ANOTHER DAY IN COURT FOR TOKELAU

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On 14 November 2022, for the second time in Tokelau's history, the High Court of New Zealand sat as the High Court of Tokelau.[1] *The High Court, constituted by Palmer J, sat to hear the case of Council for the Ongoing Government of Tokelau v AG, FI, PG and TF,*[2] *an ex parte application by the Council for the Ongoing Government of Tokelau (the Council). This case was also notable as the first family law dispute to reach a State court and 'unprecedented in Tokelau'.*[3]

Le 14 novembre 2022 et pour la deuxième fois dans l'histoire de Tokelau, la Haute Cour de Nouvelle-Zélande (High Court) a été amenée à siéger es qualité de Haute Cour des Tokelau.

A cette occasion, dans son arrêt 'Council for the Ongoing Government of Tokelau v AG, FI, PG et TF', la Haute Cour, présidée par Palmer J, sur la requête du 'Council for the Ongoing Government of Tokelau' et statuant en l'absence de défendeur, a eu à connaitre du premier contentieux porté devant une juridiction étatique en matière de droit de la famille à Tokelau.

I INTRODUCTION

The case of *Council for the Ongoing Government of Tokelau v AG, FI, PG and TF* exposes the difficulties of applying the law in countries with a plural legal system, particularly in instances where the State law is derived from foreign countries. Here,

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1 The first case was *Suveinakama and Puka v Council for the Ongoing Government of Tokelau and Ulu O Tokelau* [2017] NZHC 3287. See further, Jennifer Corrin 'Tokelau's Day in Court', (2019) (Hors Serie Volume XXIV) Comparative Law Journal of the Pacific 141. The current case was the third to be filed in the High Court. The current case was the third to be filed in the High Court. One other case was filed in 2012, *Sam v The Council for the Ongoing Government of Tokelau* [2012] NZHC 2775, but was settled before trial.

2 [2022] NZHC 2991.

3 *Council for the Ongoing Government of Tokelau v AG, FI, PG and TF* 2022] NZHC 2991 [11], setting out an extract from the affidavit of Elehi Kelihiano Kalolo para 32.

the decision making body was also based in a foreign country, raising the question of whether this is the best way of dealing with cases where cultural issues are at play. This is a question which, until recently, also arose in Nauru, where there was a right of appeal to the High Court of Australia. It may also arise where countries retain an appeal to the Judicial Committee of the Privy Council.[4] As discussed later, it is unclear whether there is still a right of appeal to the Privy Council from Tokelau. The case also reveals the conflicts that can arise in small island states where decision makers are often related to the parties in dispute. From a factual perspective, it also illustrates an incident of unforeseeable complications caused by restrictions in place due to the COVID pandemic.

II BACKGROUND

Tokelau consists of three atolls, Fakaofo, Nukunonu and Atafu, each with a village community. The country is a non-self-governing territory of New Zealand. Under the Tokelau Act 1948,[5] the Head of State is the Head of State of New Zealand, that is Charles III, King of the Realm of New Zealand. The Monarch's delegate in New Zealand, the Governor-General is also the Governor-General of Tokelau.[6] Technically, responsibility for administration lies with the Administrator of Tokelau,[7] although the country is largely self-governing. As noted in the judgment, the system of government is based on traditional village leadership. The national government is headed by the General Fono, made up of elected representatives from each atoll.[8] The General Fono is authorised to legislate for Tokelau in the form of Rules.[9] Executive authority rests with a Council, which is made up of three Faipule (chairs of the village councils) and three members of the General Fono, one designated by the Taupulega of each village[10] (typically it sits with the three Pulenuku (village mayor)). Traditional authority in Tokelau is vested in its villages, and local level government is administered through customary practices by the elders.[11] The head of government is the Ulu o Tokelau, a position that is rotated

4 In the Pacific, there is still a right of appeal to the Privy Council from the courts of the Cook Islands, Niue, Kiribati and Tuvalu.

