

**THE IDENTITY OF THE CHILD IS SUPPRESSED**

**IN THE HIGH COURT OF NEW ZEALAND  
SITTING AS THE HIGH COURT OF TOKELAU**

**I TE FALE FAKAMAHINOGA HILI O NIU HILA  
E NOHO MALUTIA AI TE FALE FAKAMAHINOGA HILI O TOKELAU**

**CIV-2022-485-728  
[2022] NZHC 2991**

BETWEEN	COUNCIL FOR THE ONGOING GOVERNMENT OF TOKELAU Applicant
AND	AG First Defendant
AND	FI Second Defendant
AND	PG Third Defendant
AND	TF Fourth Defendant

Hearing: 14 November 2022  
Counsel: J L Wademan for the Applicant  
Judgment: 15 November 2022

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**JUDGMENT OF PALMER J**

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*Counsel*  
J L Wademan, Barrister, Wellington

## **Orders**

[1] Late on 14 November 2022, sitting as the High Court of Tokelau, I granted an urgent application without notice by the Council for the Ongoing Government of Tokelau (the Council) that:

1. Until further order of the Court, the female child, [the child], born [in 2018] in ... New South Wales, Australia, but habitually resident and domiciled in Tokelau, is a ward of this Court.
2. Until further order of the Court, the Minister of Education of the Ongoing Government of Tokelau, the Honourable Elehi Kelihiano Kalolo is delegated the authority of this Court to make all necessary decisions regarding the guardianship and care of [the child].
3. The Honourable Minister Elehi Kelihiano Kalolo is to provide this Court with regular written reports regarding the guardianship and care of [the child] 28 days after the making of this order, and every three months thereafter, or at any time when requested to do so by this Court in a timely manner.

[2] The names of the family members involved have been anonymised to protect the identity of the child. This judgment records my reasons for making those orders, based on the evidence before me of:

- (a) Elehi Kelihiano Kalolo, the current Minister of Education and former Ulu-o-Tokelau, head of the Council, as Faipule of Atafu.
- (b) Aukusitino Vitale, General Manager National of the Office of the Council, on behalf of the current Ulu-o-Tokelau and the Council.

## **What happened**

### *Those involved*

[3] The child is four years old. Her birth mother and her birth father are not in a relationship and reside in Australia. After the child's birth there was apparently an agreement, between the mother and the paternal grandmother, that the grandmother would take care of the child. From the age of six months, since September 2018, the child has resided with the grandmother on Fakaofu in Tokelau. They are all citizens of Tokelau. Tokelau has been subject to a strict Covid-19 lockdown since April 2020.

### *The incident*

[4] On 5 November 2022, the grandmother and the child left Fakaofu on the cargo ship *Kalopaga*, for Samoa. It was intended that the child would fly to Australia with the father to attend a Family Court hearing in New South Wales to determine child support, a name change, and parenting orders. The grandmother and her husband would follow.

[5] The grandmother's husband was told there was no room for him on the *Kalopaga*, although subsequent inquiries suggest that was not the case. On Wednesday 2 November 2022, the *Kalopaga's* schedule was changed so that it would stop at Atafu on Saturday 5 November 2022, rather than Friday 4 November 2022. The passenger ship *Mataliki* was also in Atafu on Saturday 5 November 2022. The mother was a passenger on the *Mataliki*. She did not meet the repatriation criteria to enter Tokelau.

[6] The child's maternal step-grandfather was the Acting Director of the Office of Taupulega of Atafu and an Aumaga Committee member at the time. A report of the Department of Transport and Support Services of 5 November 2022 indicates that he threatened the crew of the *Kalopaga* over the ship radio, telling them that an incident would happen that morning and they should avoid getting involved. If the child was not transferred ashore, the ship to shore operation would be discontinued. He said he had permission from the Atafu Taupulega and the Law Commissioner to remove the child. The step-grandfather sent an email that day which stated there was a collective agreement with the leaders of Fakaofu, his children, the grandmother and her husband to bring the child to visit. Fakaofu officials say there was no agreed time as to when the visit would happen. The step-grandfather says the grandmother had changed from the *Mataliki* to the *Kalopaga* to avoid meeting the mother. He said the Law Commissioner and the Atafu Taupulega consented to the decision for the Police to board the *Kalopaga* to uplift the child and to breach the Covid-19 protocol. The Office of the Taupulega and the Law Commission say that is false.

