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

NOTE: PURSUANT TO S 22A OF THE ADOPTION ACT 1955, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2006-092-001897
[2020] NZFC 4595

IN THE MATTER OF	THE ADOPTION ACT 1955
BETWEEN	[PRAVIN MHASALKAR] [ANIKA CHAUDHARI] Applicants
AND	[RASHMI MHASALKAR] Child or Young Person the application is about
AND	CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN Other Party

Hearing:	15 June 2020
Appearances:	S Abernethy for the Applicants M Bird for the Other Party M Casey QC as Lawyer to Assist the Court.
Judgment:	3 August 2020

RESERVED JUDGMENT OF JUDGE K MUIR

---

[1] [Rashmi Mhasalkar] ([Rashmi]) was born on [date deleted] 2004 in [state deleted – state A], India. Since she was 12 days old she has lived with the applicants [Pravin Mhasalkar] (Mr [Mhasalkar]) and [Anika Chaudhari] (Ms [Chaudhari]) as their daughter. [Rashmi] is now 15 years and ten months old.

[2] The question for this court is whether this application to adopt [Rashmi] under the laws of New Zealand can now proceed. It is accepted by all involved that it is in the best interests of [Rashmi] that it does. The issue is whether the court has jurisdiction; will the making of an order under the Adoption Act 1955 (the Act) be in breach of a vital international treaty, the Hague Convention on Intercountry Adoption (The Hague Convention)?

[3] [Rashmi] was adopted through a Tamil temple ceremony and an Indian deed of adoption executed in [state A] by Mr [Mhasalkar] and Ms [Chaudhari][1] and by [Rashmi]'s birth parents. An Indian Court domestic adoption order was subsequently made.

[4] Between [dates deleted – two years] [Rashmi] lived in India with her mother. She has since been resident in Singapore with Ms [Chaudhari]. Her right to remain in Singapore is tenuous in the medium term. She holds an overseas student's visa.

[5] For the past 14 years Mr [Mhasalkar] and Ms [Chaudhari] have had to live apart. Mr [Mhasalkar] is a New Zealand citizen who lives in New Zealand visiting his family annually with no rights to live in Singapore. Ms [Chaudhari] who retains rights of residency in New Zealand, remains in Singapore with [Rashmi]. [Rashmi] has never been able to visit her father in New Zealand. She holds an Indian passport but has no sense of connection to the country of her birth.

[6] In 2015 this application was made under the Act, to adopt [Rashmi] under New Zealand domestic law.

[7] [Rashmi] is aware of this application and the decision I need to make. She is concerned that the effect of this court's decision might be that the applicants can no

[1] Mr [Mhasalkar] and Ms [Chaudhari] were both then New Zealand residents.

longer be her parents. She is understandably distressed at that prospect and she does not really understand why her parents cannot live together. She wonders if that is somehow her fault.

The Issues

[8] The key legal issue is whether this adoption is regulated by the Adoption (Intercountry) Act 1997 (AIA) – in which case the requirements of the Hague Convention must be followed and this court has no jurisdiction – or whether the Act applies. If I find [Rashmi] was habitually resident in Singapore at the relevant time the Act may apply. If I find she remained habitually resident in India at the relevant time, the AIA applies.

[9] India is a signatory to the Hague Convention as is New Zealand. Singapore is not.

[10] This application is opposed by Oranga Tamariki, who represent the Central Authority in New Zealand for the purposes of the Hague Convention. They submit the court has no jurisdiction under the Act, and to make an adoption order would be to circumvent the AIA.

[11] To decide whether or to make an order under the Act I need to decide:

(a) Was [Rashmi] habitually resident in India or Singapore at the relevant time?

(b) For reasons I set out below I find "*the relevant time*" will be the date the applicant's intention to adopt [Rashmi] crystallised into an action.[2] When was that? What event or action crystallised their intention?

[2] *Re Adoption Application by KGC and TGC* [2007] NZFLR 851.

(c) If I find [Rashmi] was resident in Singapore at the relevant time and the Act applies, are the requirements of ss 4, 7 (or 8), 10 and 11 of the Act met?[3]

(d) How should the Hague Convention principles including the principles of subsidiarity be applied to this international adoption in the event I find the Act applies?[4] Specifically:

(i) Was [Rashmi] available for adoption in India?

(ii) Was there any element of sale or trafficking involved in her adoption?

(iii) Can the formal consent of her birth parents be dispensed with?

(iv) Was a genuine parent child relationship created? And

(v) Is an adoption order in [Rashmi]'s best interests? Will it promote her welfare?

History

[12] The applicants met through an arranged marriage, which is customary in their tradition. Ethnically they are Tamil, as is [Rashmi], who was born in the Indian state of [state A]. They married in [date deleted] and moved to New Zealand [six years later]. They eventually acquired permanent residency here. They always wanted and intended to have children, but unfortunately they were unable to conceive. They lived together in New Zealand for seven years and they both still consider it their home.

[13] On 1 October 2003 India became a signatory to the Hague Convention.

---

[3] It is now conceded that the applicants are fit and proper persons to adopt and that the adoption is in [Rashmi]'s best interests for the purposes of s 11 (a) & (b) of the Act. Given the Tamil ethnicity and religious practices of her birth parents and the applicants there are no issues with s 11(c).

[4] This is significant in light of the decision of Doogue J in *Norman v Attorney General* [2020] NZHC 336 at [32] confirming, "The Hague Convention principles have been "accepted as a benchmark of good practice and have influenced New Zealand responses to intercountry adoptions from countries that are not parties to the Convention"."

[14] In 2004 the applicants applied to what was then Children, Young Persons, and their Families (CYF) for approval as adoptive parents and that approval was granted.