5 Tokelau Act 1948, s 3.

6 Letters Patent 1983 (SR 1983/225).

7 Tokelau Administration Regulations 1993.

8 Government of Tokelau, Tokelau Government: Political System, https://www.tokelau.org.nz/Tokelau+Government.html accessed 27 February 2019.

9 Tokelau Act 1948, s 3A, as inserted by the Tokelau Amendment Act 1996, s 3.

10 Constitution of Tokelau 2006, rule 6(2).

11 Tokelau Amendment Act 1996, s 4.

among the Faipule on an annual basis. The desire to move towards greater self-government is, as noted in the judgment,[12] supported by both the New Zealand Government and the United Nations Special Committee on Decolonization.[13]

The law of Tokelau consists of the Rules made by the General Fono, including the principal Rules in the Constitution of Tokelau 2006 ('the Constitution'). If Tokelau had become self-governing by the referendum in 2007, this Constitution would have come into effect as the constituent document. Whilst this did not occur, the Rules remain as a consolidation of the key constitutional Rules already in force.[14] The Constitution lists the local sources of law, in descending order of priority as the Constitution, General Fono Rules, Village Rules, and the custom of Tokelau.[15] These and other Rules are subject to the Tokelau Act 1948 (NZ), as amended,[16] which is the supreme law. The New Zealand Parliament typically only legislates for Tokelau with Tokelau's consent. The Governor-General may make Regulations, but this is rare since 1996 and typically occurs only in agreement with Tokelau. A few New Zealand statutes apply in Tokelau by virtue of the fact that they expressly provide for this.[17] Acts of the United Kingdom parliament no longer apply.[18] However, the English common law (and equity) 'for the time being' applies except to the extent—

(a) That it is excluded by any other enactment in force in Tokelau; or
(b) That it is inapplicable to the circumstances of Tokelau.[19]

The meaning of the phrase 'for the time being' was raised in *Suveinakama v Council for the Ongoing Government of Tokelau*.[20] Was the common law to be applied as it stood in 1996, the date of the amendment of the Tokelau Act 1948 to include this provision, or was it as the common law stood at the date of the hearing? Although it was ultimately held that it was not necessary to decide this point,

12 [9].

13 See United Nations Draft resolution on the question of Tokelau A/AC.109/2021/L.23 (18 June 2021), cited in Corrin above n 1.

14 See further, Tony Angelo "The Constitution of Tokelau" (2009) 15 Revue Juridique Polynesienne 181.

15 Rule 12(4).

16 See, eg Tokelau Amendment Act 1986.

17 Tokelau Act 1948 s 6. See, eg Interpretation Act 1999, applied by Tokelau Act 1948, s 8. See now the Interpretation Rules 2003.

18 Repeal of Laws Rules 1997 (Tokelau).

19 Tokelau Act 1948 s 4B(1).

20 [2019] TKHC 1; [2019] NZHC 1787 [31].

Churchman J did comment, obiter that there was not a cut-off date of 1840[21] as had been held by Elias CJ in *Suveinakama and Puka v Council for the Ongoing Government of Tokelau and the Ulu o Tokelau*.[22] The confusion arose as, prior to its amendment in 1996, the 1948 Act stated that:

> The law of England as existing on the 14th day of January in the year 1840 (being the year in which the Colony of New Zealand was established) shall be in force in [Tokelau], save so far as inconsistent with this Act or inapplicable to the circumstances of [Tokelau].[23]

The Constitution also provides that the courts of Tokelau are:[24]

(i) The Commissioner's Court and Appeal Committee of each village;
(ii) The High Court;
(iii) The Court of Appeal.

