

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT AUCKLAND**

**FAM 2015-004-000335
FAM 2015-004-000339
[2017] NZFC 8164**

IN THE MATTER OF THE ADOPTION ACT 1955

AND

IN THE MATTER OF An application by

**[BASHEER BAHRI] AND
[SAHHEEDA HUSSEIN]**

To adopt a child

AND

ADOPTION SERVICES

Other Party

Hearing: 31 May and 30 August 2017

Appearances: S Abernethy for the Applicants
 M Bird for Adoption Services
 L Reid on behalf of G Harrison as Lawyer to assist the Court
 (31 May 2017)
 G Harrison as Lawyer to assist the Court (30 August 2017)

Judgment: 19 October 2017

RESERVED JUDGMENT OF JUDGE A M MANUEL

Introduction

[1] This is an application for an adoption of two young people, [Tahleela Hussain] (born [date deleted] 1998) who is 18 years old and her brother [Jumail Hossein] (born [date deleted] 2001) who is 16 years old.

[2] The applicants, [Basheer Bahri] and [Sahheeda Hussein] are the brother in law and sister of [Tahleela] and [Jumail].¹

Background

[3] The children are resident in Afghanistan. The applicants are resident in [location deleted], New Zealand.

[4] The parents of the children have both passed away; [in 2010 and 2013]. The children are currently living with their sister and brother in law, [Munisa Hussain] and [Mukarram Hussain], and [their children] in a two bedroom dwelling in Kabul, Afghanistan. The children have been living with them since their [parent's] death in 2013.

[5] [Munisa and Mukarram] are struggling to provide for [Tahleela and Jumail], as well as their own children due to their limited financial resources. The applicants have applied to adopt both children. This is supported by [Munisa and Mukarram].

[6] In May 2017 submissions were heard from counsel for the applicants, counsel appointed to assist the Court, and counsel for Adoption Services Oranga Tamariki. Evidence was given by Rochelle McGeady, a social worker who prepared a report dated August 2016. I directed that the children's views and wishes were to be elicited by counsel appointed to assist. This has since been done by way of interviews with a clinical psychologist, Frozan Esmati, who prepared a report dated August 2017.

¹ The two young people and their sister appear to share a surname which is spelt in different ways in their respective documents, such as passports.

The relevant law

[7] The provisions of the Adoption Act 1955 (the Act) apply to the present application. The Adoption (Intercountry) Act 1997 does not apply because Afghanistan is not a signatory to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

[8] Jurisdiction to make adoption orders is conferred by s 3 of the Act:

3 Power to make adoption orders

- (1) Subject to the provisions of this Act, a court may, upon an application made by any person whether domiciled in New Zealand or not, make an adoption order in respect of any child, whether domiciled in New Zealand or not.
- (2) An adoption order may be made on the application of 2 spouses jointly in respect of a child.
- (3) An adoption order may be made in respect of the adoption of a child by the mother or father of the child, either alone or jointly with his or her spouse.

[9] The court has a discretion under s 5 of the Act to make a final adoption order in the first instance where special circumstances render it desirable to do so:

5 Interim orders to be made in first instance

Upon any application for an adoption order, if the court considers that the application should be granted, it shall in the first instance make an interim order in favour of the applicant or applicants:

provided that the court may in any case make an adoption order without first making an interim order, if—

- (a) all the conditions of this Act governing the making of an interim order have been complied with; and
- (b) special circumstances render it desirable that an adoption order should be made in the first instance.

[10] The statutory process for adoption under the Act involves:

- (a) The requirement for consent or the dispensing of consent by the Court (ss 7 and 8 of the Act); and

- (b) A report by a social worker unless one of the applicants is a natural parent (s 10).

[11] The criteria for adoption are specified at s 11 of the Act as follows:

11 Restrictions on making of orders in respect of adoption

Before making any interim order or adoption order in respect of any child, the court shall be satisfied—

- (a) that every person who is applying for the order is a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain, and educate the child; and
- (b) that the welfare and interests of the child will be promoted by the adoption, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child; and
- (c) that any condition imposed by any parent or guardian of the child with respect to the religious denomination and practice of the applicants or any applicant or as to the religious denomination in which the applicants or applicant intend to bring up the child is being complied with.