[15] Later in 2004, around September, they travelled to India. While they were in [state A] Ms [Chaudhari] was told of an impending birth in a remote village in India, [state A]. The parents involved were poor villagers who live a subsistence lifestyle at or below the poverty line. [Rashmi]'s birth father is a [job details deleted], who at the time was barely earning a subsistence income. He is currently unable to work and is surviving on support from family members and on the income that his wife can earn as an [job details deleted]. The couple had two other children prior to the birth of [Rashmi]. They decided that they could not afford to keep [Rashmi]. They could not afford a dowry for her, they had no way of supporting her.

[16] Mr [Mhasalkar] and Ms [Chaudhari] travelled to the village where [Rashmi] was born. On [date deleted] 2004 [Rashmi] was adopted by a deed.[5] There was also a traditional temple ceremony which would have been sufficient in local custom to give effect to the adoption of [Rashmi].

[17] [Rashmi] lived with Ms [Chaudhari] from that point on. Mr [Mhasalkar] returned to Singapore to work and to try to resolve the residency issues for his wife and his new child. [Rashmi] did not have a right to enter New Zealand with the couple. In 2004 while he was in Singapore seeking residency for [Rashmi], Mr [Mhasalkar] approached the immigration authorities in Singapore and evidently executed a document declaring that [Rashmi] was his child. He was told he would need to supply DNA evidence. His evidence is that he did not understand what DNA evidence was. When he realised that he was actually being asked whether or not [Rashmi] was biologically his child he did not pursue matters further.

[18] I find the declaration by Mr [Mhasalkar] to the Singapore immigration authorities was a result of communication and comprehension difficulties. Mr [Mhasalkar] was described to me by his counsel as a man who has good working or trading English, but it is clear from the evidence, including the report of the

[5] The deed was annexed to the affidavit which Mr [Mhasalkar] first swore in this application. The deed is dated and executed and includes thumb prints of the signatories.

psychologist, Dr Sarah Calvert, who visited Ms [Chaudhari], [Rashmi] and the family in Singapore, that the family prefers to converse in the Tamil language.

[19] While Ms [Chaudhari] and [Rashmi] were living in [state A], India, the couple applied for a formal Court order adopting [Rashmi], notwithstanding the fact that they had the deed and had completed the temple ceremony. On 28 February 2006 in the Court of the Additional District Munsif of [state A] an adoption order was made and signed by V Soutar, Additional District Munsif [state A].

[20] Ms [Chaudhari] moved to Singapore with [Rashmi] in [date deleted] 2006 where [Rashmi] initially held initially temporary visitor permits. When she became of school age she acquired temporary immigration status as an international student. Those international student visas have since been renewed every two years or so.

[21] In 2006 the applicants first applied in New Zealand for an adoption order. As Mr [Mhasalkar] said *"... this application went on for many years awaiting a report from CARA in India and then from Singapore*".[6]

[22] In 2008 the adoption application came before Her Honour Judge Malosi, who noted that there was difficulty in obtaining a "no objection certificate" from the Indian authorities. That difficulty was never resolved.

[23] Mr [Mhasalkar] said the focus subsequently shifted from attempts to obtain consents from India, to Singapore, both avenues were unproductive:

> The reason for this was that in an updated report from [report writer deleted] of the Central Authority of Child, Youth and Family received by the Manukau Court on 2 February 2009 it seemed that it was accepted that it was unlikely a "no objection" certificate would originate from India.
>
> It seems that no report ever eventuated from Singapore and we don't know the reasons for that.

[6] CARA is the Indian Central Authority for Hague Convention purposes which was established in 1999 as a statutory body of the Ministry of Women and Child Development Government of India.

[24] The adoption application was pursued with diligence by Mr [Mhasalkar] and Ms [Chaudhari] and by Oranga Tamariki, who went to some trouble to try and obtain information from both India and Singapore.

[25] However, on 10 February 2010 the New Zealand proceedings were struck out, evidently after Counsel to Assist expressed concern about the amount of time that the matter had been before the Court.

[26] In 2011 [Rashmi] was taken back to India and to the village of her birth by Ms [Chaudhari]. Her birth parents were absent from the village at that time, but [Rashmi] and Ms [Chaudhari] were able to meet with other close relatives, including an aunt. The experience was evidently rather bewildering for [Rashmi]. When I spoke with her by video link from Singapore she said she had relatively little memory of it. She made it clear to her mother after leaving the village that she did not have much desire to return and did not have much interest in staying in contact.

[27] Between February 2010 and December 2015 nothing overt was done by Mr [Mhasalkar] and Ms [Chaudhari] in relation to the adoption of [Rashmi]. That lacuna is uncharacteristic given the resource that they had put into their attempts to adopt [Rashmi] up to that date and the resource that they put in from December 2015 when they reapplied for a New Zealand adoption order.

[28] In December 2015, this application was filed in Court.

[29] Currently Mr [Mhasalkar] is living in New Zealand working full-time for a division of [company deleted] as a [job details deleted] and earns a salary of around $50,000 per annum. Ms [Chaudhari] is working full-time as an [job details deleted] and earns the equivalent of approximately NZ$30,000. She has [health details deleted], but otherwise her health is good, as is Mr [Mhasalkar]'s.

[Rashmi]'s Views

[30] I had the pleasure of speaking with [Rashmi]. Ms Casey QC, who has been appointed as lawyer to assist the Court, was present.

[31] [Rashmi] is well settled with Ms [Chaudhari] and extended family in Singapore. She has done well in school. She has a year of secondary school to complete and then is hoping to go to a polytechnic in Singapore, or preferably onto a tertiary institution in New Zealand. She told me she intends to study early childhood education, because she wants to be an early childhood teacher.

[32] [Rashmi] struck me as a reserved but intelligent young woman. I asked her initially if she understood what was happening and she indicated that she did. She was aware that this application was about whether a Court order could be made in New Zealand formalising her adoption.

[33] Ms Casey referred her to a remark that she had made to Dr Sarah Calvert a few years earlier, where she had said, "*I just want to feel that I belong to Mum and Dad*". She did not remember specifically making that statement, but she did say that she was not particularly worried about that issue, because as far as she was concerned her parents are her mother and father, i.e. Mr [Mhasalkar] and Ms [Chaudhari].