[7] The evidence before me is that on Saturday 5 November 2022, at Atafu, the mother was picked up by a barge from the *Mataliki*. The barge approached the

*Kalopaga*, and mother and a uniformed Police Constable (the mother's brother-in-law), boarded the *Kalopaga*. After a struggle, the Constable wrestled the child away from the grandmother and gave her to the mother who took her on the barge to Atafu. The grandmother has complained to the Atafu Taupulega and the Law Commissioner of Atafu about this incident and the way she was handled by the officer. The mother and the child have been in quarantine together since then, which was due to end on or about today, Tuesday 15 November 2022. The Constable and his wife, the child's maternal uncle and aunt, have expressed a wish to adopt the child.

[8] The grandmother was not allowed to go with them, even though her mother is from Atafu which grants her an automatic right to enter Atafu. Later, following intervention of the Council, the Ulu-o-Tokelau, Aukusitino Vitale, and the New Zealand Administrator, Don Higgins, the grandmother was allowed ashore on Atafu. She was quarantined separately from the mother and the child and her quarantine was also due to end today.

#### *Governance*

[9] Tokelau is a non-self-governing territory of New Zealand. It has expressed its desire to move towards greater self-government, which both the New Zealand government, and the United Nations Special Committee on Decolonization support.<sup>1</sup> The administrative and legislative powers of the Administrator of Tokelau are delegated to the three Taupulega of the three villages of Tokelau. Authority for national issues is delegated to a General Fono and there is also an elected Executive Council:

- (a) The General Fono comprises representatives of the Taupulega (Village Council of Elders), Fatupaepae (Women's Group) and Aumaga Taulelea (Men's Group).
- (b) The Council is comprised of the three Faipule (Village Head) and the three Pulenuku (elected Mayor) of the three villages of Atafu,

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<sup>1</sup> See United Nations *Draft resolution on the question of Tokelau* A/AC.109/2021/L.23 (18 June 2021).

Nukunonu and Fakaofu. It is chaired by the Ulu o Tokelau on a rotating basis and there are eight ministerial portfolios. The Office of the Council for the Ongoing Government of Tokelau rotates with the uluship and is responsible for providing support and advice to the leaders of Tokelau when the Fono is not in session.

[10] On Friday 11 November 2022, at a meeting of the Taupulega and the Administrator, the Acting Faipule of Atafu apologised and stated the Taupulega had no knowledge of, and had not approved, the removal of the child from the *Kalopaga*. The Taupulega of Atafu is investigating these events.

[11] At 7 pm on 11 November 2022, the Council held an emergency meeting. The Ulu declared a conflict of interest as first cousin of the grandmother. The Council was concerned that the child could potentially be removed from Tokelau. The Council resolved to apply to the High Court of Tokelau for wardship orders. It resolved to nominate Elehi Kelihiano Kalolo, the Minister of Education and Faipule of Atafu, to accept any delegation of powers from the Court. Elehi Kelihiano Kalolo states:

- 32 The Council acknowledge that the present application is unprecedented in Tokelau. It is the sincere wish of the Council that this unfortunate family law dispute between the families be resolved using time honoured Tokelauan culture and custom.
- 33 However the Council is also conscious that until some formal and cordial agreement has been reached between the families of [the child] that her immediate health and well-being is paramount over everything else.
- 34 The Council and I are therefore of the view that the best outcome for [the child] is to make her a Ward of this Honourable Court and that if this Honourable Court considers it appropriate, that I am appointed to make all guardianship and care decisions in respect of [the child] until further order of the Court.

