In conclusion it may be observed, that although the judgment in *Technofin* is thought-provoking and interesting, it is by no means the final word on the question of State liability for breach of contract by a public school in general, as well as related issues of detail.

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INTERCOUNTRY ADOPTIONS

De Gree v Webb unrep case no 05/25316 (W)

1 Introduction

This case note deals with children. Right at the outset I think it is important to take note of the fact that the Children's Bill 70 of 2003 (hereafter referred to as "the Bill"), which is referred to often in this case, was gazetted on 19 June 2006 (in other words after the judgment was delivered) and is now the Children's Act 38 of 2005. The date of commencement still has to be announced, at which time this Act will *inter alia* repeal the Child Care Act 74 of 1983 and the Guardianship Act 192 of 1993 (see sch 4 of the Children's Act). Bearing in mind that much will change once the Children's Act comes into operation and is implemented, the remainder of this discussion will focus on the legal situation as it was when the case was heard. The impact of the relevant sections of this very important piece of legislation is discussed under "4 5 The Children's Act 38 of 2005".

Section 18(4)(f) of the Child Care Act 74 of 1983 prohibited the adoption of a child born of a South African citizen by someone other than a South African citizen, or someone with the necessary residential qualifications to be granted a certificate of naturalisation as a South African citizen who has applied for such a certificate, except where the applicant is a married person whose spouse is the parent of the child (s 17(c)). In *Minister of Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC); 2000 3 SA 422 (CC) (hereafter referred to as *Fitzpatrick*), section 18(4)(f) was declared unconstitutional, thus making the adoption of a South African citizen by a non-South African citizen, and *vice versa*, possible.

South Africa has ratified the United Nations Convention on the Rights of the Child 1989 (UNCRC), and has acceded to the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 (the Hague Convention). This means that intercountry adoptions (adoption of a South African child by non-South African adoptive parents, and *vice versa*) have to be done in accordance with these international instruments, together with existing South African adoption law and procedures, as contained in the Child Care Act (and provided for by the children's court). Stringent control over adoptions of this nature is imperative. To leave your country of origin permanently is traumatic for anyone, but children are especially vulnerable and need to be protected (Bekink and Brand "Constitutional protection of children" in Davel (ed) Intro*duction to*

child law in South Africa (2000) 177). However, when a child is removed from the country not through intercountry adoption, but in terms of a sole guardianship and sole custody order obtained in the high court, and adoption is then applied for in a foreign country, it is not always certain what protective measures are in place. An application of this nature was launched in *De Gree*.

2 Facts

This matter was heard in the Witwatersrand Local Division (the judgment was signed on 21 April 2006). It was an application by an American couple, Mr and Mrs de Gree. They sought an order awarding them sole custody and sole guardianship of a minor child, R (born 11 November 2004), a South African citizen, who was in the foster care of the first and second respondents (Mr and Mrs Webb – "the respondents"). The respondents supported the application brought by the applicants, who further sought authorisation to leave South Africa with R with a view to adopting her in the United States of America .

In their founding affidavit, the applicants *inter alia* made the following submissions:

- They are financially stable and in a position to offer R opportunities she would not have if she were to continue living with the respondents.
- Their financial ability to accommodate an adoptive child was investigated by an adoption agency (Autumn Adoptions Inc) before they were declared suitable parents.
- There are no other adoptive families with whom R could be placed permanently.
- They intend to maintain ongoing contact with the respondents and are committed to maintaining R's culture and traditions.
- It will be in R's best interests if the court were to award full guardianship and full custody of her to the applicants.

Because of the nature of the application, the court requested advocate AM Skelton of the Centre for Child Law at the Faculty of Law of the University of Pretoria to act as an *amicus curiae*. She prepared heads of argument and various affidavits that were used by the court and in fact greatly influenced the decision of the court.

It was not in dispute that the applicants were caring, decent people who were suitable persons to adopt R, or that R was an abandoned child.

