IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: **2 OF 2016**

BETWEEN: **SEAN**

And

BRENDA

APPELLANTS

AND: **KERRY**

RESPONDENT

AND: **RAUL**

INFANT

AND: **THE SOCIAL WELFARE DEPARTMENT, SUVA**

GUARDIAN-AD-LITEM

Appearances: *Ms. Tikoisuva for the Appellants.*

Date / Place of Judgment: *Wednesday 13 February 2019 at Suva.*

Coram: *The Hon. Madam Justice Anjala Wati.*

JUDGMENT

A. Catchwords

Adoption of Infants Act 1944 – Application made under the Act for adoption and refused on the grounds that the applicants are not resident in Fiji – Appeal arising under s. 6(4) of the Act – the term "resident" within the meaning of the Act, denotes some degree of permanence, and while it does not necessarily mean that the applicants have their home in this country, it means that they have their settled headquarters here.

B. Legislation

The Adoption of Infants Act 1944 ("Adoption Act"): s. 6(4).

C. Cases

Re Adoption Application No. 52/1951 (1951) 2 ALL ER 931.

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1. The appellants had made an application for an order for adoption of the infant in their favour. The application was refused on the basis that the appellants were not resident in Fiji as required by s. 6(4) of the Adoption Act.

2. The appellants appealed the decision of the Magistrates' Court on the grounds that they are resident in Fiji and not anywhere else. The only issue therefore that arises from the appeal is the finding of fact on whether the appellants were resident in Fiji.

3. In form of brief background, the parties were married on 14 November 2008. They do not have any children of their own. They have always had the desire to adopt a child. They are citizens of Australia but living in Fiji since 2013. They have now lived in Fiji for more than 5 years. They work in Fiji.

4. The infant was born in August 2014. His teenage mother, the respondent, had abandoned him at the Colonial War Memorial Hospital immediately after his birth.

5. In May 2014, the appellants applied to the Social Welfare Office to be considered as foster parents. The Infant was therefore placed in the care of the appellants since 1 November 2014 when the child was not even 3 months old. Since then, the child has been in their placement for now about 4 years and 3 months. The report by the Social Welfare Department and my observation has revealed an unbreakable bond between the child and the appellants.

6. The court and the appellant's counsel have correctly relied on the case of ***Re Adoption Application No. 52/1951 (1951) 2 ALL ER 931*** to find the definition of the term ***"resident".***

7. This case indeed has similar facts to that in ***Re Adoption Application No. 52/1951 (1951) 2 ALL ER 931*** to the extent that the foster parents in that case were from England but at the time of the application were in Nigeria because the applicant husband had his work in Nigeria. The issue before the Court was whether the applicants were resident in England or in Nigeria where the husband applicant worked and the wife accompanied him.

8. In this matter also, the issue before the Court is whether the applicants are resident in Fiji where they work and have lived for over half a decade and consider this country to be their home. I will answer this in due course. Let me first outline the facts of the case identified in paragraph 9 above. It is better that I cite the facts as recited in the matter:

"An application for an adoption order under the Adoption Act 1950 was made by a district officer in the colonial service and his wife. The husband's work involved him being permanently in Nigeria, except for three months' leave every fifteen months when he returned to England, his native country. The wife lived with the husband in Nigeria, returning to England with him when he came on leave. They usually stayed with his or her parents while in England, but they had recently purchased a house in England and they intended to live here permanently after the husband's term of service should come to an end, which, in the normal course, would be after seven years. Wishing to adopt an infant, they arranged with an adoption society for it to be put in their care when they returned to England in July, 1951. The application for the adoption order was made by the wife after the infant had been in her care and possession for three months, as required by s.2(6)(a) of the Act of 1950, the husband having been obliged to return to his duties in Nigeria. The wife intended to join the husband in Nigeria, taking the infant with her, as soon as possible after obtaining the order".

