IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Case No. 7 of 2013

In the matter of the Adoption of "B-R"

JUDGE:	Eames, C.J.
DATE OF JUDGMENT:	9 August 2013 1st Revision 28 August 2013
CASE MAY BE CITED AS:	In re Adoption of "B-R"
MEDIUM NEUTRAL CITATION:	[2013] NRSC 11

CATCHWORDS:

Case Stated - *Civil Procedure Act* 1972, s.52 – Case Stated in Family Court adoption proceeding - Whether Nauruan couple may adopt the natural child of Chinese parents – Prohibition of such adoptions by s.9(1) of *Adoption of Children Act* 1965 – Whether s.9(1) is inconsistent with the fundamental rights and freedoms of an individual, whatever his or her race, as protected by Article 3 of the *Constitution* of Nauru – *Convention of the Rights of the Child* and *Convention on the Elimination of all Forms of Discrimination* considered - S.9(1) held to be valid - *In re Lorna Gleeson* [2006] NRSC 8 not followed.

APPEARANCES:

For the Secretary for Justice	Mr L Aingimea, Secretary for Justice and Border Control

CHIEF JUSTICE:

1. The *Adoption of Children Act* 1965 ("the Act") imposes restrictions on the adoption of children according to whether the child and the adopting parents are Nauruan or non-Nauruan. Thus, by virtue of the provisions of s.9, a non-Nauruan child may not be adopted by Nauruan adopting parents; they may only adopt a Nauruan child, and both adopting parents must be Nauruan. Conversely, non-Nauruan adopting parents may only adopt a non-Nauruan child. The issue before me is whether that legislation should be deemed invalid and of no effect, on the ground that it is inconsistent with the rights and freedoms protected by the *Constitution*, and/or by reference to international Conventions to which Nauru is a party.

2. The term "Nauruan" is defined in s.65 of the *Interpretation Act* 2011, as being a person included in one of the classes of persons who constituted the Nauruan community according to the terms of the now repealed (but having continuing application for this purpose) *Nauruan Community Act* 1956-1997. Section 4 of that Act listed as Nauruans those who were or were deemed to be aboriginal natives of Nauru "by virtue of the institutions, customs and usages of the aboriginal natives of the island of Nauru". The category of Nauruans also included Pacific Islanders who were married to aboriginal natives of Nauru, or were admitted to the Nauruan community, and also children born to members of the Nauruan community, and children born of a Nauruan and a Pacific Islander.

3. A separate definition is provided in s.65 for "Nauruan citizen", which relates back to Articles 71-75 of the *Constitution*. Article 71 declares that those who meet the definition as members of the Nauruan community in the *Nauruan Community Act* are also citizens. Article 72 provides that a child born to Nauruan citizens or to a marriage of a Nauruan and a Pacific Islander is a citizen. Article 73 provides that a child born in Nauru who would not otherwise have nationality of another country becomes a citizen of Nauru. By Article 74 a non-Nauruan woman married to a Nauruan citizen may apply for citizenship. Article 75 permits Parliament to declare to be a citizen a person not otherwise eligible, and also provides that the grant of

citizenship may be revoked by parliament where a person has acquired "the nationality of another country otherwise than by marriage".

4. As I shall discuss, the words "Nauruan" and "not a Nauruan" as used in s.9, may embrace as Nauruan a person not born in Nauru but assimilated into the Nauruan community. That might include a person who had been the subject of what amounted to customary adoption[1] but in the present case the child, now less than a year old, would not have been so assimilated as to be regarded as "Nauruan" by reference to Nauruan culture or tradition.

5. On 3 May 2013 the Family Court, constituted by the Resident Magistrate and two lay members, considered the application for adoption of "B-R" brought by a married Nauruan husband and wife (Family Law Case No. 7/13)[2]. Both natural parents of the child (who are citizens of the Peoples' Republic of China) attended the Family Court and confirmed their informed consent to the proposed adoption by the Nauruan couple. The child had been in the physical custody of the proposed adopting parents since her birth on 16 November 2012.

