

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN DELETED.

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**IN THE FAMILY COURT
AT WAITAKERE**

**FAM-2016-090-000630
[2017] NZFC 2152**

IN THE MATTER OF THE ADOPTION ACT 1955

AND IN THE MATTER OF AN APPLICATION BY
 [ABDUL RAHAL] AND [FAIRUZA
 NAJJAN]
 to adopt [FAZIL RAHAL]
 born [date deleted] 2000

Hearing: 13 March 2017

Appearances: A Jones for the Applicants
 R von Keisenberg as Counsel to Assist
 Ms Su-Tanielu for the Ministry of Social Development

Judgment: 23 March 2017

**RESERVED JUDGMENT OF JUDGE B R PIDWELL
(As to reasons: Section 3 Adoption Act 1955)**

[1] The applicants are the brother and sister in law of [Fazil Rahal], a male child born on [date deleted] 2000 in [location in Iraq deleted], Iraq. They are seeking to adopt him under the Adoption Act 1955 (“the Act”).

[2] After a hearing on 13 March 2017, I made an interim adoption order. The reasons why I made that order now follow.

Background

[3] Both the applicants come from Iraq and met through their fathers. Ms [Najjan] left Iraq with her [family details deleted] in [the late 1990s] and spent [number of years in a third country deleted] before being accepted as a refugee into New Zealand. She is a New Zealand citizen.

[4] Mr [Rahal] was born in [location in Iraq deleted], Iraq. He has [number of children deleted] siblings who remain in Iraq, the youngest of whom is [Fazil] who has just turned 17 years old. Mr [Rahal] arrived in New Zealand in 2008 and found employment. He remained employed for [number of years deleted] with the same employer and has recently retrained to work as a [occupation details deleted] He obtained citizenship in February this year.

[5] The applicants were married in New Zealand on [date deleted] November 2008. They have two biological children together – [Bahija] born [date deleted] 2013 and [Hakim] born [date deleted] 2010.

[6] [Fazil] and Mr [Rahal]’s mother died of a stroke on [date deleted] 2008 when [Fazil] was eight years old. His father struggled to care for [Fazil] and in 2013 signed documents to enable [Fazil] to travel to New Zealand to be cared for by Mr [Rahal]and Ms [Najjan].

[7] [Fazil] and Mr [Rahal]’s father died in a car accident some 6 months later on [date deleted] 2013. Consequently [Fazil] became an orphan. Since then he has been moving between various members of the family in Iraq, waiting to come and live with the applicants in New Zealand.

[8] The other family members in Iraq are unable to care for [Fazil]. They all have numerous children of their own and are unable to take on the extra financial and emotional responsibility of another child. Their daily struggles are compounded by the current political situation in Iraq. Hardship and poverty are rife in [location in Iraq deleted] where 1.5 million refugees have travelled the 85 kilometres from [Location in Iraq deleted] to escape ISIS control. There is no welfare and much unemployment due to increased competition from refugees for jobs.

[9] The applicants inquired with the Ministry of Social Development in 2012 about Fazil's adoption. Initially they considered the paperwork that Mr [Rahal] Senior had signed before he passed away was adequate for the purposes of adoption. It was not. Attempts to establish the correct path for [Fazil] to come in to their legal care led to significant delays, and ultimately resulted in their application to adopt [Fazil] being filed in October 2016. The applicants have continued to support [Fazil] financially and emotionally whilst navigating the Government and Court processes.

[10] This matter was set down by the registrar on short notice at a time when Mr [Rahal] was in Iraq visiting [Fazil]. Ms [Najjan] appeared at the hearing. The Court waived the requirement that Mr [Rahal] and [Fazil] be present for the interim hearing in the circumstances.¹

What does the Court have to decide?

[11] This is not an application under the Adoption (Intercountry) Act 1977, which implements the Convention of Protection of Children and Co-operation in Respect of Intercountry Adoption signed at The Hague in 1993. The focus of that legislation is to ensure a legitimate process where a child and the adopting adult come from separate contracting states. Iraq is not a signatory to that Hague convention. However there is a large body of case law which supports the proposition that the principles of the convention should be applied when considering applications from a non-convention country.²

¹ Family Courts Rules 2002, r 249.

² *P v Department of Child Youth and Family Services* [2001] NZFLR 721 (HC) at [24]; *Jayamohan v Jayamohan* [1995] NZFLR 913 (HC) at 919.

[12] The applicants have applied jointly under the Adoption Act 1955. In order to make an adoption order, I must be satisfied that the requirements of the Act are met. Section 3 states:

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.

[13] The applicants are New Zealand citizens. Despite Mr [Rahal] not being physically in New Zealand at the time the Court considered this application, I am satisfied that he is domiciled here, as is Ms [Najjan]. Accordingly, they are able to jointly apply under the Act, despite the fact [Fazil] is not presently living in New Zealand.