[34] She was asked about whether she wanted to meet her birth parents, but she said that she had no real interest in doing that. She was also asked whether she was more interested in meeting her sisters who were closer to her own age. Her response was that she was never really interested in that either, but she just thought it was cool that she had sisters.

[35] Some of her best friends in Singapore did know that she was adopted. She was asked whether it was a matter of concern to her if an adoption order was made whether her birth certificate said that she was adopted or not, and she said that she did not care about that, but "*I really want this order to go ahead*".

[36] It is clear that she regards the applicants as her real parents. She is anxious for matters to be finalised. Her uncertain adoption status and residence status have been a feature of this young woman's life for far too long now.

Home Study Reports

[37] I was aided by reports that have been prepared by Dr Sarah Calvert and Ms Kate Burke.

[38] Dr Sarah Calvert is a highly qualified and experienced clinical psychologist. She travelled to Singapore in 2018 to carry out a home assessment of [Rashmi] and Ms [Chaudhari] and she carried out a separate interview of Mr [Mhasalkar] in New Zealand.

[39] The interviews in Singapore included [Rashmi]'s extended family. In her report Dr Calvert noted that there were issues with the family communicating clearly in English. They were very much involved in the Tamil community. She noted that they lacked an understanding of the processes that were involved in formalising this adoption order. [Rashmi] was bewildered and concerned. It appeared that she feared that this Court might have the power to remove her from her parents. Dr Calvert noted:

> [Rashmi] is an intelligent and able child. However, she simply does not understand the issues involved in this report. While she knows she is adopted (that is she knows she has birth parents) she has no perception of having any family other than the one she has lived in all her life. Similarly, she knows she is 'Indian' but having grown up entirely in Singapore, with its particular form of multicultural society, she views herself as Singapore Tamil. She has no perception of herself as an 'Indian Indian'.

[40] [Rashmi] was very aware of the huge importance of the report for her as well as her parents. She understood that the outcome could well have very negative consequences for her as well as her parents and she felt she was somehow to blame. [Rashmi] did not grasp the reason why such emphasis was placed on her views because her views seemed self-evident to her. Asked if she would have chosen to speak to the Judge if that was possible she said (shyly) she would just like to tell him that "*These are my parents and I want to live together with them in New Zealand*".

[41] [Rashmi] said:

> My family is not together… I do not understand why we are not allowed to be together where my parents want to be.

[42] She said:

> But I have always been with them, they are my parents … This is my family … My mother said they went to the temple and I am their child.

[43] When Dr Calvert asked her to think about having another family, she thought about that family as if they were part of her Tamil community and then became quite distressed and told Dr Calvert:

> It is because of me that my parents are not together as they should be … I do not understand that at all … Why do people in New Zealand not think we are a family?

[44] She told Dr Calvert that she does not want to have contact with her biological family. She was curious and interested to see photos of them.

[45] It is also apparent that she is unaware of her precarious immigration status in Singapore.

[46] Dr Calvert concluded her observations of [Rashmi] by saying:

> There is an underlying sadness in [Rashmi] which is, in my opinion, associated with her understanding that it is something about her that has led to her family situation being as it is. In my view this means that the legal proceedings and stalemate which surrounds her is a child welfare and wellbeing situation. [Rashmi]'s psychological wellbeing is impacted by the way that New Zealand and Indian authorities view her. She said, "I just want to feel that I belong to Mum and Dad… no that's not right… it's like you are saying I don't belong to them and you will take me away from there… Where would I go?... they are my mother and father".

[47] Dr Calvert went on to interview the applicants at some length. Her overall assessment of both of [Rashmi]'s "parents" was positive. She noted great pride in [Rashmi]'s recent coming of age ceremony. The entire family was happy that Mr [Mhasalkar] had been able to travel back to Singapore to that very significant cultural occasion. She noted that the family had been able to fund the extensive and expensive legal process with the help of family, but they considered themselves to be in an adequate financial position.

[48] She had little hesitation in concluding that they were "fit and proper" parents to adopt.

[49] At paragraph 8.1(4) Dr Calvert opined:

> It's difficult to see how [Rashmi]'s welfare is being promoted by the refusal to find a way through the legal difficulties posed in this case. She faces a very uncertain future if her adoption in New Zealand does not proceed. Her parents cannot live together (with her) in New Zealand or in Singapore and she is not a citizen of Singapore and cannot be adopted there in any case. Her parents are not Indian.

[50] If [Rashmi] was required to return to India she would be a young woman without a dowry and without the supports to ensure she has adequate protection within that society. Her biological parents, who she does not have any relational connection to, cannot care for her. She said in closing:

> The legal difficulties have left [Rashmi], the vulnerable child whose welfare is to be protected, to feel she has done something wrong to lead to this situation.

[51] That is a sad conclusion which weighs in my decision.

[52] Ms Kate Burke is a registered psychologist, who also possesses an impressive level of expertise and experience. Ms Burke travelled to the village of [Rashmi]'s birth, [village deleted], in [state A]. She was able to contact and spend considerable time with [Rashmi]'s birth parents, Mr and Ms [Kulkarni], with other family members and with the midwife/matron from the nursing home where [Rashmi] was born.

[53] While there were difficulties with communication she was able to share photographs of [Rashmi] with the parents and wider family. There was an atmosphere of joy and excitement. Ms [Chaudhari] was then contacted by telephone in Singapore and the family crowded round and spoke with her and with [Rashmi].

[54] Mr and Ms [Kulkarni] had two daughters born prior to [Rashmi]'s adoption in 2004, but no further children. Mr [Kulkarni] is the main income earner. Both parents worked as [job details deleted] at the time of the adoption in 2004. Ms [Kulkarni] continues to work as an [job details deleted] and earns 50 rupees per day, which is the equivalent of about NZ$1.10. Mr [Kulkarni]'s capacity for employment has decreased through [health details deleted]. There is no reliable income that he can derive. They survive with support from the family members. She noted that they are and remain within the definition of poverty.