6. In his written Case Stated, the Resident Magistrate has referred to the pre-requisite, as it appears throughout the Act - in particular, in s.11(c) of the Act - that the Court not make an adoption order unless it is satisfied that the welfare and interest of the child will thereby be promoted. The Family Court has not made an express finding that the adoption would be in the best interests of this child; that finding is yet to fall for decision, however it is clear that the members would have so concluded. Indeed, the Family Court made an order under s.9 of the *Guardianship of Children Act* 1975, declaring the Nauruan couple to be the guardians of the child until the age of 18 or upon earlier marriage. In so ruling, the members applied s.25(1) of that Act which required that the welfare of the child be "the first and paramount consideration". That guardianship order remains in place.

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[1] See *Rongorongo v Secretary of the Nauru Local Government Council* [1976] NRSC 2, at [3-4], per Thompson C.J.

[2] It is unnecessary to give the names of the interested persons, including the child, in this case.

7. A previous decision of the Supreme Court, *In Re Lorna Gleeson*[3], ruled that in the case of a proposed adoption of a Nauruan child the requirement in s.9(2) that both parents be Nauruan was invalid, being inconsistent with both Article 3 of the Constitution of Nauru and with the *Convention on the Rights of the Child* ("CRC").

8. The members of the Family Court quite appropriately regarded themselves as bound by the decision of the Supreme Court, a superior court. They sought guidance, however, as to whether the judgment of Millhouse, C.J. overriding s.9(2) applied to the present case, too, although that concerned s.9(1). The Family Court wanted the advice of the Supreme Court as to whether they were bound by the statutory requirement in s.9(1) that both the adopting parents and the child must be Nauruans.

The Case Stated

9. The Resident Magistrate stated a case pursuant to s.52 of the *Civil Procedure Act* 1972 seeking the opinion of the Supreme Court, as to the application of the judgment in *Re Lorna Gleeson* to the proposed adoption of the child, "B-R". The case stated sought:

    1. A determination of the legal position concerning the application of s.9 of the *Adoption of Children Act* 1965, and asked,

    2. Whether s.9 of the *Adoption of Children Act* 1965 is an impediment to the adoption in the case before the Family Court, No. 7/13.

10. I invited, and received, written submissions from the Secretary for Justice and Border Control, and have had regard to those submissions. In the absence of a legal practitioner representing the proposed adopting parents, either before the Family Court or on the Case Stated, I have endeavoured to consider all such arguments as might have been advanced on their behalf, in favour of the adoption.

The Legislation

11. Section 9 of the *Adoption of Children Act* 1965 reads:

[3] [2006] NRSC 8, per Millhouse, C.J.

9. Adoptions by Nauruans, etc.

(1) Where the applicant is a Nauruan, an adoption order shall not be made unless the child in respect of whom the application is made is also a Nauruan.

(2) Where the applicant is a married Nauruan, an adoption order shall not be made unless the child in respect of whom the application is made is a Nauruan and the spouse of the applicant is a Nauruan.

(3) Where the applicant is not a Nauruan, an adoption order shall not be made unless the child in respect of whom the application is made is also not a Nauruan.

(4) Where the applicant is a married person who is not a Nauruan, an adoption order shall not be made unless the child in respect of whom the application is made is not a Nauruan and the spouse of that applicant is also not a Nauruan.

12. Section 5(1) provides that a sole applicant must meet prescribed age requirements, but s.5(2) provides that those requirements may be waived if, in the circumstances of the case, the interests of the child will best be promoted by making the adoption order

13. Section 6 also allows for a waiver of statutory conditions. Thus, under s.6(1), joint applicants must be man and wife and of a certain age, but then provides that those requirements may also be waived if the adoption is deemed to be in the best interest of the child.

14. There are no similar waiver provisions relating to the matters addressed by s.9.

15. Section 11 of the Act provides for "Matters with respect to which the Court is to be satisfied" and 11(c) requires that :

> "(c) after giving such consideration to the wishes of the child as, having regard to the age and understanding of the child, the Court deems proper, that the welfare and interest the child will be promoted by making the order;"

The decision in *Re Lorna Gleeson*

16. In the case of *Re Lorna Gleeson*, Millhouse C.J. was concerned with an application that the Family Court ruled contravened s.9(2), in that while the female applicant (who was the proposed adopting parent), was Nauruan, her spouse was not Nauruan. Millhouse, C.J. found that if s.9(2) was given effect, then the best interests of the child would not be served. His Honour accepted a submission by counsel for the applicant

that s.9(2) was inconsistent with both the *Convention on the Rights of the Child* ("CRC") and also Article 3 of the *Constitution* of Nauru. As to the CRC, his Honour held:

> "I am told that Nauru is a signatory to the Convention. Whether it has become part of the domestic law of Nauru is a moot point. Whether it is or is not part of our domestic law, I feel able to take the Convention into account in considering the cases stated."

