EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

NOTE: PURSUANT TO S 22A OF THE ADOPTION ACT 1955, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2023-004-001217
[2024] NZFC 15248

IN THE MATTER OF	THE ADOPTION ACT 1955
BETWEEN	[SUNAN BUNNAG] Applicant
AND	[KLAHAN BUNNAG] Child or Young Person the application is about

Hearing:	9 October 2024
Appearances:	P Finau for the Chief Executive Oranga Tamariki S Dalley for the Applicant M Casey KC as Counsel to Assist S Loffler as Social Worker
Judgment:	28 November 2024

RESERVED JUDGMENT OF JUDGE B R PIDWELL
(Reasons)

---

[1] [Klahan Bunnag] was born in Bangkok, Thailand on 18 December 2023. He is a healthy, happy baby who is very loved and well cared for by Mr [Bunnag], the applicant in these proceedings. Mr [Bunnag] asks the Court to recognise him as [Klahan]'s father by granting his adoption application.

[2] As a child, [Klahan] has rights conferred on him by the United Nations Convention on the Rights of the Child (UNCRC) to which New Zealand is a party. Any person, entity or court which has the responsibility of making decisions about [Klahan], must have his best interests as the primary consideration.[1] However, in the adoption context, his interests are elevated to the paramount consideration.[2] The distinction may be subtle, but the word "paramount" means something that is superior to all others. It is a reminder that a voiceless child is vulnerable, and those making decisions which permanently affect their parentage and childhood must ensure their interests are paramount over all else. Childhood is taonga. It is the foundation for creating a healthy adult.

[3] The Adoption Act 1955 does not enshrine the primary nor paramountcy principles, but predates the UNCRC which was adopted by the United Nations in 1989, and ratified by New Zealand in 1993.

[4] This reminder is crucial to this case, as [Klahan]'s creation was as result of an illegal surrogacy process in a country where the government felt the need to specifically outlaw surrogacy in all but very limited situations. A number of illegal steps or breaches of laws occurred in the creation of [Klahan]. However, he has now been born, and as a result, has the right to grow and thrive, to have a nationality, and the right to know and be cared for by his parent/s.[3] The irregularities in his creation, or the sins of his father, should not be visited upon him.

[5] On 17 October 2024 I granted the adoption application and made a final order establishing Mr [Bunnag] as [Klahan]'s father.[4] These are my reasons for making that order.

[Klahan]'s creation

[6] [Sunan Bunnag] was born in China in 1983. He is a permanent resident of New Zealand. He is not currently in a relationship. He identifies as a gay man.

---

[1] Articles 3 UNCRC.
[2] Article 21 UNCRC.
[3] Article 7 UNCRC.
[4] Minute of Judge BR Pidwell, *[Re Bunnag]* [2024] NZFC 13770, 17 October 2024.

[7] He wanted to become a father and spoke to friends in New Zealand and China who had experience with surrogacy arrangements, resulting in healthy children being born. He became aware of a fertility clinic in Bangkok, Thailand and contacted them. He entered into a commercial surrogacy agreement facilitated by the clinic. He chose an egg donor. The surrogate, Ms [Chon Nitpattanasai] was implanted with his gametes and the donor egg. [Klahan] was born as a result.

[8] DNA evidence has been provided showing the genetic link between Mr [Bunnag] and [Klahan].

[9] [Klahan] was cared for by Mr [Bunnag] immediately upon his birth. He was issued with a Thai birth certificate recording Ms [Nitpattanasai] as his mother, and Mr [Bunnag] as his father.

[10] Ms [Nitpattanasai] is not genetically linked to [Klahan]. She signed the surrogacy agreement which provides that she relinquishes custody and parental power and "shall depart from parenthood" within three days of the birth.[5] She has also signed the required consent, which has been witnessed appropriately by a Notary Public. In addition, she has sworn an affidavit stating "From the moment I agreed to be a gestational surrogate for [Sunan], I have always understood that [Sunan] would be raising [Klahan] in New Zealand….I have always believed that [Sunan] is [Klahan]'s legal parent… I have never intended to be [Klahan]'s mother."[6]

[11] Mr [Bunnag] travelled from Thailand to China with [Klahan] in March 2024. He then returned to New Zealand for work purposes and left [Klahan] with his parents.

