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

NOTE: PURSUANT TO S 22A OF THE ADOPTION ACT 1955, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT HUTT VALLEY

FAM-2013-096-826
[2016] NZFC 6920

IN THE MATTER OF	THE ADOPTION ACT 1955
AND	
IN THE MATTER OF	An application by AFAH TEAUPA and KAHO TEAUPA to adopt KAIRAO NIU born [date deleted] 2004 and ATAMAI NIU born [date deleted] 2010.

Hearing:	14 June 2016
Appearances:	R Fletcher for the Applicants K D Knowles for the Chief Executive M G Powell Lawyer to Assist
Judgment:	22 August 2016

RESERVED JUDGMENT OF JUDGE J J D STRETTELL

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[1] The applicants wish to adopt Kairao Niu born [date deleted] 2004 and Atamai Niu born [date deleted] 2010.

[2] The children are the children of Ofa Niu and Sione Niu who live in Tonga. They have [details deleted] children. The parents remain living in Tonga as do the two boys the subject of this application to adopt.

[3] Mrs Niu and Mrs Teaupa are sisters.

[4] A perusal of the various affidavits and reports filed in relation to this application indicates that the reasons provided for the adoption involve the natural parents' difficulties financially in coping with all of their children, the children's needs and a desire by the applicants, Mr and Mrs Teaupa to have more children in circumstances where Mrs Teaupa was unable to conceive any further children.

[5] This application for adoption was filed in the New Zealand Family Court on 21 October 2013. Following that application and the filing of the consents from the natural parents, a child study report was sought from Tonga and that report by the Women and Child Crisis Centre in Tonga was received on 10 February 2015 and on 23 March 2015 a report was filed by the Adoption Social Worker Ms Bastion recommending against the adoption order.

[6] To put this in context, however, prior to the filing of this application, Mr and Mrs Teaupa sought a guardianship order in Tonga in respect of the two children. That application was filed in or about August 2010 and on 23 May 2011 a guardianship order was made by the Supreme Court of Tonga, that order changed the surname of both children to Teaupa and Kairao's Christian name was changed to Kai.

[7] Despite the order made in Tonga and the significant delay since the filing of the adoption application in New Zealand, both boys remain living in Tonga with their natural parents, attending school and being financially supported by the applicants.

[8] It was open to the applicants to seek to have the Tongan order approved under s 17 of the Adoption Act as an overseas adoption order thereby enabling the children to be moved to New Zealand and united with the applicants. Although it was not made clear at the hearing, it is assumed that inquiries were made in relation to such an application but either was not pursued or initially was declined by Internal Affairs.

[9] Counsel to assist the Court had in August 2015 helpfully provided Internal Affairs guidelines, particularly in relation to Tonga. Significantly, the information provided included the following:

> Please note that the Department understands that Tongan law clearly differentiates between legal concepts of adoption and guardianship and therefore that guardianship orders obtained under the Tongan Guardianship Act 2004 in respect of legitimate children are not adoption orders.
>
> Therefore it is the Department's view that guardianship orders do not meet the requirements of s 17 of the New Zealand Adoption Act 1955 and therefore guardianship orders do not give the child a claim to New Zealand citizenship by descent.

[10] Presumably, faced with this general statement, the applicants have elected to apply for adoption under the New Zealand Adoption Act.

The Law

[11] The law governing adoptions is contained in the Adoption Act 1955. Relevant in particular to the application are sections 3, 11 and 17 which I set out in full.

> **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.

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 Effect of overseas adoption

(1) Where a person has been adopted (whether before or after the commencement of this section) in any place outside New Zealand according to the law of that place, and the adoption is one to which this section applies, then, for the purposes of this Act and all other New Zealand enactments and laws, the adoption shall have the same effect as an adoption order validly made under this Act, and shall have no other effect.