[12] The effect of a final order is described at s 16 of the Act.

[13] Section 2 of the Act provides that a child is a person “who is under the age of 20 years”.

[14] In *Lynch v Peach*² Sinclair J noted that if the true motivation of an adoption application is to obtain rights of nationality or residence for a child, an adoption order should be refused. However, citing *Re H (a minor)* 1982 3 All ER 84, if part of the motive is to obtain the emotional, social, and legal benefits of adoption for the child the Court could make an adoption order, even if to do so would override an immigration decision or rule.

[15] This was confirmed more recently in *Henderson v Attorney-General*³ where Whata J noted that “there is nothing in the Act to suggest that concerns about immigration are mandatory relevant considerations, let alone provide a proper basis

² *Lynch v Peach* (1986) 4 NZFLR 75 (HC).

³ *Henderson v Attorney-General* [2015] NZHC 1971.

by themselves for declining an adoption order to an otherwise satisfactory adoptive parent.” Whata J stated that the “rigorous application of the s 11 criteria should provide an adequate immigration filter in terms of excluding those persons who do not have a genuine interest in the upbringing of the children or where adoption is not in their best interests”.

Applicants’ position

[16] Counsel for the applicants states the adoption order should be granted as the applicants are fit and proper (the necessary elements such as absence of police records, good health and character have been investigated), the welfare and interests of the children will be promoted by the adoption as the applicants are recognised by the children as parents, and the applicants and children all live under the aegis of Islam so their religious beliefs are synonymous.

[17] Counsel for the applicants referred to a number of international conventions however discussion of these is not necessary for the purposes of this application.

Evidence and affidavits

Affidavits of the applicants of April 2015

[18] In their joint affidavits, one regarding [Tahleela] and the other regarding [Jumail], the applicants state they have been married since [year deleted]. [Basheer] has lived in New Zealand since 1990 and [Sahheeda] arrived in 2009 with [their children]. They are both in good health, have no criminal convictions and they are both of the Muslim faith. They note that no payment or reward or consideration for the adoption has been or will be made to or by them to any other person. [Basheer] works as [occupation deleted] and [Sahheeda] cares for the children and the household.

[19] The applicants report concern about the risks for [Tahleela and Jumail] in Kabul. They believe that [Tahleela] is too young to be married but recognise that is not the prevailing view in Kabul. They state they would encourage [Tahleela] to get

an education and learn English through adult classes. They are aware that they would have to help [Tahleela] to integrate with New Zealand culture.

[20] The applicants state they have been advised that if [Jumail] comes to New Zealand he will have to go to school here and adjust to the culture and they will try to help him do this. They believe [Jumail] would be better with them in New Zealand than he is in Kabul in terms of his emotional problems.

[21] [Sahheeda] states that she currently Skypes [Tahleela and Jumail] approximately every two weeks as well as ringing or texting them on Viber.

Affidavit of [Mukarram Hussain] of January 2015

[22] In his affidavit, [Mukarram] states that he is married to the sister of [Tahleela and Jumail], [Munisa]. They have [number of children deleted] children together. [Tahleela and Jumail] have been living with them for approximately two years.

[23] [Mukarram] is [occupation deleted] in Kabul and his monthly salary is 17,200 Afghani. [Mukarram] states that while he is providing every opportunity he can for [Tahleela and Jumail], he has limited financial resources and it is difficult for him to provide everything he would like for them as well as his own children.

Affidavit of [Basheer Bahri] of December 2016

[24] In his affidavit, [Basheer] responded to concerns about his and [Sahheeda's] ability to parent and support another two children on limited resources, as highlighted in the social worker report of August 2016, explaining that they will be able to do this with the additional financial support from [his siblings] who also live in [location deleted].

Affidavit of [Abdullah Bahri] of 17 December 2016

[25] [Abdullah Bahri] is [a brother] of [Basheer]. In his affidavit he states he is aware of the situation of [Tahleela and Jumail] and supports the applicants adopting the children. He is permanently employed with [employer deleted] and has been

working there for [duration deleted]. He states he helped pay for a trip for [Sahheeda] and their children to go to Kabul in [years deleted] and would always help [Basheer] if he needed financial assistance.