17. As to the effect of the *Constitution*, Millhouse, C.J. held:

> "Article 3 of the Constitution protects the right of the individual to respect for 'his private and family life'"

18. His Honour concluded that Article 3 was sufficient in itself to override s.9(2), but he also gave weight to the Convention. His Honour held:

> "The interpretation by the Family Court of Section 9 of the Adoption of Children Ordinance 1965 was wrong because that section is inconsistent with Article 3 of the Constitution of Nauru and is contrary to the spirit of the United Nations Convention on the Rights of the Child"

19. His Honour held that no effect should therefore be given to s.9(2) by the Family Court.

20. Although Millhouse C.J. stated that "each case must be considered separately on its own merits", it is plain that his decision and reasoning, if correct, must equally apply in the present case, with the result that s.9(1) would also be ineffective.

21. In reaching his decision, and delivering an ex tempore judgment, Millhouse C.J. had not had the benefit of comprehensive submissions, and no authority had been cited, at all, relevant to the validity of s.9(2).

22. Having had the opportunity to conduct research, and having received a helpful submission from the Secretary for Justice, I have concluded that s.9(1) is not rendered invalid or ineffective by virtue of either the *Constitution* or the CRC, nor, in my opinion, is the provision rendered invalid by virtue of the *Convention on the*

23. *Elimination of All Forms of Racial Discrimination* ("CERD")[4]. My conclusions in those regards are consistent with previous decisions of this Court, which had not been cited to his Honour.

The Constitution

24. Article 2 provides:

> "(1.) This Constitution is the supreme law of Nauru. (2.) A law inconsistent with this Constitution is, to the extent of the inconsistency, void."

25. Part II of the *Constitution* was titled "Protection of Fundamental Rights and Freedoms". The preamble to Article 3 of the *Constitution* provided:

> **"Preamble**
>
> 3. Whereas every person in Nauru is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following freedoms, namely:-
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression and of peaceful assembly and association; and
>
> (c) respect for his private and family life,
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> the subsequent provisions of this Part have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by a person does not prejudice the rights and freedoms of other persons or the public interest."

26. Articles 4 to 15, being "the subsequent provisions of this Part", set out, in detail, the extent to which certain specific rights and freedoms were thereby protected. These

[4] I have had regard to this convention (CERD) although it was not discussed in the judgment of Millhouse C.J. CERD directly and comprehensively addresses discrimination on grounds of race, ethnicity etc. and is more directly relevant, therefore, than the overarching, Universal Declaration of Human Rights ("UDHR").

fell under headings of: protection of right to life, protection of personal liberty, protection from forced labour, protection from inhuman treatment, protection from deprivation of property, protection of person and property, a provision to secure protection of law, protection of freedom of conscience, protection of freedom of expression, protection of freedom of assembly and association, and finally, Article 14 provided for the enforcement of those rights and freedoms that were set out in Part II.

27. What is clear is that the *Constitution* did not expressly provide protection of a right for a child to be adopted irrespective of the race, nationality or ethnic origin of the child, or of its adopting or its natural parents. Nor, as I shall discuss, was there a specific provision in the CRC that ensured such a right for a child.

28. The conclusion reached by Millhouse C.J. that Article 3 of the *Constitution*, in itself, granted enforceable rights, was at odds with the opinion of Thompson C.J. in *Degabe Jeremiah v Nauru Local Government Council*[5].

29. In that case, Thompson C.J. reviewed an application for consent to marry under s.23 of the *Births, Deaths and Marriages Ordinance* 1967. The applicant, a Nauruan, had sought permission to marry a person who was non-Nauruan. The Nauru Local Government Council, which was required to give consent when one party to a proposed marriage was Nauruan, refused consent, without giving reasons. The probable reason was that the proposed bride was non-Nauruan, although that was not specified to be a disqualifying factor in the section.