[55] [Rashmi] was born in what in India is termed as a nursing home where midwives provide services. There was no charge for the hospital cost. The family said that they have not been approached by anyone regarding an adoption of the child. They discussed their economic situation and decided they would not be able to raise and provide for a third child, particularly if it turned out to be a female child with the expectations that would involve in terms of dowry and long-term costs. Members of the family spoke with the midwife to ask if a family could be found to take the baby. They did not undertake gender testing prior to birth and were not able to. The decision to give the child up for adoption was made simply because they could not afford to do otherwise.

[56] The costs of the deed and Court adoption were met by Mr [Mhasalkar] and Ms [Chaudhari]. Mr and Ms [Kulkarni] were not in a financial position to pay. They are both illiterate, however, they presented to Ms Burke as intellectually capable and thoughtful individuals who had made an independent decision to look for an alternative family for the child they were expecting. They thought adoption was the best pathway for them to take.

[57] They were initially overwhelmed to receive news of their daughter and emotionally moved by pictures of them. However, Ms Burke noted:

> Both parents expressed to me the view that they were not wishing for any change in their relationship with [Rashmi] and her family. While I observed that they were visibly elated to have news of and speak to [Rashmi] whilst I was at their home.

[58] In her report Ms Burke addressed the principal features of the Hague Convention, including the fact that the best interests of the child are paramount, and the procedures outlined in order to protect against child trafficking and to provide greater security, predictability and transparency for all parties to adoption. She noted the issues that would have been addressed in a report by CARA. Those considerations were:

(a) The child is adoptable;

(b) After due consideration has been given to the possibilities for adoption within the state of origin and intercountry adoption is in the child's best interests;

(c) That the persons whose consent is necessary have been informed of the effects of their consent and in particular whether the adoption will result in the termination of the legal relationship between the child and their family of origin;

(d) That their consent has been given freely, given in the required legal form and expressed through evidence in writing; and

(e) That the consents have not been induced by payment or compensation of any kind and had not been withdrawn.

(f) That the consent of the mother has been given only after the birth of the child.

[59] From the information she gathered in the interview and her research on the religious and cultural understandings of the parties involved she formed an opinion that all of those requirements were met in relation to the adoption of [Rashmi]. [Rashmi]'s parents under Indian law were entitled to give [Rashmi] for adoption and thus she was adoptable.

[60] While those issues are matters for this court to determine, the information Ms Burke obtained is valuable in my assessment of the issues.

[61] She addressed the understanding of the birth parents of the consequences of giving [Rashmi] for adoption, and of the fact the adoption would result in the termination of their legal relationship with [Rashmi]. She noted their direct description to her in interview of their decision-making process and that this was acted on only after the child was born. I find there is evidence establishing free and informed consent including the deed and the subsequent order of adoption.

[62] She stated in conclusion that her opinion was that this was a genuine and ethical adoption which fulfilled the intentions of the Hague Convention rules, despite it not occurring as a formal process through CARA. It was entered into freely, with mutual respect and benefit. The lack of sophistication in managing the intricacies of the intercountry adoption rules in her view was most likely the cause of the difficulties the applicants have had in being able to provide [Rashmi] with a two-parent home in New Zealand.

The Law

[63] In *Norman v Attorney-General*[7] Doogue J listed the three ways in which an adoption with an international dimension can be given effect in New Zealand as follows:

> [27] First, if the child's country of origin is a signatory to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("the Hague Convention"), an intercountry adoption can occur in accordance with the provisions of the Adoption (Intercountry) Act 1997 (AIA) …
>
> [28] Second, s 17 of the Act provides that an adoption that occurs outside of New Zealand according to the law of that place will have the same effect as an Adoption Order validly made under the Act. This does not generally apply to Adoption Orders made in Hague Convention countries if the adoption is by a person habitually resident in New Zealand.
>
> [29] Third, if the child's country of origin is not a signatory to the Hague Convention, a person can apply for an Adoption Order pursuant to s 3 of the Act. …

[64] The objects and principles of the Hague Convention are central to my decision. Relevantly the objects are:[8]

> … to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child; to prevent the abduction, sale of or traffic in children; and to secure the recognition of adoptions made in accordance with the convention.

[65] Equally central are the principles and objects of the United Nations Convention on the Rights of the Child (UNCROC). That treaty recognises the need to take

---

[7] *Norman v Attorney-General* [2020] NZHC 336.
[8] *Norman*, above n 8, at [31].

measures to prevent the illicit transfer and non-return of children abroad and also specifies rights that apply in the adoption context.[9] Article 3.1 places the best interests of the child as the primary consideration in all actions concerning the child. Article 21 addresses inter-country adoptions, recognising that they may be considered as an alternative means of care while requiring measures to be taken to prevent improper financial gain arising. International agreements are encouraged to ensure placement for adoption is carried out by competent authorities.[10]

[66] The Hague Convention does not apply if the habitual residence of the child is not in one of the contracting states of the convention at the relevant date. In that situation the case can be treated as if it were a domestic adoption.[11]

[67] What does "habitually resident" mean and what is the "relevant date"?

Habitual Residence

[68] Habitual residence is a question of fact in every case. One of the leading decisions is *Punter v Secretary for Justice* where it was noted that:[12]

> The Hague Conference has consistently resisted laying down rules or principles by which habitual residence is to be tested to ensure it remains a broad question of fact.

