, become a member of the applicants' family.

3. There is nothing on the court file to suggest that the applicants are other than a respectable married couple with the best of intentions in respect of taking this young girl in to their family. They are long term residents of New Caledonia, of French nationality, and they have also spent significant periods of time with the child on their regular and frequent visits to Vanuatu. However, that appraisal has not been the product of an independent inquiry by a responsible government agency.
4. The adoption process is not one to be entered into lightly. The court must always be concerned about the welfare of the child particularly where the effect of an adoption order will see the child removed from (in this case) her country of origin, her parents, and her wider natural family.
5. This application for adoption is brought formally under the Adoption Act 1958 (UK) (*the 1958 Act*) by virtue of article 95 of the Constitution of the Republic of Vanuatu.

95. Existing law

(1) Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day as if they had been made in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution.

(2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.

(3) Customary law shall continue to have effect as part of the law of the Republic of Vanuatu.

(emphasis added)

6. Mrs Nari argues that s 12 of the 1958 Act specifically provides for the adoption of children by applicants not resident in Great Britain and,

accordingly, by adaption, inter-country adoptions are therefore available in Vanuatu.

12. Modification of foregoing provisions in the case of applicants not ordinarily resident in Great Britain

(1) An adoption order may, notwithstanding anything in this Act, be made on the application of a person who is not ordinarily resident in Great Britain; and in relation to such an application -

...

7. I do not rule either way on that issue at this time. I simply note that the making of an adoption order under the Act is discretionary – see s 1 of the 1958 Act.

1. Power to make adoption orders

(1) Subject to the provisions of this Act, the court may, upon an application made in the prescribed manner by a person domiciled in England or Scotland, make an order (in this Act referred to as an adoption order) authorising the applicant to adopt an infant.

...

8. The law and practice relating to inter-country adoption has undergone great change internationally in the recent years. In particular, the 1993 Hague Convention (*Convention for the Protection of Children and Cooperation in respect to Inter-country Adoptions*) came about to meet a growing post-World War II demand for inter-country adoption. Furthermore, it was recognized that there was a corresponding need for clear guidelines to apply to inter-country adoptions particular to safeguard the child. The pre-ambule and statement of the objects of the Hague Convention is in these terms:

**33. CONVENTION ON PROTECTION OF CHILDREN
AND CO-OPERATION IN RESPECT OF
INTERCOUNTRY ADOPTION**
(Concluded 29 May 1993)

The States signatory to the present Convention,

Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,

Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,

Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,

Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the *United Nations Convention on the Rights of the Child*, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986),

Have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

- a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
- b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

9. The outline to the 1993 Hague Convention commences in these terms:

Introduction

Intercountry adoption is a relatively recent phenomenon. It expanded slowly after World War II, until the 1970s, when the numbers increased dramatically. By the 1980s, it was recognised that this phenomenon was creating serious and complex human and legal problems and the absence of existing domestic and international legal instruments indicated the need for a multilateral approach.¹ It was in this context that the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* was developed to establish safeguards which ensure that intercountry adoptions take place in the best interest of the child and with respect for the child's fundamental rights.

The Convention recognises that growing up in a family is of primary importance and is essential for the happiness and healthy development of the child. It also recognises that intercountry adoption may offer the advantage of permanent family to a child for whom a suitable family cannot be found in his or her Country of origin. By setting out clear procedures and prohibiting improper financial gain, the Convention provides greater security, predictability and transparency for all parties to the adoption, including prospective adoptive parents. The Convention also establishes a system of co-operation between authorities in countries of origin and receiving countries, designed to ensure that intercountry adoption takes place under conditions which help to guarantee the best adoption practices and elimination of abuses.

The 1993 Hague Convention gives effect to Article 21 of the *United Nations Convention on the Rights of the Child*² by adding substantive safeguards and procedures to the broad principles and norms laid down in the Convention on the Rights of the Child. The 1993 Convention establishes minimum standards, but does not intend to serve as a uniform law of adoption. While making the rights and interests of the child paramount, it also respects and protects the rights of families of origin and adoptive families.

The Convention makes clear that Receiving States and States of origin must share the burdens and benefits of regulating intercountry adoptions. It sets out clearly which functions within the adoption process are to be performed by each State.