It is unclear whether there is a further right of appeal from the Court of Appeal. The right to appeal from New Zealand courts to the Privy Council was brought to an end in 2004,[25] but only in respect of the New Zealand metropolitan courts. Consequently, an appeal still, arguably lies from Tokelau to His Majesty in Council. His Majesty, the King of New Zealand has an Executive Council, rather than a Privy Council,[26] so a prerogative appeal would appear to lie to that body.[27]

By virtue of the Tokelau Amendment Act 1986,[28] the High Court of New Zealand has jurisdiction to administer the law of Tokelau, to be exercised in the same manner in all respects as if that jurisdiction had been conferred on it as a separate court of Tokelau.[29] Subject to applicable regulations and to the provisions of any Rules made by the General Fono, the jurisdiction is to be exercised in the same manner as if

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21 *Suveinakama v Council for the Ongoing Government of Tokelau* [2019] TKHC 1; [2019] NZHC 1787, Note 12.

22 [2018] NZHC 1670 at [6].

23 The word "Tokelau" was substituted for "the Tokelau Islands" by s 3(1)(c) of the Tokelau Amendment Act 1976.

24 Rule 8.

25 Supreme Court Act 2003, s 42. See now, Senior Courts Act 2016, Part 1.

26 Letters Patent 1983 (SR 1983/225) cl 7.

27 The author is grateful to Professor Tony Angelo for pointing out this possibility.

28 Section 3(2).

29 Section 3(1).

Tokelau was part of New Zealand.[30] Relevant Tokelauan Rules exist in the form of the Crimes, Procedure and Evidence Rules 2003, which provide that:

Every civil case and every criminal appeal in the High Court or in the Court of Appeal shall, unless the court otherwise directs, be decided on the papers.[31]

The 2003 Rules also contain a provision for an emergency application, but this is more in the nature of a freezing order, sometimes referred to as a Mareva injunction, designed to preserve assets.[32]

III THE FACTS

This case arose out of a disagreement regarding the living arrangements for a four year old child. Her parents, who were not in a relationship, lived separately in Australia and the child had been in the care of the paternal grandmother in Tokelau since she was six months old. On 5 November 2022, the grandmother and the child left Fakaofo on the cargo ship Kalopaga for Samoa. The grandmother's husband was told there was no room for him on the ship. In Samoa they were to meet the father, with whom the child was to fly to Australia 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 were to follow. Prior to departure, the Kalopaga's schedule was changed so that it would stop at Atafu on 5 November, rather than 4 November. This meant that it would be there at the same time as a passenger ship, the Mataliki. The mother was a passenger on the Mataliki.

The mother's step-father, who was the Acting Director of the Office of Taupulega (the Council of Elders) of Atafu and an Aumaga Committee member, contacted the crew of the Kalopaga over the ship radio on the morning of 5 November, telling them that the child was to be transferred ashore. He threatened that if this did not happen the ship to shore operation would be discontinued. On the same day, at Atafu, the mother and a uniformed Police Constable (the mother's brother-in-law) went by a barge and 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, even though the mother did not meet the repatriation criteria to enter Tokelau during the COVID epidemic. The mother's step-father told the crew that the Law Commissioner and the Atafu Taupulega consented to the Police boarding the Kalopaga to take the child and to the breach of the Covid-19 protocol. The Office of

30 Section 3(2).

31 Rule 87.

32 *Mareva Compania Naviera SA v International Bulk Carriers SA* (The Mareva) [1980] 1 All ER 213.

the Taupulega and the Law Commissioner later denied that they had given this permission. The grandmother was not allowed to go with the child, even though her mother was from Atafu which granted her an automatic right to enter Atafu. On Atafu, the mother and the child went into quarantine together, which was due to end on or about the day of the hearing.

The grandmother complained to the Atafu Taupulega and the Law Commissioner of Atafu about the child being taken from her and the way she was handled by the Constable. Following intervention of the Council, the Ulu o Tokelau, the General Manager National of the Office of the Council, and the Administrator, she was allowed ashore on Atafu and quarantined separately from the mother and the child. Her quarantine was also due to end on the day of the hearing.