30. The applicant contended that the refusal constituted a denial of his right under the *Constitution* to the freedom specified in paragraph (c) of Article 3, to "respect for his private and family life". The applicant's counsel contended that Article 3 of itself established a right to respect for his client's private and family life, and that was consistent with the Universal Declaration of Human Rights, which provided in Article 16 that "men and women of full age, without any limitation due to race,

[5] [1971] NRSC 5; [1969-1982] NLR (A) 11.

nationality or religion, have the right to marry and to found a family".

31. Thompson C.J. had regard to the record of the deliberations of the Nauruan Constitutional Convention, which included the speeches of Convention delegates, and the opinion of Professor Davidson, who was adviser to the Convention. His Honour quoted the speech of Mr Detudamo made on 9 January 1968, where he said:

> "Firstly, the Universal Declaration of Human Rights is a declaration of the standard to be aimed at. The words of the proclamation make it clear that the declaration is only a statement of aims of the various States and not a declaration of rights to be included in the Constitution of those states . . . When considering the contents of the draft Constitution, the working party in Canberra had the Universal Declaration of Human Rights constantly before it. It included in Part II most of those which it considered could be the basis for legal protection in the Constitution and which were appropriate in the circumstances of Nauru".

32. Having had the assistance of that material when interpreting Article 3 his Honour came to the conclusion, consistent with the opinion of Professor Davidson, that rather than adopting into the *Constitution of Nauru* all of the rights and freedoms set out in the UDHR, Article 3 was only intended to be a summary of the general principles underlying the specific rights which were adopted by Nauru, namely, those set out in Articles 4 to 13. His Honour held:

> "It is clear that there was no acceptance by the Constitutional Convention of the whole of the Universal Declaration of Human Rights as establishing a substructure of legally enforceable rights more extensive than those spelled out in Articles 4 to 13 of the Constitution . . . the reference in the preamble in Article 3 to an entitlement to fundamental rights and freedoms of the kinds stated is clearly not intended to refer to any pre-existing rights and freedoms, but only those set out in detail in Articles 4 to 13".[6]

33. Thompson C.J. noted that no right to marry had been conferred in Articles 4 to 15, and no such right was conferred by Article 3 itself. The applicant therefore had no right which he could enforce.

34. In my respectful opinion, that conclusion is correct as to the effect of Article 3.

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[6] A similar conclusion was reached with respect to the Solomon Islands Constitution, the language of its provisions and its structure being very similar to that of Nauru. *In Ulufa'alu v Attorney General* [2001] SBHC 178, Palmer ACJ held that Article 3 "provides a framework in which those rights are to be protected. Sections 4 to 15 in turn set out in detail how those rights are protected and are to be implemented".

35. Likewise, I cannot agree with Millhouse C.J. that s.9(1) is inconsistent with any Convention.

Convention on the Rights of the Child

36. Nauru ratified the *Convention on the Rights of the Child* ("CRC") on 27 July 1994 and signed the *Convention on the Elimination of All Forms of Racial Discrimination* ("CERD") on 12 November 2001. Thus, the *Adoption of Children Act* predated Nauru's agreement to both conventions.

37. Article 2(1) of the CRC provides that the adopting States must respect and ensure that the rights set forth in it shall be granted to each child "without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".

38. Article 3(1) of CRC provides, inter alia, that in all actions concerning children, whether undertaken by courts of law, legislative bodies or other institutions, the best interests of the child shall be the primary consideration. Article 3(2) provides that the State parties undertake to ensure to the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of parents, legal guardians and others with responsibilities, and shall take "all appropriate legislative and administrative measures".

39. Article 20(1) provides that for a child deprived of his or her family environment, or in any case where it would be in the best interests of the child that it not remain in that environment, the child shall be entitled to special protection and assistance provided by the State. Article 20(2) provides that States shall "in accordance with their national laws" ensure alternative care for such a child. Article 20(3) recognises that such care might include foster placement and that "when considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background".

40. The only Article specifically addressing the question of adoption, in the CRC, is Article 21. Article 21(a) requires the States to ensure that the best interests of the child be the paramount consideration. The Article addresses issues such as informed consent by parents and the particular issues surrounding inter-country adoption, but does not address the specific issues that arise in the present case. In particular, there is no express provision concerning the desirability or undesirability of the State imposing a policy prohibiting adoptions by persons of different race or ethnicity to that of the child.