Principal features of the Convention

The best interests of the child are paramount

The Convention contains certain rules to ensure that adoptions take place in the best interests of the child and with respect for his or her fundamental rights. For example, States must: consider national solutions first (implement the principle of subsidiarity); ensure the child is adoptable; preserve information about the child and his/her parents; evaluate thoroughly the prospective adoptive parents; match the child with a suitable family; impose additional safeguards where needed. This fundamental principle of the child's best interests should guide the development of an integrated national child care and protection system, of which one part is an ethical, child-centred approach to intercountry adoption.

¹ See Explanatory Report to the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption*, by G. Parra-Aranguren, at paragraph 6. Available on the Hague Conference website, www.hcc.net under Intercountry Adoption Section/Explanatory Documents.

² *United Nations Convention on the Rights of the Child*, G.A. Res. 44/25, UN GAOR, 61st Plenary Meeting, Annex. Available at www.ohchr.org

10. The outline continues to deal with the principle features of the inter-country adoption process.

11. The Republic of Vanuatu is not a signatory to the Hague Convention. However, as can be seen from the above extract from the outline to the Hague Convention, that convention is designed to give effect to Article

21 of the UN Convention on the Rights of the Child. The Republic of Vanuatu ratified that last mentioned convention in 1993.

12. Article 21 of the UN Convention on the Rights of the Child is in these terms:

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 or 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.**

(emphasis added)

13. France ratified the Convention on the Rights of the Child in 1990 without applicable qualification. Arguably, that ratification extends to include its Pacific territories which, obviously, includes New Caledonia. However, while France ratified the Hague Convention in 1998, it declared at that time that this specifically excluded its overseas territories; which includes New Caledonia.

14. While Vanuatu is not a signatory to the Hague Convention, it is still committed to the principles embedded in Article 21 of the Convention for the Rights of the Child when dealing with adoptions and, in particular, inter-country adoptions. That requires paramount consideration being given to the rights of the child in question. It is now well understood that those rights of the child can best be achieved by:

- a. First considering national solutions – that is, the placement for adoption in the country of origin;
- b. Ensuring that the child is “adoptable”;
- c. Ensuring that information about the child and his/her parents is preserved;
- d. Ensuring that the prospective adoptive parents are evaluated thoroughly by an independent, responsible and competent government agency in their country;
- e. Ensuring that the match of adoptive parents and child is suitable;
- f. Imposing additional safeguards where required;
- g. Ensuring that the placement in the foreign country will be monitored and generally supervised by a responsible and appropriate arm of that foreign country

15. It can accordingly be seen that the developed international approach to inter-country adoptions requires that the two applicable countries work together with shared responsibilities all for ensuring that the best interests of the child are protected.

16. In this case, the discretion reposed in the court to consider an inter-country adoption must be exercised in conformity with Vanuatu’s international obligations particularly under the Convention for the Rights of the Child. It is of only passing significance that Vanuatu is not a party to the Hague Convention as it is clear that New Caledonia has no obligation to assist with the assessment and supervision of an adoption between Vanuatu and New Caledonia. The Hague Convention is essentially just the instrument which gives effect, in a practical sense, to Article 21.

17. It must be understood by both the applicants and the parents of the child that this court is not against this adoption in an absolute sense. However, it is incumbent on this court to ensure that Vanuatu’s commitment to the principles stated in the Convention for the Rights of the Child is observed.

18. The proposed adoption would see this child move from her country of origin and from her wider, natural family. There is currently no guarantee that any responsible and suitable government body in New Caledonia would undertake any responsibility for assisting with the assessment of the prospective adoptive parents and, if the adoption did occur, the on-going supervision and monitoring of the adoption. It is also not clear what would occur with respect to the nationality of the child given that there is currently no input from the governments of either France or New Caledonia that might clarify that issue.

19. I note that the applicants first considered applying for the adoption order in New Caledonia but were discouraged by the apparent complexities of the local adoption requirements.

20. If the applicants still wish to proceed with this adoption application, in the face of the difficulties that I have endeavored to identify, counsel for the applicants needs to confirm that intention by memorandum to the court together with a proposal as to how these difficulties are intended to be addressed. In that event, I will invite the Attorney General to intervene so that full and proper consideration can be given to the implications and international responsibilities arising out of the proposed adoption.

21. Until such a response is received from counsel for the applicants, no further attention will be given to this application.

BY THE COURT

A handwritten signature in black ink, appearing to read 'M. J. Green J.', written in a cursive style.