The Judge noted that the step-father sent an email on the day of the incident (although the recipient was not specified in the judgment), stating that there was a collective agreement with the leaders of Fakaofo, his children (presumably the mother and her sister), the grandmother and her husband to bring the child to visit. Fakaofo officials said that there was no agreed time for that visit to take place. The step-father also alleged that the grandmother had changed from the Mataliki to the Kalopaga to avoid meeting the mother. It was further noted in the facts that the Constable and his wife, the child's maternal uncle and aunt, had expressed a wish to adopt the child.

Following an emergency meeting of the Council on 11 November, fearing that the child might be removed from Tokelau. the Council resolved to apply to the High Court for wardship orders. At that meeting the Ulu declared a conflict of interest as he was a first cousin of the grandmother.

IV THE DECISION

The High Court made the following orders, as requested by the applicant:[33]

(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

33 [1] and [19].

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.

V COMMENTARY

A The Law Applied

As stated by the Court, Tokelau's legislation does not provide for, 'care and guardianship of a child born out of wedlock'. It was therefore held that the case should be decided under the English Common Law. In taking this course, the Court relied on s 4B(1) of the Tokelau Act, which, it has been noted, provided that the English Common Law was enforceable in Tokelau unless excluded by any other enactment in force in Tokelau or where it was inapplicable to the circumstances of Tokelau.[34] While this is undoubtedly the case, apart from noting that there was no Tokelauan legislation on point, the Court did not stop to consider whether there was any other relevant law or whether there were any circumstances rendering the Common Law inapplicable. As mentioned above the General Fono Rules and Village Rules are part of the law of Tokelau and, assuming them to qualify as 'enactments', if relevant would prevail over the Common Law in the event of a conflict. Even if not qualifying as 'enactments' the existence of a conflicting 'Rule' would appear to render the Common Law inapplicable to the circumstances of Tokelau. Similarly, the custom of Tokelau is part of the law and, if contrary to the Common Law, would be another circumstance rendering the Common Law inapplicable.

Moreover, in this case, the Minister of Education and Faipule of Atafu raised culture and custom as being relevant to the case, stating that it was the applicant's wish that, 'this unfortunate family law dispute between the families be resolved using time honoured Tokelauan culture and custom.' This submission appears to bring into play the Custom as a Source of Law Rules 2004. The Rules state that if a party to High Court proceedings raises a matter of Tokelauan custom the Court must seek the advice of the General Fono on that question and must adjourn the proceedings for up to 30 days to obtain that advice from the General Fono.[35] On receipt of a reference under this rule, the General Fono must refer the matter to the Taupulega in each village and tender advice to the High Court on the basis of the responses.[36] On receipt of the advice from the General Fono, the Court must determine issues concerning

34 [14].

35 Section 5(1).

36 Section 5(3).

the matter of custom by reference to that information.[37] Only if no advice is received or where the General Fono responds that there is no relevant Tokelauan custom may the High Court decide the matter on the basis that custom is not applicable.[38] Whilst the circumstance of this case made it necessary to make an interim order, it appears that this process should have been put in place and the matter adjourned.[39]

In addition to the Common Law, the Court referred to the Hague Convention on Child Abduction and the Convention on the Rights of the Child ('CRC') in support of its approach. Tokelau is not empowered to ratify a treaty in its own right, However, New Zealand is a party to both Conventions. In respect of the Hague Convention, the Government of New Zealand has confirmed the following:[40]

Consistent with international law, New Zealand regards all treaty actions as extending to Tokelau as a non-self-governing territory of New Zealand unless express provision to the contrary is included in the relevant treaty instrument.

With regard to the CRC, New Zealand has provided to the contrary. The instrument of ratification states that, 'such ratification shall extend to Tokelau only upon notification to the Secretary-General of the United Nations of such extension'.[41]

B The Procedure Applied

In accordance with the 2003 Rules, this case was decided on the papers.[42] Affidavit evidence was received from the Minister of Education and the General Manager of the Council. Whilst this was an ex parte application, the heading of the case is framed as a inter partes application with the applicant and four defendants. This heading seems more unusual in the context of a wardship application, which has been held to be 'parental and administrative, as distinct from an adversarial jurisdiction'.[43] Whilst it is not mandatory to commence wardship proceedings by originating application, this would appear a more obvious choice, and is available

37 Section 5(4).

38 Section 2(5).

39 See also the Divorce Rules 1987, r 8, which requires referral of any application for divorce to the Taupulega.

40 In a communication dated 10 April 2002, noted in United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, https://treaties.un.org/Pages/HistoricalInfo.aspx# NewZealand accessed 18 January 2022.