(2) Subsection (1) of this section shall apply to an adoption in any place outside New Zealand, if—

(a) The adoption is legally valid according to the law of that place; and

(b) In consequence of the adoption, the adoptive parents or any adoptive parent had, or would (if the adopted person had been a young child) have had, immediately following the adoption, according to the law of that place, a right superior to that of any natural parent of the adopted person in respect of [the role of providing day-to-day care for] the person; and

(c) Either—

(i) The adoption order was made by any Court or judicial or public authority whatsoever of a Commonwealth country, or of the United States of America, or of any State or territory of the United States of America, or of any other country which the Governor-General, by an Order in Council that is for the time being in force, has directed to be deemed to be referred to in this subparagraph; or

> > > (ii) In consequence of the adoption, the adoptive parents or any adoptive parent had, immediately, following the adoption, according to the law of that place, a right superior to or equal with that of any natural parent in respect of any property of the adopted person which was capable of passing to the parents or any parent of the person in the event of the person dying intestate without other next of kin and domiciled in the place where the adoption was made and a national of the State which had jurisdiction in respect of that place—
>
> but not otherwise.
>
> (2A) The production of a document purporting to be the original or a certified copy of an order or record of adoption made by a Court or a judicial or public authority in any place outside New Zealand shall, in the absence of proof to the contrary, be sufficient evidence that the adoption was made and that it is legally valid according to the law of that place.]
>
> (3) Nothing in this section shall restrict or alter the effect of any other adoption made in any place outside New Zealand.
>
> (4) In this section the term New Zealand does not include any territory in which this Act is not in force.
>
> (5) This section does not apply to any adoption in another Contracting State that is an adoption—
>
> > (a) By a person habitually resident in New Zealand; and
> >
> > (b) To which the Convention applies; and
> >
> > (c) Which takes place in that Contracting State on or after the date on which the Convention has entered into force as between New Zealand and that Contracting State.]
>
> (6) In subsection (5), Contracting State and Convention have the same meaning as in the Adoption (Intercountry) Act 1997.]

[12] Further requirements include that the applicants have attained the age of 25 years and are at least 20 years older than the child (s 4(1)(a)), and that the parents of the children have provided their consent to the adoption (s 7(2)(a)). In this case, the natural parents have provided their consent and are actively supporting the adoption and have not imposed any religious condition in terms of s 11(c).

[13] Counsel to assist, Ms Powell, summarised authorities on adoption with immigration considerations and suggested the following might apply:

(1) An adoption order should not be made if it will not promote the welfare and interests of the children to create a new family relationship of parent and children between the applicants and the children;

(2) The principles of the Hague Convention are relevant to determining whether adoption orders are in the children's best interests;

(3) Both the principles of the Hague Convention and cases decided under the Adoption Act confirm that weight must be given to the benefits of the children remaining in the country of origin;

(4) The Court will need to weigh up the information coming from Tonga and what appears to be the favourable attitude towards adoption proceeding against the position of the New Zealand social worker and the comments in her report.

[14] Judge Ullrich in *Kebede v Attorney-General on behalf of Department of Labour and Department of Internal Affairs* 2006 NZFLR 413 observed:

> In a number of cases, the Court has reminded itself of the need to ensure that the purpose of the adoption is not simply for immigration purposes (see *An application by Webster* (1991) NZFLR 537).

[15] Judge Mill in *Re An application by H* (Adoption 2001) NZFLR 817 succinctly summarised the Court's approach in this way:

> The Court must be vigilant to ensure that the adoption is not for some ulterior purpose and must be careful that the adoption processes are used to confirm the existence of a genuine parent-child relationship.

[16] There is a degree of similarity in the factual scenario here as was present in a decision of Judge Riddell in *D v Ministry of Social Development* [2015] NZFC 1477. While the issues there were somewhat different, the significance of the decision was in the willingness of the natural parents to give up a child to the applicants, a practice Judge Riddell noted as being common practice within the Tongan culture and known as "pusiaki".

[17] In this case, it would be dangerous and lacking in a proper assessment to not only have regard to welfare and best interests in the commonly understood New Zealand parlance but also to, as best one can, overlay that with the impact as is understood of the outcome of the application from the perspective of the children within Tongan culture, particularly having regard to the negative aspects that might follow were the order not to be made and the children remained in Tonga.

[18] In that regard, one needs to consider the status of the guardianship order made by the Supreme Court in Tonga. In particular, whether the order made had the effect of an adoption order or not.

[19] The approach to the interpretation of such orders was considered by Priestly J in *Anquandah v Attorney-General* (CIV-2004-404-7320, Auckland HC). There His Honour reminded himself that it was not for him to interpret foreign law, that foreign law was a question of fact to be pleaded and proved by counsel, evidence had to be from a properly qualified witness and he helpfully suggested that a Judge or practitioner in the jurisdiction whose law was in question was properly qualified.