### **Relevant law**

[12] The High Court of New Zealand, sitting as the High Court of Tokelau, has jurisdiction to administer the law under s 3 of the Tokelau Amendment Act 1986 (NZ), which is to be read with the Tokelau Act 1948 (NZ). That jurisdiction may be exercised in the same manner as if Tokelau is part of New Zealand, but subject to the provisions of any regulations and any rules made by the General Fono. This Court has

previously held that its jurisdiction will be exercised as it usually would under the High Court Rules 2016, subject to the provisions of any rules made by the General Fono.<sup>2</sup>

[13] The Fono has made the Crimes, Procedure and Evidence Rules of Tokelau 2003 (the Rules). Relevantly, r 87 provides that, unless the Court otherwise directs, cases should be decided on the papers. Rule 93 provides that judgments should be in writing.

[14] Tokelau’s legislation does not provide for care and guardianship of a child born out of wedlock, as here.<sup>3</sup> Foreign custody orders can be registered and enforced but there is no evidence of such an order here. Accordingly, s 4B(1) of the Tokelau Act is relevant. It provides that the English common law is enforceable in Tokelau unless excluded by any other law enforceable in Tokelau or it is inapplicable to the circumstances of Tokelau.

[15] English common law emphasises the importance of the welfare and the best interests of the child. This is also the case in other common law jurisdictions. On an appeal from Canada the Privy Council in *McKee v McKee* observed, “It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody.”<sup>4</sup> The Hague Convention on Child Abduction and the United Nations Convention on the Rights of the Child have a similar emphasis.<sup>5</sup> *Halsbury’s Laws of England* outlines the inherent jurisdiction, and duty, of the High Court to take care of children who are not able to take care of themselves.<sup>6</sup> In *Re P (G E) (an infant)*, the Court of Appeal held that jurisdiction could be exercised in respect of a child ordinarily resident there.<sup>7</sup>

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<sup>2</sup> *Sam v Council for the Ongoing Government of Tokelau* [2012] NZHC 2775, [2012] TKHC 1.

<sup>3</sup> Compare with the Divorce Rules 1987, r 13(1)(i).

<sup>4</sup> *McKee v McKee* [1951] AC 352, [1951] 1 All ER 942 at 363 – 364.

<sup>5</sup> Convention on the Civil Aspects of International Child Abduction 1343 UNTS 98 (opened for signature 25 October 1980, entered into force 1 December 1983); United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

<sup>6</sup> Clare Blanchard and others (ed) *Halsbury’s Laws of England: Children and Young Persons* (5<sup>th</sup> ed, LexisNexis, Wellington 2008 – 2014) vol 9 at [284] and [286].

<sup>7</sup> *Re P. (G.E.), an Infant* [1964] 3 All ER 977 at 988.

## **Submissions**

[16] Ms Wademan, for the Council, submitted that the doctrine of *parens patriae* be invoked by the Court and that the Minister of Education, for the Council, act as agent of the Court. As an interim measure, the Council intends to restore the situation to that which existed before the 5 November 2022 incident, where the child is in the care of her paternal grandmother. Investigations and discussions will be held into the medium and longer term care and guardianship of the child. These processes would be based on the collaborative culture and customs of Tokelau. Ms Wademan submitted that the evidence before me, which is the best available in the time available, demonstrates the urgent need for official intervention before the child's quarantine ends. In the absence of the order sought, the Council does not consider there is any basis for it to intervene and the child may well be taken out of the Tokelauan jurisdiction, contrary to her best interests and welfare.

## **Reasons for the orders**

[17] I consider the interests of justice, and particularly the interests of child, required me to consider this urgent application without notice to the defendants. Time was of the essence, given the imminent release of the child and the mother from quarantine, and the lack of other lawful means to ensure the child remains in Tokelau while the dispute is resolved.

[18] The dispute is clearly best resolved through Tokelauan custom and processes. The role of the Court is to ensure the parties have the time and space to do that. I considered that is best achieved by exercising the Court's jurisdiction to make the child a ward of the Court and for the Minister of Education and Faipule of Atafu to have the authority to make all necessary decisions regarding her guardianship and care. I was particularly mindful of the Minister's intention to restore the child to the care of her paternal grandmother. That is the situation she has been in for all but six months of her life. The evidence before me is that that situation is in her best interests, while the current dispute is sorted out.

[19] Accordingly, I made the orders sought, as quoted at the beginning of this judgment. I reserve leave for any of the parties to apply to vary the orders on five working days' notice.

Palmer J