[12] [Klahan] was granted a visitor's visa to come to New Zealand. He travelled with his grandmother in August 2024. I met him for the purpose of the adoption hearing.[7]

---

[5] Surrogacy agreement dated 10 October 2022.
[6] Affidavit of Gestational Surrogate [Chon Nitpattanasai] dated 22 February 2024.
[7] Regulation 10 Adoption Regulations 1959.

Legal framework

[13] Despite the fact that Mr [Bunnag] is [Klahan]'s biological father, and is named on his Thai birth certificate, the Status of Children Act 1969 (STA) prevents Mr [Bunnag] from being recognised legally as [Klahan]'s father for the purpose of NZ law.

Presumption as to parenthood

[14] Section 5 of the STA states the legal presumptions as to parenthood. If a child is born either during the marriage, or within 10 months after the marriage has ended, the child will be presumed to be a child of the woman who bore it together with her husband/partner.[8] This is a rebuttable presumption and the standard of proof for the rebutting evidence is the balance of probabilities.[9]

[15] A man can apply to be recognised as a father of a child by a paternity order. He is presumed to be the father if he is married to the child's mother at conception or some other time, or if a declaration of paternity is made.

[16] Section 8 of the STA provides that a person named as the father of a child in a certified copy of an entry made into the equivalent of a Births Register in another country is *prima facie* evidence that they are the father for the purpose of paternity.

[17] However, the STA was amended in 2005. A new Part 2 was inserted to govern the status of children conceived by Assisted Human Reproduction (AHR) procedures. Section 13(a) provides that the purpose of Part 2 is to "remove uncertainty about the status of children conceived as a result of AHR procedures".

[18] Section 14 is the interpretation section of Part 2. Section 14(1) says:

> ***partnered woman*** means a woman who—

[8] Status of Children Act 1969, s 5(1).
[9] Section 5(2).

(a) is married or in a civil union; or

(b) is married or in a civil union, but is living with a man, or with another woman, as a de facto partner; or

(c) is not married or in a civil union but is living with a man, or with another woman, as a de facto partner.

woman acting alone means a woman—

(a) who is not a partnered woman; or

(b) who is a partnered woman, but has undergone an AHR procedure without her partner's consent.

[19] Section 22 applies to woman acting alone:

22 Woman acting alone: non-partner semen donor not parent unless later becomes mother's partner

(1) This section applies to the following situation:

(a) a woman acting alone becomes pregnant as a result of an AHR procedure:

(b) the semen used for the procedure was produced by a man **(*man A*)** who is not her partner.

(2) In that situation, man A is not, for any purpose, a parent of any child of the pregnancy unless man A becomes, after the time of conception, the woman's partner (in which case the rights and liabilities of man A, and of any child of the pregnancy, are determined in accordance with section 24).

[20] Section 22(2) therefore prohibits a man, who has provided their semen to a woman who is not their partner for the creation of a child via AHR, being recognised as the father "for any purpose".

[21] Section 26 of the STA is concerned with conflicting evidence of paternity. In particular, s 26(b) reads:

26 Conflicting evidence of paternity

Sections 18, 21, and 22 have effect despite—

…

(b) any conflicting declaration of paternity made under section 10 that the man who produced the semen was the father of the child of the pregnancy:

…

[22] Therefore s 26 overrides the Courts' power to make a declaration of paternity under s 10 where s 22 applies. Irrespective of the clear evidence that Mr [Bunnag] is the biological father of [Klahan], his only recourse is to the Adoption Act 1955 for New Zealand law to recognise their relationship.