[69] Glazebrook J noted in *SK v KP* that:[13]

> Habitual residence has been described as particularly suited to the family law context as it is a factual concept and thus has the flexibility to respond to modern conditions, which is lacking in the concepts of domicile or nationality…

[70] *Punter* and *SK v KP* discuss the issue of habitual residence in the context of child abduction cases. In the context of intercountry adoption cases the legal principles

---

[9] *Norman*, above n 8, at [32].
[10] Other key provisions include; the recognition in the preamble that the child should grow up in a family environment, in an atmosphere of happiness, love and understanding; article 8 emphasising the child's rights to their identity including nationality; article 9 protecting the child's relationship with their parents; article 10 requiring swift and humane disposition of applications for family reunion; article 11 requiring measures to be taken to prevent the illicit transfer and non-return of children abroad; article 12 requiring the child's views to be heard and given due weight and; article 21.
[11] *Re Wipu* [2015] NZFC 6001 at [11].
[12] *Punter v Secretary for Justice* [2004] 2 NZLR 28 (CA) at [3].
[13] *SK v KP* [2005] 3 NZLR 590 (CA) at [71].

lying behind the phrase "habitually resident" were discussed by Judge Turner in *Mitchell v Ketut*.[14] Under the heading "Legal Principles" he said:[15]

> The phrase "habitually resident" is not defined in the legislation. It is a factual inquiry, to be decided by reference to all of the circumstances of the case under consideration. It has been said that the phrase has "no particular legal magic. It is to be construed in the ordinary meaning of the words. The essence of 'habitual' is customary, constant, continual. The opposite of that is casual, temporary, or transient.

[71] Ms Abernethy referred me to four other cases, which she said together with *Mitchell v Ketut* constituted the five most relevant cases for this Court to consider in this case.

[72] In *Re the Adoption of P*[16] the child had come to New Zealand after an Indian adoption by her aunt and uncle. The adoption placement broke down and two years later while still living in New Zealand and she was sent to live with another aunt and uncle, also resident in New Zealand. They applied to adopt *P* under the Act. Judge Somerville had to address the implications of the Hague Convention which had been adopted by India in 2003. The Judge noted that for the convention to apply three elements had to be established:[17]

> (a) The child must be habitually resident in the state of origin which is India in this case;
>
> (b) Either the child must be being adopted in India by spouses or persons habitually resident in New Zealand; or
>
> (c) Being moved to New Zealand for the purposes of such an adoption in New Zealand.

[73] If any of those elements were not established the Convention did not apply and the adoption is approached in the same manner as if it is an adoption from a non-Hague Convention country, but it was still appropriate to apply *"the philosophy of the Convention".*[18]

---

[14] *Mitchell v Ketut* [2016] NZFC 6175.
[15] At [20].
[16] *Re Adoption of P* [2005] NZFLR 865 (FC).
[17] At [12].
[18] At [13] citing re MC 26/7/94, Fraser J, FC Palmerston North FAM-2003-054-767/768.

[74] Judge Somerville referred to Glazebrook J's statement in *Punter v Secretary for Justice:*[19]

> No definition of habitual residence has ever been included in a Hague Convention; this has been a matter of deliberate policy, the aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems. In those contexts the expression is not to be treated as a term of art but according to the ordinary and natural meaning of the two words it contains.

[75] Judge Somerville noted that using the provisions of the AIA had been considered but a child study report or No Objection Certificate (NOC) from CARA was never going to become available. The Hague Convention protocols, although on the face of it applicable, were non-functional.

[76] The Judge considered that although *P* had only been in New Zealand for three years, and only with the applicants for 18 months, her habitual residence was in New Zealand. The Judge found that therefore the AIA did not apply.[20]

[77] In the *Re Adoption Application by KGC and TGC*[21] in *KGC* Judge Hikaka was dealing with applicants who had made false statements to New Zealand Immigration in order to gain entry of Philippine born children to New Zealand on visitors permits, when really they were intending to adopt them. In considering when the appropriate time was to determine habitual residence, His Honour noted:[22]

> [56] … When a child is moved from country of origin to a receiving country in what might be found to be deliberate contravention of the Intercountry Adoption Convention then the time to asses habitual residence may be close to the time referred to (namely immediately before the time of removal) by Her Honour Glazebrook J.
>
> [70] Accordingly, the date to determine habitual residence is set following an objective assessment of the circumstances. The time itself must be **when intention crystallises in an action**. (emphasis added)

[78] The Judge in that case decried those who in his view "*would be acting inconsistently with and in breach of the objects of the Convention*" by removing a child from their state of origin to spend time in another country for the ultimate purpose of

---

[19] At [27] citing *Punter*, above n 7, at [63].
[20] At [33].
[21] *Re Adoption Application by KGC and TGC* [2007] NZFLR 851 (FC).
[22] At [56] and [70].

adoption. He thus decided that the date to determine habitual residence was the date of their arrival in New Zealand.[23]

[79] In *Re Application by PHB*[24] a Thai child aged about nine had been brought to New Zealand by her Thai mother in anticipation of the mother's marriage to a New Zealand citizen. The mother died about a year after arrival in New Zealand and the widower applied to adopt the child under the Adoption Act with the agreement of the Thai family. Judge Ullrich QC said:[25]

> It is clearly of paramount importance that as a contracting state under the Convention, New Zealand must abide by its terms. It would severely prejudice international relations if New Zealand were to flout any terms of the Convention.
>
> It is equally important that the terms of the Convention are not extended beyond the strict scope of its terms. To do so would be an infringement of the Sovereignty of New Zealand.

[80] The Judge noted that the object of the Convention on Intercountry Adoption is to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect to the child's fundamental rights as recognised in international law.[26] Judge also noted:[27]

> In intercountry adoption cases, the precipitating event is the forming of the intention to adopt.

[81] The Judge went on to say that the purpose or intention to adopt can arise after the child has left the state of origin but may not be connected with departure from the state of origin.

[82] The Judge ultimately found that although the settled purpose of the deceased wife of the applicant was to reside permanently in New Zealand with the child, the child had not been brought to New Zealand for the purpose of adoption. That purpose only arose after arrival.

---

[23] At [70] and [71].
[24] *Re Application by PHB* FC Blenheim FAM-2010-006-000223, 22 June 2011.
[25] At [55]-[56].
[26] At [86].
[27] At [91].