[20] In *Gee Joung Cheon v Attorney-General* (Auckland HC, CIV-2007-404-7669 Heath J noted at paragraph [32]:

> [32] The admissibility of evidence of foreign law is governed by s 144 of the Evidence Act 2006 which states:
>
> **144 Evidence of foreign law**
>
> (1) A party may offer as evidence of a statute or other written law, proclamation, treaty, or act of State, of a foreign country—
>
> (a) evidence given by an expert; or
>
> (b) a copy of the statute or other written law, proclamation, treaty, or act of State that is certified as a true copy by a person who might reasonably be supposed to have the custody of the statute or other written law, proclamation, treaty, or act of State; or
>
> (c) any document containing the statute or other written law, proclamation, treaty, or act of State that purports to have been issued by the government or official printer of the country or by authority of the government or administration of the country; or

> (d) any document containing the statute or other written law, proclamation, treaty, or act of State that appears to the Judge to be a reliable source of information.
>
> (2) In addition, or as an alternative, to the evidence of an expert, a party may offer as evidence of the unwritten or common law of a foreign country, or as evidence of the interpretation of a statute or other written law or a proclamation of a foreign country, a document—
>
> (a) containing reports of judgments of the courts of the country; and
>
> (b) that appears to the Judge to be a reliable source of information about the law of that country.
>
> (3) A party may offer as evidence of a statute or other written law of a foreign country, or of the unwritten or common law of a foreign country, any publication—
>
> (a) that describes or explains the law of that country; and
>
> (b) that appears to the Judge to be a reliable source of information about the law of that country.
>
> (4) A Judge is not bound to accept or act on a statement in any document as evidence of the law of a foreign country.
>
> (5) A reference in this section to a statute of a foreign country includes a reference to a regulation, rule, bylaw, or other instrument of subordinate legislation of the country.
>
> (6) Subpart 1 of Part 2 (which relates to hearsay evidence) does not apply to evidence offered under this section.

[21] Heath J acknowledged that expert evidence is not always required. However, in this case the applicants have tendered the evidence of Kenneth Nigel Hampton QC, a former Chief Justice of Tonga from 1995 to 1997. As Chief Justice of the Supreme Court, the Court had the responsibility, among other matters, for adoptions.

[22] Mr Hampton states in his affidavit filed in support at paragraph [12] and following:

> [12] In Tonga it is common for members of an extended family to customarily adopt children where the immediate family finds it difficult to support those children (although I note that this is not the only rationale for such – often wider family dynamics are involved, including for example couples that are childless). The process also involves the adopted children maintaining contact with their birth parents and other members of the extended family. This process also reflects Tongan culture and custom.

> [13] In my view the 2011 order marked (A) rather than being just a "guardianship" order as named, is an adoption under Tongan law and should be recognised accordingly.

[23] Mr Hampton goes into some detail as to the reasons for his conclusion, in particular pointing to the contents of the guardian ad litum report provided to the Supreme Court prior to the guardianship order having been made.

[24] Such evidence is helpful to the Court's consideration of the application to adopt, independent of its relevance under s 17. In particular, it provides a foundation upon which the Court can assess the nature of the existing relationship between the birth parents and the applicants and the children in Tonga including the perception in Tonga of the process undertaken, culminating in the guardianship order.

[25] In light of the documentary evidence provided from Internal Affairs which concluded that a guardianship order was not an adoption order, and its significance in terms of the social work report provided by Ms Bastion, further analysis of the Guardianship Act 2004 of Tonga and the customary adoption process undertaken by the applicants in Tonga is instructive.

[26] The Tongan Guardianship Act 2004 provides the Supreme Court of Tonga with jurisdiction to inter alia:

> (a) Determine any questions of guardianship, custody and access in any proceedings before the Court.

[27] Section 6 states:

> 6.1 The Court may upon application, make a guardianship order in favour of a person who has had customary adoption of the child.
>
> 6.2 A customary adoption may occur notwithstanding that:
>
> (a) the agreement was not in writing, but can be inferred from discussions or conduct; and
>
> (b) a parent of the child has a continuing relationship with the child;

[28] Customary adoption is defined in the Act as:

> Means the placement of a child according to custom and the transfer of parental rights of custody and control in the upbringing of the child.