3 Decision

In her affidavit, which was submitted as part of the documents compiled by the *amicus curiae*, Pamela Wilson, a registered social worker employed by the Johannesburg Child Welfare Society (JCWS), explained that the accepted process in intercountry adoptions was not adhered to in this case. The accepted route for undertaking intercountry adoptions is to use the children's court. She stated that JCWS had finalised adoptions to both Hague Convention countries and non-Hague Convention countries. By applying for a guardianship and custody order, the applicants sidelined the proper procedure. Ms Wilson disputed the applicants' statement that no local adoptive families were available to adopt the child, stating that they (JCWS) had prospective adopters on their adoptive waiting list but that they had not received any requests for a local family for R.

An affidavit by Maria Mabetoa, the Chief Director: Children Youth and Family in the National Department of Social Development, was also filed by the *amicus curiae*. She confirmed that only organisations or private social workers who have registered a speciality in adoptions and who have a working agreement in place with a foreign accredited organisation, can do intercountry adoptions, and that intercountry adoptions can only be considered once the Department of Social Development has agreed in writing. She further explained the concern of the Department of Social Development regarding the use of guardianship and custody orders via the high court (as in this case) with the ultimate object of obtaining an adoption order in another country.

The arguments of the *amicus curiae* were briefly the following:

- South Africa is bound to act in accordance with its obligations in terms of the UNCRC and the Hague Convention.
- Granting applications for sole guardianship and sole custody to foreign couples in respect of South African children instead of applying the adoption procedures in terms of the Child Care Act is contrary to the intention of the court in *Fitzpatrick* and may prejudice the constitutional rights of the child.
- Once a child has been removed from South Africa, the South African court loses its authority as upper guardian of that child. Thus the ideal situation would be to conclude the adoption in South Africa.
- If the court finds that there are instances where the best interests of the child dictate the use of a sole guardianship and custody order to achieve the aim of adoption at a future time, the decision must be guided by the principles set out in international law and the Child Care Act.
- In *Fitzpatrick* the court clearly envisaged that intercountry adoptions would be undertaken in terms of the Child Care Act and its protections.
- The Children's Bill (now the Children's Act) makes it clear (cl 273, s 273 of the Act) that in future all intercountry adoptions will be dealt with by the children's court.
- The intention of the Bill (cl 25) is to close the avenue of high court applications for guardianship of South African children by non-South Africans (s 25 of the Act).
- Granting the order sought will circumvent South African adoption law and procedure – the Child Care Act and children's court adoption procedures provide the appropriate safeguards in adoption (including intercountry adoption) cases.
- If the high court (as upper guardian of all children in South Africa) does find that it is in the best interests of a child that a guardianship and custody order be issued with a view to an adoption being concluded in another country, the court should be satisfied that all the requirements relating to the consent to adoption have been adhered to, that the child expresses his or her wishes where possible, that the applicants have adequate means to maintain and educate the child, that they are of good repute and fit and proper to have custody of the child, that the religious and cultural background of the child and the applicants are considered, and that substantial efforts have been made to place the child in foster care or adoption in South Africa first.

In answer to the arguments presented by the *amicus curiae*, the applicants submitted that they had complied with all the recommendations made by the *amicus curiae* and that it was clearly in the best interests of the child that she be given

the opportunity to be removed to the USA to be adopted there. However, Goldblatt J was concerned that the picture painted by the applicants of a secure and reasonably affluent lifestyle could result in affluent foreigners always taking precedence in relation to adoptions over less affluent citizens of this country. He further held that the high court should not be placed in the position of having to fulfil the functions of a commissioner for child welfare, who is better trained and more experienced in matters of this kind than a high court judge.

The judge was of the view that it is not for the high court to decide what is in the best interests of the child in this matter, but that this should be done in accordance with the procedures set out in terms of the Child Care Act.

The court fully agreed with the views expressed by the *amicus curiae* and confirmed that it is bound by what was said in *Fitzpatrick*. The application was dismissed.