41 Instrument of Ratification, 6 April 1993.

42 Rule 87.

43 *Wilkinson v C and C* [1999] NZFLR 569.

with the permission of the court, without notice.[44] The heading would then be, 'In the matter of … And In the matter of an application by … .'.[45]

The Crimes, Procedure and Evidence Rules contain a provision for an emergency application for an injunction.[46] However, an order under this Rule endures for only 24 hours, unless, within that time, a formal claim is made by the applicant for the injunction.[47] The Court noted here that, subject to the Tokelauan Rules, the High Court Rules 2016 (NZ) applied to proceedings in the High Court of Tokelau.[48] By implication, the High Court Rules were followed here, but the judgment does not specify which particular Rules were relevant. Proceeding without notice is permitted by order of court,[49] which, by implication, occurred here.[50] The High Court Rules make provision for a Freezing Order,[51] but this must be for a limited time and set a date for a hearing at which the respondent will have the opportunity to be heard.[52] They also make provision for an interlocutory injunction prior to the commencement of proceedings in cases of urgency, but any such order must provide for commencement of proceedings[53] In this case no such order was made nor any order paving the way for a full hearing and for a final order to be made. A reporting process was put in place by the third order,[54] but otherwise, the judge left the matter in the hands of the Court's delegate, the Minister of Education, reserving leave for any party to apply for a variation of the orders on five working days' notice.[55]

C Appeals to Foreign Courts and Conflicts of Interest

As mentioned above, where a court sits in or is constituted by residents of a foreign country the question arises whether this is appropriate when cultural issues

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44 High Court Rules 2016 (NZ), r 19.5

45 High Court Rules 2016 (NZ), r 19.9.

46 Rule 106.

47 Rule 106(3).

48 Citing as authority *Sam v The Council for the Ongoing Government of Tokelau* [2012] NZHC 2775 [8].

49 High Court Rules 2016 (NZ), r 5.24.

50 Above n2, at [1].

51 Sometimes referred to as a Mareva Injunction. See *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1980] 1 All ER 213.

52 High Court Rules 2016 (NZ), r 32.2.

53 High Court Rules 2016 (NZ), r 7.53.

54 Above n2, at [1].

55 Above n2, at [19].

are at play. This question is relevant in other countries which retain an appeal to the Judicial Committee of the Privy Council. In the Pacific, the Cook Islands,[56] Niue,[57] Kiribati,[58] Tuvalu,[59] and possibly Tokelau,[60] allow a final appeal to the Privy Council in certain cases.[61] The question was also relevant in Nauru until 2018, when appeals to the High Court of Australia were abolished and replaced by a newly established Court of Appeal.[62]

On the other side of the coin, in some cases, having a decision-making body outside the country may have the advantage of avoiding the appearance of bias. As mentioned, this case highlights the conflicts that can arise in small island countries where decision makers are often related to the parties in dispute. Here, the Ulu declared a conflict of interest as he was first cousin of the grandmother. Further, if reference had been made to the Taupulega for advice on custom, as it is argued above was the correct procedure, it would have presented a difficulty in this case. However, whilst a conflict of interest appears to arise, in that each of the parents and the others involved in this case are from different villages, being two of the three villages from which the Taupulega's advice is to be sought, conflict of interest is not a cultural concept of Tokelau, where decisions are made without reference to this.