Social Worker's Report of August 2016

[26] Pursuant to s 10 of the Act, a social worker report was prepared by Ms McGeady. Ms McGeady considered the applicants to be fit and proper persons who are able to support and care for the children. However, she made observations that the applicants had limited financial resources and commented that “the issues of social mores and gender treatment in Afghanistan are not a reason for adoption”. Ms McGeady was unable to make any recommendation regarding the application as at the time a child study from Afghanistan could not be obtained.

Report of Frozan Esmati of August 2017

[27] Ms Esmati, a clinical psychologist, was appointed for the purpose of obtaining the children's views and wishes and obtaining relevant background material. She spoke to both [Tahleela and Jumail] separately via the use of Viber communications software.

[28] Ms Esmati reports that both [Tahleela and Jumail] were impacted by the loss of their parents, in particular their mother. Both children describe their life in Kabul as restricted. [Tahleela] has no access to formal education and is unable to leave the house without the presence of her brother or brother in law. [Jumail's] movements out of home are limited by his fear of exposure to explosions.

[29] Ms Esmati reports that the children do not have a close relationship with their sister [Munisa] and her husband [Mukarram], who they are currently living with. Both described their relationship with [Munisa] as a “neutral relationship where she treats them well but they do not feel secure enough with her for them to share their problems with her”. In contrast, both children identified [Sahheeda] as their main supporter and both stated they would be comfortable sharing their problems with her. [Tahleela] in particular described having a closer bond with [Sahheeda] compared to [Munisa] and

explained that on average she talks twice a week with [Sahheeda]. The children call their brother in law “Lala” which in Pashtun culture means an elder brother who is in charge of the family after the death of a father, and report they talk to him frequently.

[30] In 2016, [Sahheeda] and her children spent [duration deleted] in Kabul in order to spend time with [Tahleela and Jumail]. [Basheer] supported this and Ms Esmati noted this shows strong commitment to [Tahleela and Jumail].

[31] The children both have a positive view of New Zealand and both would like to pursue higher education. When asked who he would miss if he moved to New Zealand, [Jumail] said he no longer has anybody to miss in Afghanistan now that his parents are gone.

[32] Ms Esmati reported that in her opinion, [Tahleela and Jumail’s] attachment with [Sahheeda] is best described as secure attachment and is characterised by openness, connectedness and a feeling of safety. The children view [Saheeda] and [Basheer] as parent figures, confiding in [Saheeda] in the same way they would their mother and relying on [Basheer] as a father figure. She noted that both children perceived official adoption as something positive and migration to New Zealand as a better opportunity.

[33] Ms Esmati noted that while both children have a good understanding of New Zealand’s safety and security they are naive about potential problems in the country, however good bonding with [Sahheeda] and her family might mitigate this effect. She also cautions that both children may need professional support in the form of counselling to help them to adjust to new life conditions in New Zealand and to assist them with grief and loss, and that [Tahleela and Jumail], as well as [Sahheeda and Basheer] might need guidance and support to avoid culture shock.

Findings

Should an adoption order be granted?

[34] Two primary issues require resolution, namely:

- (a) Whether there is sufficient information upon which to make a decision pursuant to s 11 of the Act to grant the adoption; and
- (b) Whether the criteria at s 11 of the Act are satisfied.

[35] I will address the sufficiency of information first, and if satisfied, will then assess the application in light of the criteria.

Sufficiency of information?

[36] In her social worker's report of August 2016, Ms McGeady stated that:

We have no knowledge of Afghanistan services and no accredited correspondent such as International Social Services in Afghanistan who would be able to furnish our service with a Child Study Report or other independent information in order to report fully to the New Zealand Family Court about the children's current circumstances.

While I find the applicants fit and proper under Section 11(a) of the Adoption Act 1955 I am not able to make any recommendation regarding this application as we are unable to obtain a child study report from Afghanistan.

[37] The importance of a child study report is that it contains information from a child's home country relating to the child's identity, adoptability, background, social environment, family history, medical history (including that of a child's family), and any special needs of the child. It also gives due consideration to the child's upbringing and ethnic religions and cultural background, ensures any necessary consents have been obtained and considers whether the proposed adoption is in the best interests of the child.