Below, the court's decision will be evaluated in view of the existing and future South African legislation on adoptions, that is, the Child Care Act and the Children's Act. The Constitution of the Republic of South Africa will also be considered, as will the two relevant conventions to which South Africa is a party, namely the United Nations Convention on the Rights of the Child and the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption. A brief overview of the relevant provisions of the various legal instruments will first be given.

4 Relevant legal instruments

4 1 United Nations Convention on the Rights of the Child 1989 (UNCRC)

The UNCRC, which entered into force on 2 September 1990, is concerned with the rights of the child pertaining to its family environment and to alternative care (Detrick "Family rights under the United Nations Convention on the Rights of the Child" in Lowe and Douglas (eds) *Families across frontiers* (1996) as quoted by Robinson *The law of children and young persons in South Africa* (1997) 228). It has been hailed as a watershed in the history of children (Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 1995 *SAJHR* 401). It sets out the basic human rights of children everywhere. South Africa ratified it on 16 July 1995, while the USA is one of only two member states that have not ratified it, although the USA did sign it on 16 February 1995.

Having ratified this instrument, South Africa is bound to act in accordance with the UNCRC. Article 3(1) provides that the best interests of the child shall be a primary consideration in all actions concerning children. In terms of article 21, the best interests of the child shall be the paramount consideration in an adoption. In terms of article 21(b) "intercountry adoption may be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot, in any suitable manner, be cared for in the child's country of origin", while article 21(c) stipulates that "a child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption".

4 2 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993

The Hague Convention recognises that the child should grow up in a family environment, and further that intercountry adoption may offer the advantage of a

permanent family to a child for whom a suitable family cannot be found in his or her state of origin. As mentioned above, South Africa is a party to the Hague Convention, which entered into force in South Africa on 1 December 2003. The USA signed the convention on 31 March 1994, signalling its intent to proceed with efforts to ratify it, and the Intercountry Adoption Act of 2000 was signed into law on 6 October 2000 to implement the Hague Convention. However, the USA is, to date, not a party to the Convention.

The Hague Convention sets out norms and procedures to safeguard children involved in intercountry adoptions and to protect their interests as well as those of birth and adoptive parents involved in intercountry adoptions, and to prevent abuses. It applies in the case of adoptions where a child who is habitually resident in one contracting state (the "state of origin") has been, is being, or is to be moved to another contracting state (the "receiving state") either after his or her adoption in the state of origin by spouses or by a person habitually resident in the receiving state, or for the purposes of such an adoption in the receiving state or the state of origin (a 2). An object of the Hague Convention is to establish safeguards for ensuring that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law (a 1(a)), if a suitable family cannot be found in the child's state of origin (preamble to the Hague Convention). One such safeguard is establishing a central authority that has to discharge the duties the Hague Convention imposes upon it (a 6(1)). Specific requirements are also set out regarding the adoptability of a child, the best interests of a child, and the consent required (a 4).

4 3 The Constitution of the Republic of South Africa, 1996

The Constitution is the supreme law of the Republic (s 2), and therefore shapes the ordinary law (Currie and de Waal *The Bill of Rights handbook* (2005) 7). The Bill of Rights contained in the Constitution (ch 2) enshrines the rights of *all* people in our country (s 7(1)). Children are thus protected by our Constitution. In fact, although they have the same protection as adults (with a few exceptions), they also have additional, specific protection, as set out in section 28. Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment (s 28(1)(b)), and a child's best interests are of paramount importance in every matter concerning the child (s 28(2)).

Over and above the international and human-rights instruments that were discussed above, the following South African statutes apply specifically when we are faced with circumstances such as in this case. These Acts relate to adoption as well as guardianship and custody.

4 4 Child Care Act 74 of 1983

Chapter 4 of the Child Care Act (ss 17–26) regulates adoptions in this country. Since *Fitzpatrick* this has also included intercountry adoptions. All adoptions are done in accordance with the provisions of these sections. The result is that the adoption of a child is effected through the children's court (s 18(1)(a)). Section 18 sets out specific requirements that have to be met before such a court may grant an adoption.