[14] Section 4 of the Act provides:

4 Restrictions on making adoption orders

- (1) Except in special circumstances, an adoption order shall not be made in respect of a child unless the applicant or, in the case of a joint application, one of the applicants—
 - (a) has attained the age of 25 years and is at least 20 years older than the child; or
 - (b) has attained the age of 20 years and is a relative of the child; or
 - (c) is the mother or father of the child.
- (2) An adoption order shall not be made in respect of a child who is a female in favour of a sole applicant who is a male unless the court is satisfied that the applicant is the father of the child or that there are special circumstances which justify the making of an adoption order.
- (3) Except as provided in subsection (2) of section 3, an adoption order shall not be made providing for the adoption of a child by more than 1 person.

- (4) Any adoption order made in contravention of this section shall be valid, but may be discharged by the court under section 20.
- (5) Where any adoption order made in contravention of this section provides for the adoption of a child by more than 1 person, the High Court may, on the application of any such person made at any time while the adoption order remains in force, make such provision as appears just with respect to the role of providing day-to-day care for the child, and with respect to the maintenance and education of the child.

[15] The requirements for s 4 are satisfied. The applicants have each attained the age of 20 years and are related to the child. [Fazil] is a “child” as defined in s 2 of the Act as he has not yet attained the age of 20. I do not need to consider the issue of consent as [Fazil’s] biological parents are both deceased.

[16] The criteria for adoption is conferred by s 11 of the Act which states:

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.

[17] Accordingly I need to be satisfied of three things, namely:

- (a) The applicants are fit and proper persons to care for [Fazil].
- (b) The welfare and interests of [Fazil] will be promoted by the adoption.
- (c) Any condition imposed by the parent or guardian in respect of religious denomination will be complied with.

[18] Mr [Rahal] Senior did not impose any conditions when the papers were signed in 2013 in respect of [Fazil's] religious denomination. In any event, the applicants and [Fazil] share the same religion.

[19] Accordingly the issues for determination are:

- (a) Are the applicants' fit and proper people to have custody of [Fazil] and of sufficient ability to bring up, maintain and educate him?
- (b) Will the welfare and interests of [Fazil] be promoted by the adoption? His age and views will be relevant to the Court's assessment of this issue.
- (c) Are the inquiries which have been undertaken satisfactory to inform the Court of these matters?
- (d) Consideration of the underlying principles of the Adoption (Intercountry) Act 1977.
- (e) The applicability of the United Nations Convention on the Rights of the Child.

The applicants are fit and proper people

[20] The evidence clearly establishes that the applicants are fit and proper persons to care for [Fazil]. The Court has had the benefit of a social worker's report, prepared on behalf of Child Youth and Family and designed to assist the Court in its determination of this issue. In the report the social worker confirms that the applicants are of good physical and mental health and that the police have no concerns with respect to either applicant. In her assessment, the applicants are both fit and proper.

[21] They applicants are New Zealand citizens and enjoy interaction with all aspects of New Zealand life. They live in a Housing New Zealand home, which is warm and comfortable. Mr [Rahal] will shortly commence full time work upon his

return from Iraq. Ms [Najjan] cares for their two young children and is not in paid employment. Although they are in receipt of government financial assistance, they maintain their family adequately and have been able to provide financial support to [Fazil] over the years.

[22] I adopt the submission of counsel to assist that the fact the applicants are in receipt of government assistance does not disqualify them from adopting [Fazil]. I concur with Judge Ulrich in *K v Attorney General* where Her Honour held that dependence on welfare benefits must be taken into account but is not an automatic disqualifier in terms of the ability to adopt.³ Her Honour noted:⁴

As a New Zealand citizen she is entitled to access welfare benefits if she needs that safety net in order to support herself or her family. It is common for refugees to spend some time in receipt of a benefit after their arrival in New Zealand. The applicant has shown that she is capable of coming off the benefit and gaining employment.

[23] In this case Mr [Rahal] has been in employment and is embarking on an alternative career path that will hopefully provide the family with more disposable income. The applicants are entitled to access the welfare benefits as New Zealand citizens and looking at the overall circumstances, I am satisfied that they are fit and proper persons with sufficient ability to bring up, maintain and educate [Fazil].

[Fazil's] welfare and interests will be promoted by the adoption

[24] As an orphan since 2013, [Fazil] has spent his teenage years moving between various members of his extended family. He has had a transient life, and although he currently attends school, relies on the applicants for financial support. The applicants depose that he is skinny and does not eat well and that he has had a difficult time since his father died. He is lonely and stressed. The applicants depose that they regard [Fazil] as their son and have made a room available for him in their home since 2013. They maintain contact with him, both physically (returning there in 2013 and, for Mr [Rahal], currently) and remotely via telephone and electronic means. The social worker witnessed a FaceTime call between the applicants and [Fazil] which she described as a close and warm interchange.