The above underlined portion is of particular significance.

[29] When one considers the Act as a whole, it is clear that the making of the guardianship order is therefore part of a process, the guardianship order does not stand alone as the definitive document but supplements what has already taken place i.e. between the birth parents and the applicants which cumulatively creates the customary adoption as defined in the Act.

[30] The conclusion reached by Mr Hampton at paragraph 13 in his affidavit, is supported by the reports provided to the Supreme Court by the guardian ad litum appointed for the purpose of reporting on the application. In this case the report was provided by the Solicitor-General's office.

[31] After identifying the children, the report states at paragraph [2]:

> [2] The natural mother is the older sister of the female applicant. She agreed to give up her older son for adoption when the female applicant asked her to adopt the child when she was still pregnant. When the natural mother found out she was pregnant again with the younger child the female asked if she could adopt both children to which she agreed. Ever since the children were born the female applicant and her husband have been supporting them financially from New Zealand.
>
> The female applicant and the natural mother were interviewed on 9 September 2010. The house assessment was carried out by one Maraea Ropata, a registered social worker of Lower Hutt, New Zealand on 15 September, 2010.

[32] And at page 4:

> When the natural mother became pregnant again to their [details deleted] child Atamai, the female applicant asked the natural parents if she could also take him as her own. The natural parents agreed.

[33] The report provides further detailed information in respect to the applicant's and then says at page 8, paragraph [38]:

> The applicants are loving, compassionate and honest people. The fact that they have not been able to bear any more children has not stopped their hearts from accepting and wanting to raise the children as and like their own.

[34] Paragraph [40]:

> Ever since birth of the children, the applicants and their extended family have accepted the children as part of the applicant's family. They have embraced them and shown them that there is no lack of love and support for them both of them [sic].

[35] At paragraph [42]:

> [42] From the information gathered, the children are attached to the applicants and have already accepted them as their biological parents.
>
> [43] Therefore, the applicants are fit and proper parents to adopt the child (children) [sic].

[36] The whole thrust of the report is to provide information pertaining to adoption. Other than that being self-evident from the manner and content of the reporting, the report could hardly be required in such width and detail if the order sought was to enable the applicants to exercise a role of guardianship as understood in terms of New Zealand law.

[37] Adding further weight to the conclusion reached by Mr Hampton is a perusal of the guardianship order made by the Supreme Court in Tonga in May 2011. The order states:

> (1) That the applicant shall have parental responsibility (Tongan) for the child thereby incorporating the wording of s 6 of the Guardianship Act;
>
> (2) The order notes the change of Christian name of the oldest boy [details deleted].

[38] Finally, the applicants and the birth parents also recognise the change of their status. That was made clear last year when because of concerns about the use of funds provided to the birth parents for the boys, the applicants directed the birth parents to place the children with their brother in Tonga which the birth parents did.

[39] This arrangement came to an end when the applicant's brother moved to New Zealand and the children then returned to the birth parents' care.

[40] Accordingly, when one takes into account not only the evidence of Mr Hampton but standing back and looking at the whole process undertaken in Tonga, culminating with the order made by the Tongan Supreme Court in May 2011, these children did undergo a Tongan customary adoption, the effect of which was to transfer the parenting rights of the natural birth parents to the applicants.

[41] That of course is not the end of the matter for the parties do not seek a declaration under s 17 but seek orders under s 11. As counsel for the applicants notes, however, the process is relevant and informative and provides relevant background to the application and is particularly relevant to the objection by the social worker to the adoption and consideration of the welfare and best interests of the boys.

The delay

[42] Between the making of the Tongan guardianship order in May 2011 and the hearing of this application is a period of five years. Counsel to assist the Court raises that as an issue for the Court's consideration. Two questions arise out of the delay:

(1) Why was there such a delay? and

(2) Does that in any way impact adversely upon the application?

[43] A perusal of the documentation, indicates that the parties filed their New Zealand application for adoption in December 2013. Shortly thereafter a Child Study Report was sought by Child Youth and Family from Tongan Social Services. This report was not received until 10 February 2015. Ms Bastion then provided the social work report in March 2015. Between April and December 2015 various interlocutory issues were dealt with by the Court, they included disclosure of social work reports and the appointment of Counsel to Assist, Ms Powell.