4 5 The Children's Act 38 of 2005

As mentioned above (see "1 Introduction"), the long awaited Children's Act is now a reality even though it is not yet in operation. It is therefore imperative that

we look at how this development will impact on the existing legal position, once implemented.

Just like the other legal instruments already discussed above, the Children's Act provides that the best interests of a child are paramount (s 9). Section 7 includes a long list of factors that have to be taken into account when deciding on the best interests of a child (there are 14 subsections). Further, in terms of section 230(1)(a) a child may only be adopted if the adoption is in the best interests of the child. Specifically, in light of the present case, it should be noted that section 262(5)(a) provides that an adoption of a child from the Republic by a person in a non-convention country has to be in the best interests of the child. Furthermore, section 25 provides that "[w]hen application is made in terms of section 24 [when someone applies for guardianship of a child who already has a guardian] by a non-South African citizen for guardianship of a child, the application must be regarded as an intercountry adoption for the purposes of the Hague Convention on Inter-country Adoptions and Chapter 16 of this Act". This is an important section which eliminates the possibility of important legislation that protects our children from being sidestepped.

Chapter 16 of the Children's Act consists of 20 sections (ss 254–273) which solely regulate intercountry adoptions. Other adoptions are regulated by a further 26 sections in chapter 15. Under the Children's Act adoption will thus be regulated far more thoroughly than is the case under the Child Care Act. According to section 254 of the Children's Act, the purposes of chapter 16 are to give effect to the Hague Convention, provide for the recognition of certain foreign adoptions, find fit and proper adoptive parents for an adoptable child, and generally regulate intercountry adoptions. Section 262 sets out the requirements for the adoption of a child from South Africa by a person in a non-convention country, while section 273 clearly states that no person may process or facilitate an intercountry adoption other than in terms of this chapter. When read together with section 25, the possibility of a non-South African citizen circumventing existing legislation in order to adopt a South African child, will no longer exist once the Children's Act comes into operation. Thus, the best interests of a child will be better protected.

5 Conclusion

In any matter concerning a child, his or her best interests are always of paramount or primary importance (Constitution s 28(2); UNCRC a 3(1) and a 21). In the case of an adoption, whether it is incountry (an adoption of a South African child by South African adoptive parents) or intercountry, the best interests of the *child*, and not those of the parents or adoptive parents, must be served.

Although it has to be determined in every case what the best interests of a child are – which is not easy – a child needs a sense of stability, security and continuity, which includes not subjecting the child to unnecessary and disruptive moves (Boberg *Law of persons and family law* (1997) 527–529). An adoption order terminates all rights and obligations between a child and any person who was his or her parent immediately prior to such adoption (Child Care Act s 20(1); see also Children's Act s 242(1)(a)). The adopted child is deemed to be the legitimate child of his or her adoptive parent or parents for all purposes (Child Care Act s 20(2); see also Children's Act 242(3)), in other words, adoption confers parental power on the adoptive parent or parents (Boberg 320). However, an adoption will not be granted unless the children's court is satisfied

that the stringent requirements of section 18 of the Child Care Act have been met. When allowing a child to be taken to a non-convention country, the necessary safeguards set out in the Hague Convention and the Child Care Act will not apply (see, however, s 255 of the Children's Act in terms of which an agreement with a non-convention country may not be in conflict with the Hague Convention). The high court can then no longer protect the best interests of the child.

In *De Gree* the court's attention was drawn to several cases where orders similar to the one sought in this matter, were granted. Goldblatt J viewed these orders as incorrectly granted. I support his view. The high court, as upper guardian of children (Boberg 500), has to act in the best interests of the child in deciding guardianship and custody (*idem* 404). The high court obviously has the power to award guardianship and custody to anyone, and it will do so where the best interests of the child require it, but by allowing a child to be removed from South Africa in circumstances where it is uncertain what mechanisms there will be to protect the child (the USA has not ratified the UNCRC or the Hague Convention), the high court, in my opinion, will fail in its duty to protect the child's best interests.