41. In my opinion, s.9(1) is neither inconsistent with the letter nor the spirit of the CRC. The issue is simply not addressed in the CRC. Whilst the overriding principle that States must act in the child's best interest has been endorsed by ratification, nothing in the CRC dictated that the fact that the adopting parents were of a different race or ethnicity to the child must be regarded as irrelevant. But even if it should be taken that the spirit of the CRC dictated that that was the appropriate approach to adopt, a State might choose not to adopt that approach in its domestic legislation. In this case, the *Adoption of Children Act* pre-dated the CRC, and its ratification by Nauru, but the legislature has chosen to retain it.

Convention on the Elimination of All Forms of Discrimination ("CERD")

42. Article 1(1) of CERD provides that racial discrimination means, inter alia, any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the effect of impairing the enjoyment or exercise of "human rights and fundamental freedoms". Nothing in CERD expressly asserts that a child has a human right or fundamental freedom to be adopted irrespective of the race or ethnicity of the child and/or the adopting parents.

43. Article 1(2) provides that CERD does not apply to distinctions, exclusions, restrictions or preferences drawn by a State between "citizens" and "non-citizens".

44. Section 9 is not concerned with drawing distinctions between citizens and non-citizens, but with other descriptors. A child born in Nauru (as this child was) who

had no other nationality would be entitled to Nauruan citizenship. It may well be, however, that the child would still not meet the definition of "Nauruan" in the *Interpretation Act*.[7]. It is unnecessary that I decide that question.

45. Although s.9(1) may be said to impose a race-based or ethnicity-based criterion for adoption, it does not follow that its purpose or effect necessarily amounts to racial discrimination. The Nauruan legislators may well have considered that an adopted child's best interests would always be better served by requiring that the adopting parents share the race of the child. However, the intention of the legislators is not the relevant matter[8]; what matters is whether the effect of the legislation is to impose a discrimination which is at odds with the CERD.

46. I will assume, for present purposes, that the restriction against adoption by Nauruans of a child who is non-Nauruan is a restriction or distinction based on race, colour, descent, or national or ethnic origin, thus prima facie constituting discrimination as identified by the Convention. It does not follow from that conclusion that s.9 (1) is invalid.

47. Applying the approach of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh*[9], conventions do not form part of domestic law unless incorporated into local law by statute.

48. Section 49 of the *Interpretation Act* 2001 provides:

> **"49 Interpretation to achieve purpose of law**
> (1) In interpreting a written law, the interpretation that would best achieve the purpose of the written law must be preferred to any other interpretation.
> (2) This section applies whether or not the purpose of the written law is expressly stated in the written law."

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[7] The distinction between restricting benefits such as housing, education, employment etc. on grounds of nationality (i.e. denying aliens those benefits) rather than race or national origin has been recognised: see *Ealing London Borough Council v Race Relations Board* [1972] AC 342 at [354-5], [359], [363], [365-6]; see Halsbury's Laws of Australia, Civil and Political Rights, Lexis Nexis [80-340].

[8] See Halsbury's Laws of Australia, supra, [80-240]. Art 1(1) of CERD addresses conduct which "has the purpose or effect" of impairing the equal enjoyment of rights or freedoms on grounds of race, etc.

[9] (1995) 183 CLR 273, at [286-288], per Mason C. J. and Deane J; at [298], per Toohey J; at [304], per Gaudron J; at [314-5], per McHugh J.

49. Section 51 of the *Interpretation Act* 2001 provides:

> "**51 Non-legislative context – when extrinsic material may be considered**
> (1) In interpreting a written law, material not forming part of the written law may be considered in order to:
> (a) resolve an ambiguous or obscure provision of the law; or
> (b) confirm or displace the apparent meaning of the law; or
> (c) find the meaning of the law when its apparent meaning leads to a result that is clearly absurd or is unreasonable."

50. Section 52(1)(c) provides that such extrinsic material that may be considered includes any treaty or other international agreement to which Nauru is a party.