[83] The fifth relevant case cited was *Re Tolbert (Adoption)*.[28] New Zealand citizen applicants applied to adopt the applicant wife's nephew. The child had come to New Zealand from the USA in the company of his birth mother and his aunt, who was one of the applicants. The intention to adopt was formed during the gestation of the pregnancy. The family considered it to be a whangai arrangement.

[84] Judge Walsh in that case referred to *Re PHB* and *Re KGC and TGC* and in reliance on those decisions found that the appropriate time to determine habitual residence is when the child leaves the state of origin.[29]

[85] However, the Judge nonetheless reasoned that the biological link between the birth and adoptive parents and the overlay of the whangai nature took it outside the terms of the AIA.

[86] In three of the five cases above the children were found to be habitually resident in New Zealand as a result in part of the Court taking account of the best interests of the children and policy reasons as to why the application should be exempted from the AIA. In *Mitchell and Ketut* the attempt to adopt under the Act was unsuccessful as an overseas adoption which was to be recognised under s 11 of the AIA had been made and the process under the Act was redundant. The *KGC* case was an outlier where the mendacity of the applicants to various Government agencies implied a calculated evasion of the Convention in order to progress an interfamilial adoption and policy reasons of Convention compliance led the Judge to decide that the children were habitually resident in law in the contracting state of original, namely the Philippines.

The Implications for [Rashmi]

[87] The decisions analysed above all turn on a detailed analysis of the relevant facts in each case.

---

[28] *Re Tolbert (Adoption)* [2015] NZFC 10288.
[29] At [23].

[88] The principle that emerges is that in deciding whether the child is habitually resident in a contracting state or not, the relevant time to be considered is the time when "*following an objective assessment of the circumstances*" an intention to adopt crystallises in an action. In other words, it is not enough that there is a subjective privately held intention to adopt. The Court must find the point at which the adoptive parents take a step which manifests or evidences an intention to adopt. Usually that step will be one of the material steps on the way to an adoption, such as leaving the child's country of birth or origin or taking some formal step towards an adoption application.

[89] The significant events that might manifest intention to adopt in this case include:

(a) The execution of the adoption deed in India on 30 December 2004. [Rashmi] was [less than one year] old then. [Rashmi] was living in India with her mother at the time.

(b) The confirmation of the deed of adoption by Court Order on 28 February 2006. Again, [Rashmi] was living in India with her adopted mother at that time.

(c) The July 2006 application for an order in New Zealand under the Adoption Act 1955. At that time [Rashmi] was living in India.

(d) December 2015 when the applicants filed a fresh application to adopt in the Auckland Family Court. [Rashmi] by that time had been living with her adoptive mother in Singapore for almost 10 years. Her adoptive father was living in New Zealand and travelling to Singapore when he could.

[90] Because I am considering whether the AIA and hence the Hague Convention applies, the manifest steps that crystallises intention into an action generally relate to an attempt to formalise the adoption in New Zealand.

The Crystallising Event

[91] I find on balance of probabilities that the adoption events that occurred in India, which evidently included a traditional Temple ceremony, were not part of or did not manifest an intention by the applicants to commence an intercountry adoption process. They were instead attempting to adopt [Rashmi] legitimately using Indian laws and customs.

[92] If the relevant crystallising action was the July 2006 application to adopt [Rashmi] filed in the New Zealand Court I find that [Rashmi] was at that date still habitually resident in India and I would not have jurisdiction under the Act.

[93] However, as noted above, in 2010 the New Zealand adoption proceedings were struck out. The applicants submitted that between 2010 and 2015 with no adoption proceedings in train there was *"an interregnum which broke any settled purpose of moving to New Zealand for the purposes of adoption"*.

[94] I find on balance of probabilities that by 2015 [Rashmi] was settled in Singapore with her mother. That was her habitual residence. Indeed, given her young age when she arrived there and the time that she had spent there it was probably the only home that she had really known.

[95] The Court does not have evidence as to why there was this "interregnum" or lack of action for almost six years.

[96] However, I conclude that they did abandon their intention to pursue the New Zealand adoption in 2010. If they had not done so they would surely have sought to promptly reinstate the application. They had otherwise committed significant resource to that application and when they filed their new application in December 2015 they committed significant resource to that application as well. I find, on balance of probabilities, that first application in New Zealand under the Act is not the relevant crystallising event.

[97] The applicants urge me to conclude that it was the filing of this New Zealand adoption application in November 2015 that is the crystallising event. If that is right, then given that I have found that [Rashmi] was habitually resident in Singapore at that date, and given that Singapore is a non-contracting state, this application can proceed.

Oranga Tamariki's Position

[98] Ms Bird, acting for Oranga Tamariki, argues against such a finding being made. She argued that "*all four corners of the foundation of the Hague Convention on Intercountry Adoption need to be preserved*".

[99] Ms Bird first set out the procedure that was required in order to comply with the Hague Convention. She noted that under s 10 of the AIA approval was required from the New Zealand Central Authority (NZ Central Authority). She conceded that approval had been retrospectively granted by NZ Central Authority on 12 February 2019.

[100] A key issue she said was the absence of a certificate of approval from CARA in India, which is required under s 11 of the AIA. She relied on the Court of Appeal decision in *U v Attorney-General.*[30] That decision confirmed that recognition of an overseas adoption order which was within the scope of the Hague Convention could only be determined by compliance with the convention and the requirements of the AIA.

[101] She accepted that this adoption prima facie is not "*manifestly contrary to their (India's) public policy*" noting that CARA in India had appeared willing to try to retrospectively validate the adoption, which appeared to be an indication that on its face the adoption was not contrary to their policy. She said however, that central to the Ministry's concerns was the floodgate effect:

> If the definition of habitual residence strays from Judge Hikaka's strict test to evolve from India to Singapore, every would-be applicant it is submitted, has an instant loophole to evade the restrictions of Hague countries for overseas adoption.