Oranga Tamariki opposition

[23] As with all adoption applications, the court is required to obtain a report from a social worker.[10] The terms of the report are not prescribed. The practice is for a specialist social worker from the Adoption unit of Oranga Tamariki to provide a report, having met the intended parent/s, completed background and reference checks, and provide an opinion or assessment on whether they are fit and proper people to raise the child.[11]

[24] A report was prepared by Mr Loffler for these proceedings. Despite acknowledging that Mr [Bunnag] is the only parental option for [Klahan], and that it may be in his best interest and welfare to be permanently cared for by Mr [Bunnag], it concludes by recommending that an adoption order is not made.

[25] The report canvassed Mr [Bunnag]'s personal background, current relationships, personality and character, home environment, education and employment, finances health, and police checks. Nothing untoward was identified. The surrogacy process, pregnancy and birth were all detailed, together with [Klahan]'s health and development.

[26] The sole reason for not assessing Mr [Bunnag] as a fit and proper person under the adoption legislation was because he engaged in an illegal surrogacy process overseas.

[10] S 10 Adoption Act 1955.
[11] S 11(a).

Issue

[27] The question therefore to answer is: should this Court create a legal parent/ child relationship between a biological parent and his child when the child has been created by process outlawed in another jurisdiction?

[28] [Klahan]'s creation involved multiple breaches of the law in Thailand. I am grateful for the assistance of Ms Casey KC in her role as counsel to assist the court in this regard. She provided the following information:

(a) Surrogacy in Thailand is illegal for international intended parents.

(b) In 2015, a federal law was passed prohibiting commercial surrogacy for all intended parents, including Thai citizens.

(c) Surrogacy is available and regulated in Thailand for married heterosexual couples, who meet strict criteria. The surrogate must be a blood relative.

(d) Mr [Bunnag] paid a significant sum of money to an individual who worked or was connected to the fertility clinic for the surrogacy programme.

(e) Questions arise about how Mr [Bunnag] and the surrogate presented themselves in order to obtain a birth certificate and passport.

(f) Some of the terms of the surrogacy agreement and how it was signed and witnessed raise concerns.

[29] The Court received further reports from Oranga Tamariki prepared by Ms Gardenier, a senior advisor in the Intercountry Adoption Team. She identified "a concerning trend where New Zealanders have engaged in surrogacy around involving Thai surrogates despite the illegality", and in other countries. She also identified that

this creates a significant risk to international and diplomatic relations and carries reputational risk for the New Zealand government agencies involved in the process.[12]

[30] The concern is if children born of illegal surrogacy arrangements are allowed entry into New Zealand, and their parentage is then endorsed by an adoption order, that could be seen as an endorsement of unlawful actions. However, this court is not considering immigration issues, nor the country's international reputation outside of its obligations under UNCRC. Those factors are relevant to a government minister and agencies when considering entry requirements for immigration purposes.[13] This court is bound by its obligation to uphold the principles of UNCRC and apply the current law in New Zealand for this particular child.

[31] The current law is the Adoption Act 1955, which provides no barrier to creating the parent/child relationship for a child with its biological father, despite the irregularities or illegalities in the creation of the child. The only barrier would be if the biological father was found not to be a "fit and proper person" to raise and maintain the child, or if the adoption did not promote the child's interest and welfare.

[32] For decades, Family Court judges have been applying the adoption law and commenting that it is in dire need of review to accommodate the changes in society and way children and families are created.[14] No government has yet made any changes, and thus the court must apply the law as it stands to each case before it.

Jurisdiction

[33] Section 3 enables any person "whether domiciled in New Zealand or not" to apply to adopt a child "whether domiciled in New Zealand or not". This is a far reaching provision, which opens the courtroom door to any person to apply to adopt any child. The only restrictions are contained in section 4, none of which apply here.[15]

---

[12] Reports from Oranga Tamariki dated 16 April 2024; 30 August 2024.
[13] As listed in the Ministerial Non-Binding Guidelines (Annex 1: to report of Ms Gardiner dated 16 April 2024.
[14] See for example Re KJB and LRB [Adoption] 2009 NZFLR 97 at [39] per van Dadelszen FCJ.
[15] Mr [Bunnag] is over the age of 25 years.