51. Thus, where there is ambiguity a statutory provision will be interpreted by reference to the Conventions, so as to adopt an interpretation in conformity with the Convention, but where there is no ambiguity then even if the statute was inconsistent with the ratified Conventions the plain words of the statute would have to be given effect. There is no overriding basis for the Court to apply an interpretation to the legislation so as to have it comply with the principles stated in the international covenants when the legislation is clear and unambiguous.[10]

52. Thus, s.9 (1) is not overridden by CERD.

53. I am not alone in preferring the analysis of the *Constitution* and Conventions provided by Thompson C.J. in *Degabe Jeremiah* to that in *Re Lorna Gleeson*.

54. The learned authors of the Pacific Human Rights Law Digest accepted without criticism the conclusions reached by Thompson C. J.[11] On the other hand, the authors criticised the decision of Millhouse, C.J.[12]

55. The learned authors observed, first, that Millhouse C.J. had wrongly applied the CRC when that law had not been "domesticated" by local legislation.

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[10] See *Cheedy on behalf of the Yindjibarndi People v Western Australia* [2011] FCAFC 100 at [97]-[108], per North, Mansfield, and Gilmour JJ.
[11] Pacific Human Rights Law Digest, Vol 1 PHRLD, published by Pacific Regional Rights Resource Team, 2005, at pages 10-11.
[12] Pacific Human Rights Law Digest, Vol 2 PHRLD, published by Pacific Regional Rights Resource Team, 2008, pages 4-5.

56. The authors added:

> "However, a human rights convention cannot contradict a clear and unambiguous provision of domestic legislation. It can only be applied to clarify an ambiguous provision or one that is capable of two or more interpretations or to fill a lacuna."

57. The authors added:

> "Compare this case to the next case in this digest, *Rhea v Caine*, where a Fiji court decided that a clear and unequivocal residency requirement was fulfilled by a short-term stay, together with a previous stay in Fiji. Both cases might be considered to be untenable applications of international human rights standards".

58. In my respectful opinion, the analysis adopted by Thompson C.J. is correct, and when applied to this case I conclude that no right is provided to the child under the *Constitution* that would deny the application of s.9(1).

59. Furthermore, no Article in the CRC nor the CERD spells out such a right or freedom and, even if it did, no domestic legislation has incorporated such a right into the law of Nauru.

Section 9 and Nauruan Culture

60. It cannot be presumed that the requirement in s.9 that a non-Nauruan child could not be adopted by Nauruan parents must amount to racial discrimination, or was inapplicable when a Court decides that the adoption would otherwise be in the child's best interests.

61. The restrictions imposed by the Act on adoption have been acknowledged as valid, and applied by the Court, over many decades. The restriction on adoption of a non-Nauruan child by a Nauruan couple had been accepted as reflecting Nauruan culture long before the adoption legislation came into effect in 1965. In *Edowe Apin v Nerina Apin & Ors*[13] Connell C.J. held that it was "carefully drawn legislation to govern the adoption of children".

[13] [2001] NRSC 4.

62. In *Rongorongo v Secretary of the Nauru Local Government Council*[14] Thompson C.J. heard evidence from the Head Chief and other senior community witnesses as to the traditional rights of an adopted child to inherit the estate of adopting parents. He concluded that before the Second World War there had been instances where Nauruan couples had adopted a non-Nauruan child, who then inherited their estates. He noted, however, that their right to inherit may have been because they had so assimilated into the community as to be regarded as being Nauruan, and that, until such assimilation had concluded, the rights to inheritance were merely inchoate. Thompson, C.J. concluded, however, that one impact of the Second World War experience was that, at least by 1954, it was no longer accepted as culturally appropriate for non-Nauruans to be adopted by Nauruans. The 1965 Act reflected that cultural norm, and since 1965 adoptions could only be achieved under the Act.

63. In an earlier decision, *John Aremwa & Others v Nauru Lands Committee*[15], Thompson C.J. once again heard evidence as to customary practices. The appellant was Gilbertese and his mother married a Nauruan after the death of his father. The step-father treated him as family, but he was not adopted formally, nor did he apply under the then *Nauruan Community Ordinance* 1955-1966 to be accepted as Nauruan. As I discuss below, His Honour concluded that a non-Nauruan who had not been formally adopted could not inherit his "adoptive" Nauruan mother's estate.