³ *K v Attorney General* (2006) 25 FRNZ 413 (FC) at [114].

⁴ At [113].

[25] Ms von Keisenberg in her role as counsel to assist has provided information from the Central Intelligence Agency (CIA) website which confirms the US State Department's current travel warning against air travel to Iraq due to terrorist violence. It also establishes the amount of humanitarian aid sent to Iraq in 2016 to assist with the refugee crisis there and the ongoing issues with the citizens of Iraq.

[26] In those circumstances, I find that the opportunity for [Fazil] to spend the balance of his childhood in New Zealand is in his interests and welfare. He will be a member of a New Zealand family who have ongoing ties with Iraq, but he will be protected from the issues of being an orphan in a war-torn country. He will have continuity of care in a stable environment.

[27] [Fazil's] views are not clearly before the Court as he still remains in Iraq due to immigration issues. However the social worker messaged with him and confirmed that he indicated an understanding of what being adopted means, and in particular said "he sees Mr [Rahal] as his father figure as he was young when he lost his father and has always looked up to Mr [Rahal]". Equally, [Fazil] says he "sees Ms [Najjan] as his mother figure and has recently started to call her mother".⁵

[28] On that basis I consider [Fazil] does wish to be adopted and does understand the implications of the process.

Inquiries have been undertaken satisfactorily

[29] There is no independent information before the Court to verify and elaborate of [Fazil's] circumstances in Iraq. The social worker made inquiries regarding a child study from Iraq, however given the instability and lack of resources in Iraq, she never received a response to that process.

[30] There is, however, information before the Court sourced from the US State Department which provides a reliable and up to date picture of the circumstances of those living in Iraq at present. I am satisfied that the inquiries made and the

⁵ Report from Child Youth and Family dated 23 January 2017 page 4.

information provided to the Court is sufficient to enable a proper determination to be made.

Principles of the Adoption (Intercountry) Act 1977

[31] Notwithstanding that Iraq is not a contracting state, I must consider the objectives of the Adoption (Intercountry) Act 1977, which is designed in particular to establish safeguards for intercountry adoptions with a focus being on the best interests of the child. It is essentially anti child abduction, sale and trafficking legislation. In this case, there is no suggestion of those activities. [Fazil's] parents are dead and the applicants are related to him. Therefore I do not consider I need to make any further inquiry.

[32] However I do note that the criteria used by Child Youth and Family to assess an international adoption are met in this case, namely:⁶

- (a) the applicants have the qualities and characteristics to allow them to be eligible for the adoption under New Zealand law;
- (b) they have the racial, cultural and religious characteristics relevant to the child in particular race, culture and religion;
- (c) they are willing to provide an open type of adoption, acknowledging the biological tie;
- (d) [Fazil] is in the need for a home and family life which cannot be met by his biological kin group or family in his home country; and
- (e) [Fazil] is legally free or available for adoption purposes and be eligible for immigration to New Zealand.

[33] It is clear the Court will not make an adoption order solely for immigration purposes.⁷ The focus must be on whether the adoption is in the interests and welfare

⁶ *Re NCS* [2013] NZFC 3034 at [44].

⁷ *Application by Webster* [1991] NZFLR 537 (FC).

of the child. I accept that the primary purpose for this application to adopt [Fazil] is to provide him with a permanent, stable home and family life with the applicants and their two children. I am satisfied that cannot be achieved by any other means and that the emotional and physical deprivation that [Fazil] is currently suffering from would be alleviated by him being accepted and loved by members of his family who live in New Zealand.

The United Nations Convention on the Rights of a Child

[34] As New Zealand is a signatory to the United Nations Convention on the Rights of a Child, which was ratified in 1993, I am bound to give consideration to the principles contained in that convention, in particular article 21, which requires countries to:

- (a) Ensure that the best interests of a child are the paramount consideration;
- (b) Ensure the adoption of a child is authorised only by competent authorities in accordance with the applicable law and procedures;
- (c) Recognise intercountry adoption may be considered as an alternative means of child's care if a child cannot be placed in foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; and
- (d) Ensure that the child concern by intercountry adoption enjoy safeguards and standards equivalent to those existing in the case of national adoption.

[35] Article 3 confirms the fundamental principle that the best interests of the child is a primary consideration.

[36] I am satisfied that the adoption aligns with the principles of UNCROC. [Fazil] is being adopted by members of his own family who will preserve and develop his cultural, religious and ethnic identity. The adoption is supported by the