[30] *U v Attorney-General* [2012] NZCA 616, [2015] 2 NZLR 115.

Discussion

[102] In the *KGC* case the Judge was dealing with adoptive parents who had deliberately set out to bring children to New Zealand for the purposes of adopting them while concealing that purpose and actively deceiving the New Zealand Immigration Authorities.

[103] I do not find that there has been any intention to deceive by the applicants in this case. To the contrary I find they have done what they could at every stage to comply with their understanding of the relevant legal requirements including a traditional adoption, an adoption by deed and an adoption by Court in India, and two applications to the Family Court in New Zealand.

[104] I do not find that the decision by Ms [Chaudhari] to travel with [Rashmi] to Singapore to live was part of any scheme or intention to gain settled residency in a non-Convention state, so the provisions of the Hague Convention did not apply at that time. It is apparent that the applicants then had no concept of the provisions or implications of the Hague Convention. Evidently, counsel who then acted for them in New Zealand were equally unaware because they proceeded to file an application in the New Zealand Courts which evidently did not address the Hague Convention concerns at all.

[105] A key difference between the proposed adoptive parents in this case and in *KGC* is my finding there has been no attempt to conceal or deceive.

[106] Unlike the applicants in *U v Attorney-General* these applicants are not seeking to have the overseas adoption recognised under the AIA.

[107] Ms Bird rightly emphasised the importance of New Zealand's treaty obligations and the need for this Court to honour and uphold those treaty obligations. However, this Court also has obligations to [Rashmi] under the United Nations Convention on the Rights of the Child. [Rashmi]'s welfare and best interests are paramount and will not be met if I find that I have no jurisdiction in this matter. Indeed, such a finding would be potentially highly adverse to her interests.

[108] In her helpful submissions Ms Casey suggested that the floodgate risk was more perceived than real, noting:

> (a) The evidence of Dr Calvert and Ms Burke which the Ministry had not challenged, which established among other things that the adoption of [Rashmi] in India was entirely consensual with no element of trafficking or reward and with no element of dishonesty or gain on the part of the adoptive parents.
>
> (b) There are unlikely to be many prospective parents who would be willing to sustain such a long period of separation from the intended place of residence or from each other.
>
> (c) The culture of [Rashmi]'s birth community was being preserved and there was no evidence of trafficking or lack of consent.
>
> (d) The applicants were suitable to adopt and Oranga Tamariki now accepts that there was no fraud or illegal intent on their part.
>
> (e) At some point intercountry adoption principles should give way to [Rashmi]'s right to a family life as well as a right to share the nationality of the couple she loves and identifies as her parents.
>
> (f) Pragmatism should trump a floodgate argument. The Convention will no longer apply to [Rashmi] when she turns 18 in 2022. The Adoption Act continues to apply up to the age of 20 and at that point [Rashmi]'s habitual residence would be irrelevant. However, it cannot be in [Rashmi]'s interests to force her to wait another three years or more with her highly uncertain immigration status in Singapore in place and with her family being forced to live apart for that time.

Intention to Adopt: Decision

[109] Ms Casey noted that after the original New Zealand application was struck out in 2010, Mr [Mhasalkar] proceeded to invest in his life in New Zealand by perfecting his status here as a citizen.[31] That led to a divergence where Ms [Chaudhari] and [Rashmi] are effectively stuck in Singapore while Mr [Mhasalkar] must remain in New Zealand to work. There was a change in circumstances between 2010 and 2015 which was sufficiently significant to enable them to file a new application to adopt and to some extent that is evidenced by the decision that Judge Maude made on 24 June 2016 when he said:

---

[31] This may have been the result of misguided legal advice. The change in his status did not positively affect the prospects of success in this application and was otherwise unnecessary. His right to work and live in Singapore was lost as a result.

> I have considered the changed circumstances asserted since the strike out of the applicants first application to adopt. Leave granted for new application to progress.

[110] I agree with Ms Casey that in this case the rights of [Rashmi] as an individual child should not be subservient to the principles of the Hague Convention. I find in this potential clash between the principles and the Hague Convention and the requirement that I protect and preserve [Rashmi]'s welfare and best interests under the UNCROC, it is the Hague Convention that must yield.[32]

[111] However, it is only because of the highly unusual, indeed I would think unique, circumstances in this case. They include:

(a) The length of time that [Rashmi] has been with the applicants as their child;

(b) The length of time that she has been resident in Singapore, a non-Convention country;

(c) The fact that there has been nothing resembling trafficking, no attempt to deceive and no attempt to illegitimately claim advantage;

(d) There is no reasonable alternative. Resort cannot be had to the provisions of the Hague Convention because it has become evident through two significant attempts and a considerable passage of time that CARA in India either will not or is unable to provide the assistance required, even in the form of a NOC. There is no retrospective ability to correct matters in this case. Alternatives were available in at least four of the five key decisions considered above. There are none here;

(e) In this case there has been an adoption process in India, indeed three processes – the Temple ceremony, the deed and the Court order. A genuine attempt was made within the country of birth, I find in good faith, by these applicants to transfer parentage. That process was so

[32] Given I find the objects of the Hague Convention were not breached here, there may well be no actual conflict between the two treaties principles.

regulated that it generated a birth certificate showing Mr [Mhasalkar] and Ms [Chaudhari] as [Rashmi]'s birth parents;

(f) The fact that we now have adopting parents whose only practicable option for reuniting this family appears to be for an order to be made under the AIA; and

(g) Finally, Oranga Tamariki are otherwise comfortable with this family and this application.

[112] As Ms Casey submitted, a Convention that is designed to protect children need not be so strictly construed or applied as to effectively punish or harm a child. To uphold the cornerstones of the Convention at all costs as I was urged by Ms Bird, might not actually be punitive but it would be perceived by [Rashmi] as punitive. I am particularly concerned by the fact that [Rashmi], when interviewed by Dr Calvert, did not understand the process and felt responsible for the position that she and her parents were in.

