

P O Box 604
4 Marien Ngouabi Street
Windhoek
Namibia

Tel: Int +264 61 223356
Fax: Int +264 61 234953
E-mail: info@lac.org.na
Web: www.lac.org.na



Toni Hancox (Director)

Corinna van Wyk
Sharen Zenda
Bradley Khoa

LEGAL ASSISTANCE CENTRE

Recipient of the UNICEF Maurice Pate Human Rights Award – 1997
JP Karuaihe Human Rights Excellence Award – 2008, 2010, 2014, 2016 and 2020 and Social Responsibility Award – 2013

LAC Press Release - 20 April 2021

Lühl v Minister of Home Affairs and Immigration NEGLECTING THE CHILDREN'S BEST INTERESTS

The Legal Assistance Centre finds the High Court judgment in the Lühl case very disappointing and disturbing. The Court refused to order the government to issue travel documents to the children involved in the case on flimsy procedural grounds and in our view neglected its primary legal duty to safeguard the best interests of these children.

To situate the discussion, two men (one Namibian citizen, Phillip and one Mexican citizen, Guillermo) married legally in South Africa and came to live in Namibia. Since there is no framework for surrogacy in Namibia, they arranged to have a child in South Africa by means of a surrogate parent. One child, Yona, was born to them in this manner in 2019 and resides in Namibia with both his parents. Twins Paula and Maya were born to them in a subsequent surrogacy arrangement in South Africa this year. The narrow issue at stake in the court case was a request for travel documents to allow Phillip to return to Namibia with the twins to re-join Guillermo and Yona who are here in Namibia.

In South Africa, surrogacy is governed by the Children's Act, 2005. This law requires that a child born in terms of a valid surrogacy agreement must be genetically related to at least one of the commissioning parents – but it also states that the effect of the surrogacy agreement is that any child born to the surrogate mother in accordance with the agreement is for all purposes the child of *both* commissioning parents from the moment of birth. Thus, both Phillip and Guillermo are listed as the parents of all three of their children on the children's birth certificates, in accordance with South African law – and they *both* bear parental rights and responsibilities for those children.

Since Namibia lacks a legal framework for surrogacy, heterosexual couples resident in Namibia have similarly gone to South Africa to make surrogacy arrangements – without any difficulties in bringing their children home to Namibia.

It is not unusual for couples who use special medical procedures to bear children to be listed as the parents of such children, regardless of genetic links. For instance, Namibia's Child Care and Protection Act, 2015 makes provision for artificial insemination where married couples have fertility problems; even if a donor egg or a donor sperm, or both, are used in the procedure, the law states that “any child born as the result of such techniques is, for all purposes, considered to be the biological child of such woman and her husband”.

Furthermore, Namibia's adoption law states that an adopted child is for all purposes regarded as the child of the adoptive parent, and Namibia regularly recognises adoptions which have taken place under the laws of other countries. There is usually no genetic link between parent and child in the case of adoption.

The documents before the Court made it clear that the Ministry was unwilling to issue even temporary travel documents to twins Paula and Maya without proof of a genetic link between the twins and Phillip as the Namibian parent. And yet, if Phillip and Guillermo had been partners of opposite sexes instead of partners of the same sex, no one would ever have questioned the twins' birth certificate or asked for a DNA test.

The Ministry's suggestion that Namibian citizenship by descent is dependent on a genetic link is simply untrue – and all Namibian parents who have adopted children in Namibia or abroad, or had children by assisted fertility techniques using donor eggs or sperm in Namibia or elsewhere, should be very worried about such an assertion.

The reality is that Paula and Maya are being discriminated against because of the sex of their parents.

The High Court emphasised the need for deference to the executive branch, asserting that to have ruled otherwise would “constitute an impermissible encroachment by the court into the domain of the Executive organ of the Namibian State”. It took the view that the Ministry had not made a “final decision” although the papers before the court made the Ministry's stance crystal clear.

What the High Court did *not* do is consider the best interests of the children, as it is required to do in terms of Namibian law as well as the Convention on the Rights of the Child. It also failed to consider the High Court's inherent role as the upper guardian of all minor children, which gives it a special duty to safeguard the best interests of minor children.

The Namibian Constitution guarantees all children the right to know and be cared for by their parents.

Section 5 of the Child Care and Protection Act provides guidance on the principles that should guide *all* proceedings, actions and decisions by an organ of state in any matter concerning a child, not just those which fall under the Act. These principles include respect for children's fundamental rights and freedoms as set out in the Namibian Constitution and for the best interests of the child. This provision also states that children must be treated fairly and equitably, and protected from direct or indirect discrimination on a number of grounds - including the gender or sex of the child *or the child's parents*.

And yet when the Ministry filed papers before the court clearly indicating that it intended to impose a requirement concerning a genetic link which it would not have applied in respect of a heterosexual couple, the Court as upper guardian of the twins did not even blink. It made reference only to the provision in the Child Care and Protection Act which allows a court to ordering DNA testing where this would be in the child's best interests, without discussing the discriminatory nature of imposing such a requirement in the first place. The Court made no real analysis of the Paula and Maya's best interests, or its duty to protect those interests.

At the end of the day, this is not a gay rights issue so much as a child rights issue. The twins have every right to spend the early days of their lives with both of their loving parents. It is surely in the best interests of the twins and their older brother for the family to be together.

We are very sad indeed to see that the High Court did not exercise its duty to protect the best interests of minor children more robustly.



Toni Hancox
thancox@lac.org.na



Dianne Hubbard
dhubb@africaonline.com.na

Trustees of the Legal Assistance Trust:

Clement Daniels (Chairperson)

Tangeni Amupadhi

Norman Tjombe

Taamba Iithete

Toni Hancox (ex officio)

Dantago Garosas