64. In *Gad Demaunga v Nauru Lands Committee*[16] I concluded that the *Adoption of Children Act* was a Code which was intended to override any contrary tradition or customs. That conclusion was consistent with prior decisions of the Court[17] but in any event, it had long been accepted that what later became the principle stated in s.9 reflected the culture of Nauruans.

65. I held in *Gad Demaunga*[18]:

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[14] [1976] NRSC (A) 42 at [4].
[15] [1970] NRSC 3.
[16] {2012] NRSC 18.
[17] See *Adeang v Mwareow & Anor*, Land Appeal No 3 of 2002, 29 October 2002, per Connell C.J.; *Denuga v Nauru Lands Committee & Anor*, land Appeal No 4 of 1996, judgment 19 December 1997, per Connell C.J.
[18] At [29].

"The Act provides that a Nauruan may only adopt a Nauruan child, and a non-Nauruan may only adopt a non-Nauruan child (s.9). Such questions have caused difficulty in the past for the Nauruan Lands Committee. In *John Aremwa & Others v The Nauru Lands Committee,* Thompson, C.J. considered a case where a non-Nauruan child became a member of a Nauruan family but was not "formally" adopted. The Committee decided that the child was not entitled to share in his adopting mother's estate because he was not Nauruan. The Chief Justice concluded that Nauruan custom did not permit succession by a non-Nauruan, but having heard evidence of some instances where that had occurred, he held:

> "In my view, the circumstances in which Guado inherited the land are as consistent with his having been accepted as Nauruan by the Council of Chiefs as they are with his having inherited the land as a non-Nauruan. The history of Nauru is full of instances of non-Nuruans having been adopted into the Nauruan community and thereafter accepted as Nuarans. Before the Nauruan Community Ordinance 1955-1966 was enacted there was no statutory basis for this: that Ordinance now provides such a basis".

66. The untrammelled effect of s.9 was also acknowledged by Thompson C.J. in the case of *H and E Jeremiah Re: Yvette Saili Ewwo*[19]. In that case, Thompson C.J. held that s.9 precluded the adoption by a married Nauruan couple of the child born to an unmarried couple, their son being the child's father and the mother being a Gilbert Islander. His Honour held that had the birth couple been married the child would have been regarded as a Nauruan, but could not be so regarded when the couple was unmarried.

67. There is, then, consistent Supreme Court authority upholding the efficacy of s.9.

The best interests of the child

68. The law of Nauru is that stated in ss. 9(1) and 11(c) of the Act. The former section, in effect denies any such right to have the child's best interests adjudged without regard to considerations of the race, ethnicity and nationality of the proposed adopting parents and the child. Section 11(c) provides that the Court may not make an adoption order unless it is satisfied that:

> ". . after giving such consideration to the wishes of the child as, having regard to the age and understanding of the child, the Court deems proper, that the

[19] Action No 5 of 1970, 4 November 1970.

welfare and interest of the child will be promoted by making the order".

69. It cannot be presumed that the restriction imposed by the legislature in s.9(1) was inimical to the best interests of this child, or all children in a similar situation, but even if it was so, nothing in the *Constitution* or the Conventions denies the Republic the right to impose that restriction, notwithstanding that the Act adopts as its touchstone the welfare and interests of the child. As I have discussed, above, while there has been occasional controversy on the question, it has long been accepted that s.9 reflects Nauruan custom.

70. The Secretary for Justice and Border Control submitted that in circumstances where the Family Court decided that the best interests of the child would be achieved by allowing the adoption, the temptation was to adopt the approach of Millhouse C.J., accepting that that outcome was at least within the spirit of the Convention and the *Constitution*. He acknowledged, however, that Article 3 of the *Constitution* does not confer substantive rights, and that the wording of s.9 was not inconsistent with Article 3, and must therefore prevail. He concluded by submitting:

> "The 1970 decision of Thompson C.J. in *H and E Jeremiah* also makes it difficult to entertain a liberal approach. The situation remains today as it did in 1970s; as the law stands, the applicants cannot adopt the child".

71. I agree with that submission. Even if the Family Court members concluded that the child's best interests would be served by approving this proposed adoption, the Court could not overlook the requirement of s.9(1).

72. I answer the questions posed in the Case Stated:

1. Section 9(1) is valid and must be applied.

2. Yes.

The Hon Geoffrey M Eames AM QC
Chief Justice
9 August 2013