[34] [Klahan] is clearly a child, being under the age of 20 years.[16]

[35] I need to be satisfied that the Adoption (Intercountry) Act 1997 (AIA) does not apply. The AIA ratifies the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. It applies when a child is habitually resident in another Contracting State, and provides that the New Zealand Central Authority must approve the placement of the child with New Zealand based prospective adoptive parents.[17]

[36] It is accepted that a child's habitual residence is intrinsically linked to that of its parents, particularly newborns. The enquiry is one of intention. Mr [Bunnag] never intended to live in Thailand or China. Although [Klahan] was born in Thailand, it was never intended to be his country of residence. He was cared for by Mr [Bunnag] until he was of an age where he could safely travel. Mr [Bunnag] then travelled with [Klahan] to China, and left [Klahan] there with his parents in order to return to his life in New Zealand, and commence the adoption and immigration processes. There is no evidence that he intended to live anywhere else with [Klahan]. I am satisfied in those circumstances that [Klahan] was not habitually resident in Thailand, and was only in China as a waiting room until a visa was issued for him to enter New Zealand. He is now habitually resident in New Zealand, and living with his father, Mr [Bunnag].

[37] Therefore, the AIA does not apply.

Consents (section 7)

[38] I need to be satisfied that valid consent has been given by the surrogate in accordance with the requirements of the Act.

[39] Ms [Chon Nitpattanasai]'s consent is dated 22 February 2024. It has been signed in front of a Notary Public, sealed and translated.[18] She has also provided an

---

[16] Although all other Acts of Parliament in New Zealand and UNCRC define a child as under the age of 18 years, the Adoption Act defines a child as a person under the age of 20 years in s 2.
[17] S 10 AIA.
[18] S 7(8)(b).

affidavit explaining her personal situations and reasons for becoming a surrogate, reaffirming her consent for [Klahan] to be raised by Mr [Bunnag] in New Zealand.

[40] I am satisfied that valid consent has been given by the surrogate. No one else is required to consent to this process.[19] No other parent or guardian has been identified.

[41] Mr [Bunnag] clearly consents.

Fit and proper s 11(a)

[42] Before making an order, I need to be satisfied that Mr [Bunnag] is a fit and proper person to have the role of providing day-to-day care for [Klahan], and is of sufficient ability to bring up, maintain and educate him.

[43] The social worker has concluded that Mr [Bunnag] fails this test, due to his engagement in illegal activity overseas.[20]

[44] However, she also confirms that Mr [Bunnag] has no criminal convictions, is in good health, is financially secure and well educated, has flexible employment, owns his own home, had positive childhood experiences and reflects good core values. His references were positive.

[45] But for the illegalities in the creation of [Klahan], Oranga Tamariki confirmed they would have accessed him as "fit and proper" and supported the adoption application.[21]

[46] I turn to the ultimate issue then: should [Klahan] be penalised, and suffer the consequences of New Zealand law not recognising his biological father and only parent, due to the irregularities of his creation?

---

[19] The woman who donated her egg is not required to consent.
[20] Section 10 report dated 16 April 2024 at p12.
[21] Confirmed by counsel for Oranga Tamariki in oral submissions.

[47] But for the prohibition in section 26 of the Status of Children Act, Mr [Bunnag] would be recognised as [Klahan]'s father. Section 8 provides that if he is named as the father in a register in the country of his birth, that birth certificate is *prima facie* evidence that he is the father. Mr [Bunnag] relied on the birth certificate to obtain [Klahan]'s visa into New Zealand.[22]

[48] Section 26 was enacted to underscore section 22 which protects the rights of anonymous semen donors in assisted human reproduction pregnancies undertaken by a woman acting alone. I do not consider Parliament intended it to become the barrier to a biological father wanting to be recognised in law when the child is born via surrogacy. However, that is exactly what has occurred here.

[49] Mr [Bunnag] accepts now that he entered into a surrogacy agreement in a country which does not permit surrogacies by single gay men. He says he undertook research (through his friends and on the internet) and was not aware of the illegality. Ms Loffler (social worker) finds that hard to believe. Mr [Bunnag] confirmed that he only discovered that he needed legal advice, and that there may be legal complexities to address, when the surrogate was three months pregnant.

