

**TANG KONG MENG V  
ZAINON BT MD ZAIN:<sup>1</sup>  
A CASE DECIDED BUT NOT  
RESOLVED**

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**I. FACTS**

On December 3, 1986, Alvina, a female, was born to one Chong Mo Mool ('Mdm Chong') and Tang. They were not married at that material time as Tang was then still married to another lady. According to Mdm Chong, when Alvina was only three months old, she handed her to Zainon and Suhaimi who were to baby-sit her at a charge of RM180 per month. Tang, on the other hand, asserted that both he and Madam Chong employed the services of Zainon and Suhaimi. After careful consideration of the evidence, the court was more inclined to believe the latter's version. Soon after this, Tang and Mdm Chong parted ways, but nevertheless each visited Alvina from time to time, and according to Mdm Chong, she continued to pay Suhaimi and Zainon the charges for baby-sitting Alvina.

In 1990, Tang went to Singapore to work. According to both Suhaimi and Zainon, Tang returned to visit Alvina in 1991 and on one occasion stayed at their home for two to three nights sleeping in the same room with his daughter, Alvina.

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<sup>1</sup> [1995] 3 MLJ 408.

Towards the end of 1990, Mdm Chong who had also been visiting Alvina on and off agreed to allow Suhaimi and Zainon to adopt her, and convert her to the Islamic faith. Consequently, on 8 December 1990 both Suhaimi and Zainon, made an application to the Registrar of Adoptions ('Registrar') at Daerah Gombak, Selangor, under the Adoption Act 1952 to adopt Alvina. This application was processed together with a letter signed by Mdm Chong consenting to the adoption. However, although Tang's name was inserted in the application form, his particulars such as race, religion, place of birth and more importantly, his address, were left blank. According to the Registrar, she was only able to interview Suhaimi, Zainon and Mdm Chong and not Tang since his whereabouts were not disclosed and unknown. As the necessary ingredients for the adoption under the Act had been fulfilled, and by exercising her discretion as provided under the said Act to dispense with the consent of any parent, she registered the adoption of Alvina in the register of adoptions on 11 May 1991. On the same day, Alvina was converted to the Islamic faith and was given the name of Noralvina bte Abdullah.

In November 1991, Tang visited Alvina. Her adoption and conversion to Islam were concealed from him. Following this, in June 1992, Tang took Alvina away from Suhaimi and Zainon to reside in his sister's house in Menglembu, Perak. By October 1992, she was enrolled into a Chinese school. At around this time, Tang came to understand from his brother in Kuala Lumpur that the police were looking for him for the alleged kidnapping of Alvina. As a result, he immediately surrendered himself to the authorities. Alvina was returned to Suhaimi and Zainon. At the time of the hearing, Alvina was nine years of age.

## **II. THE ISSUES RAISED AT THE TRIAL**

The plaintiff, Tang, applied for a declaration that he was lawfully entitled to the custody and care of the child. He also sought a declaration that any religious instruction given to Alvina or her participation in any ceremony or act of worship of the Islamic faith was in contravention of Article 12(4) of the Federal Constitution. The plaintiff also applied for an order that the defendants deliver Alvina to him. He argued that Mdm Chong had deserted him and abandoned her right to the care and custody of Alvina. She was therefore unable to grant consent to the adoption. He had assumed the role of a guardian to Alvina, and hence the right to consent to her adoption lay solely with him.

During the course of the trial, the second defendant (the adoptive father) applied for a declaration that the registration of the adoption of Alvina was lawful and the right of custody be granted to him.

### III. THE DECISION

The Judge in his opening statement took special note of the sensitive nature of the case, where 'human feelings of the parties ... and the racial and religious sensitivity of the two major races in the country in general are involved'.<sup>2</sup> The Judge also pointed out that in such a case, the welfare of a young girl was of paramount importance.

He continued to say that there was no dispute that Alvina was the illegitimate child of Chong Mo Mooi and the plaintiff. The plaintiff, being the father of an illegitimate child, had no legal right to custody under the civil law. Legally, it is the natural mother who is entitled to and have exclusive care of her illegitimate child. The mother is under an obligation to maintain the child. Although under the Married Women and Children (Maintenance) Act 1950,<sup>3</sup> the mother of an illegitimate child is the guardian, she can still apply for maintenance from the putative father, if he neglects to provide maintenance for the child.