[44] Further delays then arose, brought about by the difficulty Ms Powell had in instructing an agent in Tonga to interview the boys. Indeed, the agent's report was only received on the eve of the hearing (10 June 2016).

[45] The only delay, therefore not explained by administrative delays is the initial period between the making of the 2011 Tongan orders and the filing of the subsequent New Zealand application in October 2013.

[46] In the circumstances, including the complexity surrounding the application, the status of the Tongan orders, I do not consider that that delay in any way impacts significantly upon the process now undertaken. That is particularly clear given the boys' express views have not changed and that the Court is able to appropriately assess the boys' welfare and best interests, independent of and despite the actual delays surrounding this application.

The Application under Section 11

[47] The Court must be satisfied before making any adoption order of two matters:

(a) That every person who is applying for the order is a fit and proper person; and

(b) The welfare and interests of children will be promoted by the adoption, due consideration being for this purpose given to the wishes of the children having regard to the age and understanding of the children.

[48] There is no dispute as to the applicants being fit and proper persons. The evidence before me, uncontested, satisfies me that they are, and indeed the Ministry accepts they are and the social work report acknowledges that as well.

[49] Given the nature of this application and in particular the overlaying immigration processes that arise, it is necessary to address this issue in more detail. The Court has benefited from the opportunity to assess both applicants giving evidence. They are extremely hardworking committed parents who undoubtedly seek to legitimise from a New Zealand legal perspective, what they already believe they have, that is the boys as part of their family unit. Both spoke emotionally and with feeling about the boys. It demonstrated better than any statement made that the

purpose of this adoption is not immigration or status related but genuinely based upon a feeling of family and belonging between the applicants and the two boys.

[50] The applicants therefore are not only fit and proper but show demonstrably by their actions a genuine wish to reunite what they believe is part of their family who currently are living in Tonga.

Is the order in the children's welfare and best interests?

[51] There are several reports that purport to address both in a general and specific way, the overarching principle that the Court must apply. I have already referred to the report provided by the Tongan Crown Office to the High Court in Tonga in some detail. No further reference is required other than to record the conclusions of that report indicated that the children's welfare and best interests were met by the making of the order in Tonga.

[52] The Tongan Child Study that was undertaken following the filing of this application for adoption, was only available to the Court in a redacted version which was unfortunate and failed to recognise the purpose of the application before this Court.

[53] Nevertheless it may be deduced from the material available from that report, that the report writer concluded:

(1) That the principal reason for the adoption was the desire of the applicants to have further children;

(2) That the natural parents' physical predicaments of no employment and poor circumstances were relevant and were likely to impact adversely upon the children the subject of the application;

(3) That the boys themselves supported the adoption proceeding.

[54] The New Zealand social worker's report provided by Ms Bastion accepted that the applicants were fit and proper persons to adopt but did not support the making of the order, Ms Bastion concluding:

(1) That the best interests of the children would be served by they remaining within their existing family and environment, Ms Bastion noted at page 5:

> "To move them to another country to meet the needs of the adults involved would cause the boys unnecessary trauma, loss and grief"

[55] In coming to that conclusion Ms Bastion placed little weight on the children's wishes. While Ms Bastion accepted that the natural parents were themselves unable to meet the children's material needs, she concluded those needs were nevertheless being met by the applicants by the contribution of funds that they have made post the making of the guardianship order in Tonga.

[56] Significantly Ms Bastion acknowledged she was unaware of the Tongan Crown Law report nor of the recent report provided by Tongan Council at the request of Ms Powell. Of course the late arrival of that latter report meant of course that Ms Bastion had no opportunity to consider its contents when making her report.

[57] Ms Bastion accepted that there had been no opportunity for her to interview the children and accepted also that the natural parents and the Tongan community generally regarded the applicants as the children's parents.

[58] Ms Bastion was unwilling to accept that there was emotional or psychological attachment between the boys and the applicants. To be fair, as I referred earlier, she did not have the opportunity to consider the impact of the later report and made that assessment primarily on the delay and time taken since the application had been filed and what might have been seen to be the logical conclusion that given the children had remained in the natural parents care over that period, there could not be any significant emotional or psychological attachment to the applicants.

[59] The most recent report provided was that of Ms Lesina Tonga, a lawyer practising in Tonga, who at the request of Counsel to Assist, Ms Powell and following the Court's direction, interviewed the children and reported. That report arrived in New Zealand on 10 June 2016 and was available to everyone shortly

before the hearing. Despite its late arrival, it provides relevant and updated information.