In *Fitzpatrick* Goldstone J emphasised (para 27) that intercountry adoption is an alternative form of child care that may take place under the Hague Convention only after the possibilities for placement of the child within the state of origin have been given due consideration (preamble to the Hague Convention; UNCRC a 21(b)) and it has been determined that an intercountry adoption is in the child's best interests (Hague Convention a 4(b)). In *De Gree* no attempts appear to have been made to have the child adopted locally, and there are no reports, affidavits or any other documentation indicating that an intercountry adoption would be in the best interests of the child. All we have is the founding affidavit of the applicants, which really does not contribute much, save to emphasise repeatedly that R's future would be financially secure and that she would grow up in a loving family. Of course both of these are important factors, but there are many other factors that need to be taken into account in determining a child's best interests. After all, the issue of whether a child should remain in foster care or should be adopted must be dictated by the best interests of the child. Furthermore, even if only the issues of financial security and a loving family environment were at issue, it must be borne in mind that R was already in foster care when the adoption application was made. Foster care is not permanent but often lasts for a child's entire childhood, and in the present case there is no evidence which indicates that the child's foster-care placement does not provide her with financial security and a loving family. The respondents receive a state grant to raise R, which assists with their financial situation, and there is no evidence that her existing family environment is anything other than loving. Furthermore, if R were not adopted by Mr and Mrs de Gree it is quite conceivable that she may be put up for adoption by other (financially stable and loving) applicants.

All provisions relating to local adoptions, where relevant, apply to intercountry adoptions as well, in other words the child concerned with intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption (UNCRC a 21(c)). Ultimately intercountry adoption is not a first choice for a child (preamble to the Hague Convention; a 21(b) of the UNCRC), and without anything to indicate differently, it cannot be assumed that the best interests of the child will be served by an intercountry adoption where the other options, as discussed above, have not been pursued. Allowing R to leave South Africa under circumstances where her adoption will be subject only

to state law and procedures, totally discards the agreed-upon norms and procedures of the UNCRC and the Hague Convention.

Looking at the applicable legal instruments and the facts of *De Gree* it is unclear why the applicants did not apply to adopt R (instead of applying for guardianship and custody). As Pamela Wilson explains, the JCWS has a policy in place that is in line with the principles and procedures laid down by the Hague Convention, and three adoptions to the USA were finalised by them prior to this case. The respondents supported the adoption, and in their founding affidavit the applicants referred to an adoption agency, Autumn Adoptions Inc, stating that the agency had investigated their financial ability to adopt R and found them to be suitable parents. No further information about this agency is available, but, bearing in mind that the couple intended to adopt R only upon their return to the USA, it seems to me that it might be an American adoption agency. The question is why the applicants chose this avenue. I can only speculate that they might have reasoned that the guardianship and custody order was a quicker or easier way to proceed. Perhaps they had made enquiries about an adoption order and realised that there were stumbling blocks that might prevent the adoption order from being granted, or maybe they were advised to follow this route. There is nothing to indicate that the applicants are not good parents or will not be good adoptive parents for R. The bottom line is that, for whatever reason, they went about their attempt to remove R from South Africa the wrong way.

This judgment is welcomed as confirmation of the paramountcy of South African children's best interests in intercountry adoptions. Although leave to appeal to the Supreme Court of Appeal was granted to the applicants on 14 June 2006, it is doubted whether their appeal will succeed, especially in light of the provisions of the Children's Act, which provide (ss 24 and 25) that an application of this nature should be regarded as an intercountry adoption (see "4 5 The Children's Act 38 of 2005"). Until such time as the appeal is heard, it is hoped that other divisions, when confronted with similar circumstances, will follow suit and reject applications for guardianship orders which serve merely as a prelude to an intercountry adoption.

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DEPRIVING A CRIMINAL DEFENDANT OF HIS CHOICE OF PAID COUNSEL

United States v Gonzalez-Lopez
548 US 2006 No 05-352

1 Facts

Gonzalez-Lopez was charged in the Eastern District Court of Missouri on a federal drug charge. His family hired attorney John Fahle to represent him. After the