D Wardship

Wardship is an ancient jurisdiction arising not from statute or rules but from the inherent duty of the Sovereign to protect his or her subjects. In 1991, limited wardship jurisdiction was conferred on the New Zealand Family Court.[63] This was

56 Constitution of Cook Islands 1964, art 59(2). For a survey of the relationship between the Privy Council and Cook Islands see Frame, A 'The Cook Islands and the Privy Council' (1984) 14 Victoria University of Wellington Law Review 311.

57 Constitution of Niue 1974, art 55(2).

58 Kiribati Independence Order 1979 (UK), s 123, Sch; Kiribati Appeals to Judicial Committee Order 1979 (UK) (SI 1979 No 720).

59 Constitution of Tuvalu, Cap 1.02, ss 119(a) 136; Tuvalu (Appeals to Privy Council) Order 1975 (UK) (SI 1975 No 1507).

60 See discussion above, text at nn 25 to 27.

61 In *Bade v The Queen* [2016] UKPC 14, the Privy Council held that although there had been no express revocation of the right to Petition the Privy Council for special leave to appeal from a decision of the Court of Appeal of Solomon Islands, this was the necessary intendment of the Constitution of Solomon Islands 1978.

62 Nauru Court of Appeal Act 2018; Constitution of Nauru, art 57 as amended by the Constitution (Amendment) Act 2018, s 4.

63 Guardianship Act 1968, s 9A to 9C, now repealed.

extended to full jurisdiction in 1997,[64] but this exists concurrently with the distinct jurisdiction of the High Court, which in its modern form is part of its equitable jurisdiction.[65] Wardship has been promoted as a 'flexible and resourceful remedy'.[66] This case provides a good example of this, providing a means of responding to an urgent situation. However, the question does arise as to whether this remnant of an ancient, paternalistic, inherent jurisdiction of the Crown, in this case, Charles III as King of New Zealand, is still appropriate in Pacific island countries.

E Adoption

One incidental matter that arises from the judgment is the question of adoption. The facts mention that the child's maternal uncle and aunt had expressed a wish to adopt the child. Until 2007, adoption of Tokelauan children under the age of twenty-one was governed by the Tokelau Islands Adoption Regulations 1966, made by the Governor-General.[67] These Regulations provided that customary adoptions were to be of no 'force or effect'.[68] Application for a certificate of adoption was to be to the Administrator and only Tokelauans resident in Tokelau were permitted to apply.[69] In 2003, the reference to the Administrator in the Regulations was replaced by reference to the Council of Faipule.[70] Then, in 2007, the Regulations were revoked by the Tokelau Amendment Act,[71] having been patriated in the form of the Adoption Rules 1966, in the same terms, but deemed to have been made by the General Fono. Accordingly, adoption by Tokelauan custom is not legally recognised. This seems at odds with the Constitution's emphasis on the 'Tokelau Way' and the recognition of custom as a source of law.[72] There is some accommodation of custom in the Rules, which, whilst providing that the certificate terminates all the rights and responsibilities of the natural parents, the rights of the child to inherit property from

64 See now, Care of Children Act 2004 (NZ), s 31.

65 Judicature Act 1908 (NZ) s 16, repealed by the Senior Courts Act 2016 s 182 and replaced by s 12(a); Guardianship Act s 10E(2), now replaced by the Care of Children Act 2004. See also *Re RSR* [2005] NZFLR 228 [31], [33] and [34].

66 *Hawthorne v Cox* [2008] NZFLR 1 [75]. Justice Paul Brereton 'The Origins and Evolution of the Parens Patriae Jurisdiction', Lecture on Legal History, Sydney Law School, 5 May 2017.