[60] Parts of the interview by Ms Tonga were reported verbatim in the report. A summary of the interview with Kairao, which lasted some two and a half hours is particularly relevant.

[61] Kairao is now 12, he told Ms Tonga that he believes that the applicants are his parents (legal), that he sincerely wished to be with them, that his Tongan brothers and sisters know he is coming to New Zealand and that they already regard he and his brother as the applicant's children. He said he would nevertheless keep in contact with his brothers and sisters in Tonga. Counsel Ms Tonga observed:

> During the interview I observed the child, tears flowed particularly when he repeatedly talked about missing Kaho and Afah (the applicants) at times they are to part, either his return to Tonga or Afah's leaving for New Zealand.

[62] A similar report was provided in respect to Atamai (now aged 5). This interview lasted one and a half hours. Atamai aged 5 referred to the applicants as his mother and father and maintained that despite it being suggested by Ms Tonga that his natural mother and father were in fact his real parents. Confronted with that proposition he steadfastly maintained that the applicants were his parents.

[63] He expressed a wish to live in New Zealand. Atamai did not see any difficulty or problem in leaving friends and family behind were he to go to New Zealand. Ms Tonga observed:

> As I observed them, the younger child looked as though he is certain he is going to his parents in New Zealand no matter what. The elder child has a genuine bond with Afah and Kaho.

[64] The Ministry's position as expressed by Ms Bastion is that there is no need of these children that is not being met in their present environment and thus the order should be declined. Ms Bastion is an experienced social worker and undoubtedly has reached these conclusions on what might be thought to be the general propositions that might follow the specific circumstances of the children bearing in mind the retention of the natural parents of their care, the delay in finalising this

matter and the financial support that is now provided by the applicants. In reaching those conclusions, two issues immediately become evident.

[65] That the conclusions are reached on general proposition rather than facts specific to the two children here. No criticism can be made of Ms Bastion, but it is open to the objection as was taken by counsel for the applicants that there was no specific evidence that those conclusions, reasonable though they might be as a general proposition, related to these two boys.

[66] I accept there is a reasonable basis for that objection.

[67] Firstly, the financial aspect, the boys' day to day needs historically could not be met. That was part of the reason why the process was commenced. There is nothing to suggest the circumstances have changed for the natural parents. The applicants' practical assistance to date, is based on an obligation they believe they have to these boys, arising from the orders made by the Supreme Court of Tonga. The result of which they became responsible for "the upbringing of the children".

[68] I do not think it is fair or reasonable therefore to hold that that should be held against the applicants or moreover be a basis for rejecting applications because the children's physical needs are being met.

[69] Secondly, to the extent there is evidence before the Court both as to impact of the orders and the impact upon the boys of the orders, it is to the effect that the boys are seen by others in Tonga and by the boys themselves as being part of the applicants' family. There is no evidence to suggest that the conclusion reached by Ms Bastion is in fact supported by the evidence available to the Court. That is to say, there is no evidence that there would be an emotional, psychological negative impact were the boys to be adopted and moved to New Zealand. To the extent there is evidence before the Court, it is to the contrary – that it is the boys' wish to be with the applicants in New Zealand and that the delay has not impacted so as to cause the boys to waver in the strength of their wishes or their view of the matter that the applicants are their legal parents.

[70] It is therefore open to conclude that the boys, were the orders not to be made, may both feel loss and feel degraded (lose face) because of the failure to enable them to be reunited with their parents in New Zealand.

[71] That conclusion is based upon the evidence heard.

Observation

[72] The position Ms Bastion takes reflects what might be said to be a normal approach to application involving non-Convention countries, they being countries that have not acceded to the Convention on Protection of Children and Co-operation in respect of Inter-country Adoption. In *Kebede v the Attorney General* (supra) at paragraph [48] of Judge Ullrich summarised relevant considerations as including:

(1) Are the natural parents alive?

(2) Is there a suitable caregiver for the child in the home country?

(3) Is the child already in New Zealand?

(4) How old is the child?

(5) How dependent is the child?

(6) Have the applicants cared for the child?

(7) Is there a blood relationship between the child and the applicants?

(8) What is the situation in the home country (war, poverty, education, political unrest)?