9. On the question of whether the applicants were resident in England, Justice Harman said:

"Counsel for the infant suggests that the applicant must not only be resident here, but must have no immediate intention of being resident elsewhere. It is a striking fact that a child which is adopted does not become a ward of court, nor is the court bound to make any conditions whatever about where the child shall reside in the future. Having satisfied itself that the adopters are suitable persons, that they have the means, and, I suppose, the accommodation, which is likely to lead to the child's advantages, the duty of the Court is finished. Counsel for the applicant contends that it does not in the least matter if the applicant goes abroad immediately after the order is made. As a matter of merits, of course, it matters very much. As a matter of jurisdiction, I think it does not matter. One must be able to postulate at the critical date that the applicant is "resident", and I think that is a question of fact. "Resident" denotes some degree of permanence. It does not necessarily mean that the applicant has a home of his own but it means that he has his settled headquarters in this country. It seems to me dangerous to try to define what is "resident". It is very unfortunate that it is not possible to do so, but, in my judgment, the Court must ask itself in every case: Is the applicant resident in this country? In the present case, when I ask myself that question in respect of the wife, I can only answer: "No. She is merely a sojourner here during a period of leave. Like

her husband, she is resident in Nigeria where his duties are and whither she accompanies him, in pursuance of her wifely duties". I do not think that the applicants in this case are residents in England at present, although they may be hereafter..."

10. On the facts of the case and based on the principles of law, I find that the Court below erred in making a correct analysis of the facts to determine whether the appellants were resident in Fiji.

11. The parties have been living in Fiji since 2013. The second named appellant, Ms Wiseman was offered to work in Fiji with a trade program which is funded by Australian DFAT and NZ MFAT from September 2013.

12. Subsequently she was granted an exemption by the Fiji Immigration to work in Fiji. Her initial contract term was until June 2017 which was renewed beyond that period. I have to take into consideration the new evidence before me that the term has been extended and the appellants are still in Fiji and working here.

13. Ms Tikoisuva has asked me to take into consideration the fresh evidence sought to be adduced pursuant to a motion filed by the appellants on the aspect of the extension of the contract.

14. The evidence on the extension of the contract was not produced in the Magistrates Court because at the time of the hearing, concerns surrounding the same had not been raised by the lower Court. However, the period of the contract was also used to determine whether the appellants were resident in Fiji.

15. I find that if the information was relevant, the court ought to have asked the appellants to address the concern. This opportunity was not allowed to the appellants and a finding was made against them. On that basis, I find that it was prejudicial to the appellants and the child in dealing with the matter without the correct information being placed before the court.

16. I will have regard to the extension of the contract matter because that is incontrovertible evidence and is material information which could have been produced if required although it was not available at the time of the hearing. If the correct information was provided, the lower court would not have arrived at the conclusion it did in determining the issue.

17. Due to the work and the period the appellants were required to be in Fiji, they sold their home in Australia for over half a million dollars and shipped all their personal belongings and household items to Fiji. They found a property to lease and live in. They have lived in a rented property in Fiji ever since.

18. The appellants also purchased in Fiji a vehicle and various expensive household items for their comfortable living. They obtained their driving licences in Fiji and also got registered as tax payers of the country. They also transferred their monies from Australia into Fiji accounts.

19. They now call Fiji their home and are settled in Fiji. Their duties require them to be in Fiji although they travel to other South Pacific Countries for work purposes but that is only for a short period. They do visit Australia for short temporary periods. They are however not resident in Australia. Whether they will in future is not a matter that the law requires me to examine. The law also does not require me to examine in which country they will be resident hereafter.

20. I therefore find from the facts of the case that the appellants are resident in Fiji and that they qualify to make an application for adoption in this case. I am also satisfied that there is immense bonding with the child and vice versa. It is not in the interest of the child to remove him from the appellants whom he considers to be his parents and place him with any other institute or person(s).

21. The appellants are, on my finding, capable persons to provide for the needs and welfare of the child.

22. I therefore allow the appeal and grant the adoption order in favour of the appellants. There shall not be any conditions attached to the order.

Anjala Wati

Judge

13.02.2019

To:

1. ***Toganivalu & Valenitabua Lawyers for the Appellants.***
2. ***Social Welfare Department, Suva – Guardian- Ad- Litem.***
3. ***File: Adoption Appeal Case No. 0002 of 2016.***