[50] Mr [Bunnag] was cross examined on this point, and on the whole process. I found him to be an honest witness, whose intention throughout was focussed on creating a family, with all the sacrifices that entails. I do not consider he began this process, knowing it was illegal and hoping the New Zealand system would subsequently sanction it. I consider he was simply ignorant of the legalities.

[51] When asked how he would explain [Klahan]'s birth story to him in an honest way, he said:

> First of all that's a beautiful mistake I've made. I regret I may have committed a crime in Thailand but I never not in one minute regret having you in my life.[23]

[52] I accept Ms Casey's submission that the term "fit and proper" must be considered in the context of a person anticipating caring for a child, maintaining and

---

[22] NOE p28.
[23] NOE p37.

educating it, and that there are no limitations on the kinds of factors the court can take into account.

[53] Criminal activity or convictions must be seen in this context. They do not automatically disqualify an applicant. In the cases where applicants have been found not to be "fit and proper", there is usually a high level of concern about a person's integrity, motivation for the adoption, or possible immigration motivations.[24] As Judge Rogers aptly said in *Tafili v Manu* the judge is "not necessarily looking for applicants who have never made mistakes, but rather for people who can currently be assessed as fit and proper."[25]

[54] Mr [Bunnag] entered into the surrogacy agreement, blind to the pitfalls, the illegalities of process, out of desire to become a father. I do not consider Mr [Bunnag] entered into it with *male fide* intentions.

[55] The law around surrogacy is complex, particularly in a cross-border situation. There is no statute in New Zealand (yet) to provide clarity. In those circumstances, it is not for the courts to punish the child that is born through an unclear process.

[56] [Klahan] has rights, as stated above. He has the right to be cared for by his father, his only parent. I find that Mr [Bunnag] is a fit and proper person for the purpose of s 11(a).

Welfare and interests s11(b)

[57] I also need to be satisfied that the making of an adoption order promotes [Klahan]'s welfare and interests. This is the paramount consideration under UNCRC.

[58] Oranga Tamariki concede this point. It is however, irreconcilable with their assessment that Mr [Bunnag] is not "fit and proper".

---

[24] See Adoption application by H, Palmerston North FC, FAM2011-54-180, 25 November 2011, per Judge Binns.
[25] *Tafili v Manu* [2015] NZFC 122 at 15.

[59] Mr [Bunnag] has looked after [Klahan] from his birth, apart from some months when his mother cared for him in China. Without an adoption order, he and [Klahan] would be in an untenable position. [Klahan] has Thai citizenship by virtue of his birth. Mr [Bunnag] has Chinese citizenship and cannot live in Thailand. He is a New Zealand permanent resident and has his life in New Zealand, where he can openly live as a gay man. He is unable to do that in China. Without an adoption order, his only option would be to live in China (but [Klahan] may not be eligible for Chinese citizenship), where he has no job, or home and may suffer from discrimination. That situation cannot be in [Klahan]'s interest and welfare.

[60] [Klahan]'s welfare is my paramount consideration. His interests will undoubtedly be promoted by the making of the order. It will mean that he knows and will be cared for by his only parent, and preserve his name and family relations.[26] He will be raised in a home where he will have freedom of beliefs, the benefits of education and equal opportunities.[27]

Special circumstances for final order in first instance

[61] It is common in surrogacy adoptions (particularly where there is a biological link between the intended parent/s and child) for the court to find that there are special circumstances to make a final adoption order in the first instance. Interim orders are issued to monitor the family and ensure that everything works out in terms of bonding and commitment. This order is simply confirming legally the underlying biology and relationship that is already in existence. In those circumstances, it is appropriate to make a final order.

Orders

[62] For those reasons I made a final adoption order on 17 October 2024.

---

[26] Article 7 and 8, 9, 18 UNCRC; Mr [Bunnag] will ensure [Klahan] knows his full birth story.
[27] Aricles 14, 28

[63] I wish Mr [Bunnag] and [Klahan] all the very best for their future.

_____
Judge B R Pidwell
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 27/11/2024