[73] To reflect the circumstances present in the case before the Court, one should add to the list:

(a) Are there any existing orders in place in the country of origin, and if so what effect does it have?

(b) Has there been any inquiry undertaken in relation to the children and of the effect upon them of the making or refusing to make any order?

[74] Although counsel for the applicants queries whether the Court should rely on the summary contained in *Kebede v Attorney-General* I consider that when assessing as the fundamental test what is in the child's welfare and best interests, the widest possible perspective should be used and that therefore includes all matters that might be relevant to the assessment of that test.

[75] In other words, the summary remains a touch stone to assess what reflects the children's welfare and best interests.

The boys' views

[76] In considering welfare and best interests one must pay more than lip service to the views of the children and in particular Kairao now aged 12.

[77] I am satisfied that there is no evidence that these are children who have been influenced in their stated views by those of their natural parents or the applicants. Obviously both the natural parents and the applicants support the adoption, but the nature of the replies, particularly of Kairao indicate a sincere and deeply held wish and an emotional expression of that wish.

[78] There is also evidence that both children have logically looked at what the impact of the decision might have, the impact upon their relationship with their natural parents and also their brothers and sisters, yet they both support the making of the order.

[79] In the light of that, particularly the most recent report provided by Ms Tonga, it would be wrong not to acknowledge and give weight to the expressed views as being actual views of desire expressed at least by a 12 year old who is capable of weighing up the impact of such a decision.

[80] There is no doubt, however, that the significant delay and the retention of the children in their parents' care over that period and the maintenance of the children's day to day life within the Tongan community are factors which weigh against the

making of the adoption order because it reflects a maintenance of the status quo. Inherent in the status quo is, of course, maintenance of several of the relevant principles i.e. care by natural parents, retention in the community, retention of the relationship with brothers and sisters. Those factors have significance.

[81] Nevertheless is not without relevance that what has supported that maintenance of the relationship is the provision of funds by the applicants to maintain the children within that environment at an acceptable standard. Part of the reason for the original adoption applications was the inability of the natural parents to maintain the children. There is no evidence that that has improved independent of the support provided by the applicants.

[82] I am not prepared to disregard the significance of that environmental factor simply because the applicants are providing the funds because of their perceived obligation to do so and as the Ministry would have, draw the conclusion that there is no financial need, no poverty and nothing that may be put right by the making of this application.

[83] Adoption cases are inevitably fact specific and thus only general principles from other cases apply. In this case there are existing orders of "local adoption" already made. In my view, the impact of those orders are of significance, not only in what they reflect as to the intentions of the parties but further, as to the impact of those orders upon the children, particularly in the way that they approach their relationship with their natural parents and the applicants. Both the children, and the parents, and clearly the Tongan community, accept that the position of both children changed significantly with the making of the Tongan orders to the end that the applicants supplanted the parents as the father and mother vis a vis the two boys.

[84] As a consequence, it is more likely that the impact of not making the order of adoption will have negative consequences for the boys far greater than simply disappointment, they will be seen within the Tongan community as the boys whose parents were unable to care for them. That in turn is likely to adversely impact upon their emotional and long term wellbeing.

[85] I accept that is a conclusion I reach without the assistance of specialist evidence, however, it is in my view a conclusion properly to be drawn from the facts found proved.

[86] If the order is made, then for both boys there will be a period of adjustment and difficulties in coming to terms with new schools, language and environment. But that is something many immigrants and immigrant children will face, there is nothing to indicate that these children are unable to meet that challenge. They are clearly keen and as Kairao says he will work hard. Such challenges as there are, are not insurmountable, [details deleted]. Clearly the support that the applicants will give to the boys will be encouragement and support to achieve a sense of belonging within the New Zealand society were the order to be made.

[87] I do not consider that the relationship with wider family in Tonga will not be sustained. The applicants are part of this family themselves, it is the mother's sister who is the natural mother. The applicants were impressive witnesses and committed people who are doing this not for the benefit of themselves but to provide for these boys a secure and supportive family environment.

[88] The order of adoption sought meets the welfare and best interests of Kairao Niu and Atamai Niu. I am satisfied that both subsections of section 11 are satisfied. There will be an order for interim adoption to be made final after six months.

J J D Strettell
Family Court Judge

Signed at Christchurch on 19 August 2016 at am/pm