[38] Obviously there are difficulties in obtaining such information from war torn Kabul. This deficiency was partly remedied by the psychologist's report of August 2017. Ms Esmati is a registered clinical psychologist who is Afghan by nationality and speaks Dari/Farsi. She interviewed each child separately, on two occasions each, via Viber communication software. She was able to provide background material, as well as ascertaining the children's views and wishes.

[39] Counsel for the applicants referred to several cases where adoption orders had been made notwithstanding the absence of a child study report. In *Re Application to Adopt by GC and DW*⁴ a final adoption order was made in respect of a child in Korea where no child study report was available, but there was corroborative evidence available because a Korean adoption order had been made earlier and social work evidence was available deriving from that process.

[40] In *K v Attorney General*⁵ the children in question were living in Ethiopia. Both parents were dead. The application for adoption was by an older sister. No child study report was available but there were written statements from the children. Final adoption orders were made in the best interests of the children, taking account of the poverty, war and political strife in their home country.

[41] The case *Application by GAG and GAN*⁶ also involved children in Ethiopia whose parents were dead. The children were cousins of the applicant husband. No corroborative information was available from Ethiopia. Counsel to assist organised a suitable person to obtain an interview with the children. The Court considered there was sufficient independent verification of the children's situation to be relied on. The applicants claimed that immigration was not the primary motivation, but the application was a genuine attempt to provide family assistance for the children. The outcome was that final adoption orders were made.

[42] Applying these authorities to the present situation, I find there is sufficient information available to mitigate the lack of a child study report, and for the application to be considered on its merits.

The criteria

[43] Section 11 identifies the criteria that must be considered for the purpose of adoption. In summary the Court must be satisfied that:

- (a) The applicants are fit and proper persons to care for the child;

⁴ *Re Application to Adopt by GC and DW* [2015] NZFC 7754.

⁵ *K v Attorney-General* (2006) 25 FRNZ 413.

⁶ *Application by GAG and GAN* [2013] NZFC 1236.

- (b) The welfare of the child will be promoted by the adoption;
- (c) Any condition imposed by the parent or guardian in respect of religious denomination is being complied with.

[44] The nature of the inquiry was summarised by Judge P J Callinicos in *DPH v Horton*.⁷

[121] In essence the approach to the determination of s 11 is one of assessing the particular circumstances of the subject child involved, assessing whether the applicants for adoption are fit and proper in terms of providing the requisite care for the subject child and considering any alternatives which might be available to the far reaching step of adoption itself.

[45] I turn then to examine these matters in light of the information available to me.

Fit and proper persons

[46] The applicants are fit and proper persons to adopt these two young people. They are in good health, have no criminal connections and are of good character. With the assistance of other family members, they have sufficient ability to bring up, maintain and educate the children as required by s 11(a) of the Act.

The welfare of the children

[47] I am satisfied that the welfare and best interests of the children would be promoted by an adoption order being granted. Although I anticipate that the transition from life in Kabul to life in New Zealand may present challenges to both the applicants and the children, it has never been suggested that the applicants do not have the children's welfare and best interests at the forefront of their considerations. The adoption is in accordance with the children's own wishes.

⁷ *DPH v Horton* [2014] NZFC 325.

[48] *Religious denomination*

[49] As stated, the applicants and the children are of the same religious denomination and practices.

Overall assessment

[50] While there can be little doubt that the application is being used for the purposes of immigration, this is not a case where the applicants do not have a genuine interest in the upbringing of the children or where adoption is not in their best interests. The motive (at least in part) is to obtain the emotional, social and legal benefits of adoption for the children and to create a unified family.

Interim or final order?

[51] All the conditions of the Act governing the making of an interim order have been complied with, and the question is whether there are special circumstances which make it desirable for a final adoption order to be made at first instance.

[52] Presently the children are in Kabul. This application has been on foot for some considerable time and their childhood and teenage years will soon be at an end. It is in their welfare and best interests that they are united with the applicants and their other family members without any further delay. Special circumstances exist.

Findings

[53] Final adoption orders are granted in favour of the applicants [Basheer Bahri] and [Sahheeda Hussein] for the adoption of [Tahleela Hussain] and [Jumail Hossein].

A M Manuel
Family Court Judge