[113] I therefore find that in the unique circumstances of this case, following an objective assessment of the circumstances, the intention to adopt [Rashmi] crystallised when the second application was filed in New Zealand in November 2015 and [Rashmi] was resident in a non-contracting state at that time. I have jurisdiction to proceed.

Approach to be Followed

[114] Having made that decision the authorities establish that I should nonetheless pay due regard to the requirements of the Hague Convention. In particular, I should be satisfied that the child is available for adoption, that it is in her best interests and that her wishes have been consulted.[33] There must be no element of trafficking involved and I must find a genuine parent child relationship was intended.

---

[33] *Re Application by LIM* FC Porirua FAM-2008-091-000629, 18 October 2001; *Re Chung (Adoption)* [2015] NZFC 7754 at [42]; *Re SN* [2012] NZFC 9705 at [3]; *Re Application by Teaupa* [2016] NZFC 6920, [2017] NZFLR 89 AT [13].

[115] I am satisfied from the report of Ms Burke that [Rashmi] was available for adoption. I find there is no element of trafficking here. A genuine parent child relationship is well established. [Rashmi] is beloved, safe and thriving.

[116] I am satisfied from the material in Ms Burke and Ms Calvert's reports, from my discussions with [Rashmi] and from the evidential material filed by the applicants, that it is in her best interests that this application proceeds. Her wishes have been consulted and it is clear this is something that she very much wants and indeed needs to happen.

Consent

[117] We do not have the formal consent of [Rashmi]'s birth parents. However, I accept that the Temple ceremony, the deed that was executed in India, and the Indian Court Order are all clear evidence that [Rashmi]'s parents did consent to this adoption occurring. I can also be satisfied that it is likely that they still consent or have not withdrawn their consent given the contents of Ms Burke's report. Her birth parents were delighted to hear news of their daughter and were evidently very happy to find life had gone well for her.

[118] In the absence of formal consent, I have to decide under s 8(1)(a) of the Adoption Act 1955 whether consent can be dispensed with:

> **8 Cases where consent may be dispensed with**
>
> (1) The court may dispense with the consent of any parent or guardian to the adoption of a child in any of the following circumstances:
>
> (a) if the court is satisfied that the parent or guardian has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child; and that reasonable notice of the application for an adoption order has been given to the parent or guardian where the parent or guardian can be found:

[119] The language in s 8(1)(a) "*abandoned, neglected, persistently failed to maintain* …" is somewhat pejorative for the situation that we are faced with here. However, in a non-pejorative sense of the word, [Rashmi]'s birth parents have

"abandoned" their daughter to Mr [Mhasalkar] and Ms [Chaudhari] by entrusting them with the future care of their daughter. Overseas adoption orders can form the basis of a dispensation of consent from the birth parents using this section as confirmed in *Re Chung (Adoption)*.[34] There, a Korean adoption formed the basis of dispensation with the consent of the birth parents. Similarly in *[R] v New Zealand Central Authority*[35] a Thai adoption order had been made.

[120] Judge Walker in *GI v PAI*[36] placed weight on the birth mother's initial consent to a Russian adoption to satisfy herself that there had been consent to an adoption order in deciding to dispense with the mother's consent.

[121] In this case, in reliance upon s 8(1)(a) of the Adoption Act 1955 I find the need for formal consent can be dispensed with.

[122] I am otherwise satisfied that all of the requirements of the Adoption Act are met. Section 3 of the Act enables the applicants to make this application jointly. They are spouses. Section 4 of the Act is satisfied. The applicants are over 25 years of age and are both at least 20 years older than [Rashmi].

[123] The extensive information that is before me including the reports of Ms Burke and Ms Calvert, satisfy me that the applicants are fit and proper persons to have the role of providing day to day care of [Rashmi] and have the ability to bring her up and maintain her. They have both shown themselves to be honest, diligent and hardworking.

[124] It does not appear that any conditions as to religious denomination or practices have been stipulated but it is of considerable comfort to note that [Rashmi] has been and will continue to be raised in the Tamil community, whether that occurs in Singapore or in New Zealand.

---

[34] Above n 27.
[35] *[R] v New Zealand Central Authority* [2017] NZFC 516.
[36] *GI v PAI* [2013] NZFC 2983.

[125] The adoption order that is sought today has important implications for [Rashmi] and for her family who may at last be able to live together with a real sense of security.

[126] I also have to consider whether this order should be an interim order or final order. I can only make the order final if special circumstances are made out. There are a number of cases which have been decided in similar circumstances where special circumstances have been found. In *Re Tagioalisi (Adoption)*[37] Judge Pidwell described the purpose of an interim order as:

> [19] … to test the bonding and establishment of a relationship with a child and to enable the social worker to provide ongoing monitoring.

[127] In this case [Rashmi] has already been in the care of her adoptive parents for 15 years. I note from another reported case *Adoption Application by B*,[38] the decision whether to make a final or interim order essentially involves a balancing exercise where the matters to be considered include providing a sense of permanency and the stress that is associated with uncertainty, which is to be weighed against the benefits of the social work overview that can occur during the interim period.

[128] I find in this case that it is appropriate to make a final order. If the purpose of an interim order is generally to test the bonding and establishment of a relationship with a child, then it is clear in this case all the testing that is necessary has already been done.

Orders

[129] I make a final adoption order in favour of the applicants for the female child [Rashmi Mhasalkar] born on [date deleted] 2004 at [the Nursing Home] in [state A] India.

[130] The name of the child for the purposes of re-registration of her birth shall be [Rashmi Mhasalkar].

---

[37] *Tagioalisi (Adoption)* [2015] NZFC 2319.
[38] *Adoption Application by B* [2007] NZFLR 399.

[131] The words adoptive parent shall not appear on any certified copy of the birth certificate.

[132] The parties have leave to apply for any incidental directions or orders to give effect to this decision within 14 days of this decision.

Signed at Auckland this 3rd day of August 2020 at am / pm

K Muir
Family Court Judge