Having established that Chong Mo Mooi had the exclusive care of Alvina, the Judge then went on to deal with the issue of whether Chong Mo Mooi had abandoned such right and therefore her right to consent to the adoption. Taking into account the evidence 'as a whole', his Lordship concluded that Chong Mo Mooi had not abandoned her rights. Although she was separated from the plaintiff, she continued to visit Alvina and provide for her maintenance. She was therefore able to give a valid consent to the adoption of Alvina.

The Judge then proceeded to consider Alvina's alleged adoption. He noted that consent 'was only one of the many factors'<sup>4</sup> necessary to complete the adoption process under section 6(1) of the Adoption Act. Two of these requirements were singled out by the court for consideration: first, whether the defendants had custody over Alvina for a continuous period of two years before the registration of the adoption; and

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<sup>2</sup> *Ibid* at 411-412

<sup>3</sup> Act 263 s 3(3).

<sup>4</sup> *Supra* n 1 at 413

secondly, whether Alvina was 'maintained' by the defendants for that same period. According to the court, the word 'custody' meant 'physical custody' in this case. Accordingly, it was held that the defendants had custody of Alvina at the material time. The critical factor in this case was whether Zainon and Suhalmi had maintained and brought up Alvina for a continuous period of two years prior to the registration of the adoption. Although the defendants denied receiving money from Chong Mo Mooi for the child's upbringing, the evidence showed otherwise. Having received such payments, the court said that the defendants could not be considered to have maintained the child as was required under section 6(1) of the Act. He averred that failure to satisfy any of the conditions under that provision would result in the registration of the adoption being *void ab initio*. Having found that Suhalmi and Zainon did not maintain Alvina during the entire period of custody they had of her right up to the time of registration of the adoption, the learned judge declared the registration null and void. Accordingly, the Judge ordered the registration of Alvina's adoption to be deleted from the records.

Finally, on the issue of custody, the court noted that although legally, Chong Mo Mooi 'had a better right being the natural mother of an illegitimate child,<sup>5</sup> she had expressly stated that Alvina would have a better life being looked after by the defendants. It was obvious to the court that Chong Mo Mooi had no interest, intention nor the ability to gain physical possession of Alvina.

The judge also noted that Chong Mo Mooi, had 'two other illegitimate children by two other men' and was in no position to look after Alvina. Although the plaintiff was financially stable, his employment in Singapore made it difficult for him to be with the child.

Having regard to all the circumstances, the court, reiterating that the welfare of the child was of paramount importance, appointed the defendants as Alvina's guardians.

Although the defendants were given custody of Alvina it was not unconditional. The Judge warned the defendants that until such time as the court ordered otherwise:-<sup>6</sup>

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5 At 416.

6 *Ibid.*

- i) they must allow both the plaintiff and Chong Mo Moot to visit Alvina once a month on a weekend and to take her away to spend time with them (from 10 am on Saturday and returning her before 7 pm on Sunday);
- ii) they must not decide on Alvina's religion; and
- iii) they must not make Alvina take part in 'any ceremony or act of worship of the Islamic faith'.

#### IV. COMMENTS

The court had ordered that the defendants were not to decide on Alvina's religion or to make Alvina receive further religious instructions in or to take part in any ceremony or act of worship of the Islamic faith. To the extent that the defendants were not the adoptive parents of Alvina, it would have been unconstitutional for the defendants to do any of the above acts. According to Article 12(4) of the Federal Constitution,

....the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

However, the court appointed the defendants as Alvina's guardians. As guardians, the defendants would be, according to section 3 of the Guardianship of Infants Act 1961, responsible for the support, health and education of Alvina. Seemingly, they would also have the constitutional right to decide on Alvina's religion. By ordering otherwise, was the court not denying the defendants one of their rights, as enshrined in the Constitution, as guardians?

Notwithstanding the above orders and more important, it should be noted that the court did not rule on the legality of the conversion of Alvina to the Islamic faith. Given that Alvina's natural mother, who had the constitutional right to decide on her religion, had given her consent, it can only be concluded that Alvina's conversion was valid. Accordingly, Alvina remained a Muslim. Under these circumstances who was entitled to give her religious instructions if the defendants who were appointed her guardians were not permitted to?

It is submitted that the court has left many questions unanswered and in the process created doubts as to whether the welfare of Alvina, which was stated to be of paramount importance, had been given serious consideration.

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