67 Reg 2.

68 Reg 3.

69 Reg 4(1).

70 Rule 1(1)(i).

71 Section 9(1) and Sched Part 2.

72 Preamble and r 12(4).

the natural parents is preserved.[73] In other countries of the region customary adoption, which does not cut the ties between biological parents and the child, has been allowed to continue.[74] Queensland has recently passed the *Meriba Omasker Kaziw Kazipa* (Torres Strait Islander Child Rearing Practice) Act 2020, recognising traditional adoption amongst Torres Strait islanders and attempting to reconcile those practices with international standards.[75]

F The Role of the Administrator

The Administrator of Tokelau sits below New Zealand's Minister for Foreign Affairs and the Secretary of Foreign Affairs in the line of executive authority. The Minister and Secretary sit below the Executive Council, which is below the Governor-General.[76] As mentioned above, technically, administration lies with the Administrator.[77] The Administrator may delegate power to any other person, and in particular to Tokelau institutions.[78] In 2004, most of the Administrator's powers were delegated to the Taupulega of each village who then delegated to the General Fono authority in matters beyond those properly undertaken by each village alone. When the General Fono is not sitting, those powers can be exercised by the Council.[79] The Council was the applicant in this case.

In the course of the judgment, it was mentioned that those who intervened to allow the grandmother to go ashore in Atafu included the Administrator who was in Tokelau at the time.[80] The Administrator was also present at a meeting with the Taupulega where the Acting Faipule of Atafu apologised and said the Taupulega had not approved the removal of the child from the Kalopaga and had no knowledge of it.[81] There is no further mention of him in the judgment.

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73 Rule 9(2). See also Succession Rules 2004, which provide that succession on intestacy is to be in accordance with custom: r 3(1).

74 See, eg Adoption of Children Act 1968 (PNG); Adoption Act 2004 (Solomon Islands), s 28.

75 See further, Sue Farran and Jennifer Corrin, 'Torres Straits Islanders lead the way in legislating for Kupai Omasker in the Pacific', (2021) 33:1 Child and Family Law Quarterly.

76 Tony Angelo "The Constitution of Tokelau" (2009) 15 Revue Juridique Polynesienne 181, 184.

77 Tokelau Administration Regulations 1993, now known as the Administration Rules 1993.

78 Administration Rules 1993, rr 5-7.

79 Recited in the preamble to the Tokelau Amendment Act 1996, cl 7(ii). See also Tony Angelo "The Constitution of Tokelau" (2009) 15 Revue Juridique Polynesienne 181, 183.

80 Above n2 at [8].

81 Above n2 at [10].

This case highlights the difficult balance involved in the Administrator's role. On the one hand, his powers have been delegated so that they now reside with the elders, and the government of Tokelau has clearly expressed, 'its wish to paddle its canoe to the greatest extent possible'.[82] On the other hand, administration still formally lies in his hands. Presumably, it is a case of offering advice when requested, which appears to be the path taken here.

G Citizenship

Palmer J stated in the judgment that the parents, the child and her grandmother were all citizens of Tokelau. In law, that was not the case. As mentioned above, Tokelau is a non-self-governing territory of New Zealand, and its people are New Zealand citizens. In two referendums, one in 2006 and the second in 2007 the two-thirds majority required to move to self-government in free association was not reached.[83]

VI SUBSEQUENT DEVELOPMENTS

Until an application is made to vary the orders made, the decision making regarding the child remains with the Court, albeit that this power has been delegated to the Minister.

As matters stand, Orders made ex parte on the basis of urgency are in place and there is no provision for a full hearing to take place. As previously mentioned, on making the Orders, the Judge in this case gave leave for any of the parties to apply for variation on five working days' notice. No application appears to have been made and it is hardly surprising that the individuals concerned have not applied, given the cost and complexity of making an application to the High Court. Whether there will be a full hearing on the initiative of the Council (the Court's representative), a party or the Court remains to be seen.

The fate of the Family Court hearing that was scheduled to take place in New South Wales is unknown. Had that court made an order prior to the High Court's judgment, a foreign country would have had control of the child's future. From that perspective, there is benefit in the decision having been made by the High Court of Tokelau (albeit sitting in New Zealand), and, in effect, retaining control of the child in Tokelau.

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82 Tokelau Amendment Act 1996, Preamble cl 10.

83 The General Fono has endorsed a proposal to hold the next referendum on self-determination by 2025.