

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

~P~ (Foreign adoption: Original documents from country of origin)

STEPHENS J

Introduction

[1] The adoptive parents of a child, ~P~, who was born in Bangladesh, having obtained an adoption order in this jurisdiction under the Adoption (Northern Ireland) Order 1987, seek the return of the ~P's~ original Bangladeshi passport and original Bangladeshi birth certificate which had been lodged in court in relation to the adoption application and presently remain on the Court Service file.

[2] The practice in relation to applications in this jurisdiction to adopt a child who is a foreign national (a foreign adoption) is to require that the foreign passport and the foreign birth certificate be lodged in court. It has also been the practice that these original documents are retained after an adoption order has been made and are not returned to the adoptive parents on behalf of the child.

[3] The documents are important documents establishing the child's origin, identity and original nationality. For both the adoptive parents and the child they are particularly significant and symbolic items in the life story of the child.

[4] The adoptive parents made the application but did not make any substantive submissions. Mr McGuigan appeared on behalf of the Official Solicitor. Northern Ireland Court Service were put on notice of the application and indicated that they were content to comply with any outcome. Accordingly they were not represented and did not make any submissions.

[5] Nothing should be published which would identify ~P~.

The issues

- [6] The application raises a number of issues:
- (a) Whether there is a burden on Court Service to show that they lawfully retain the original passport and the original birth certificate from the adoptive parents or from them on behalf of ~P~?
 - (b) If there is a burden on Court Service then whether it has been shown that they have the right to retain the original passport and the original birth certificate from the adoptive parents or from them on behalf of ~P~?
 - (c) Whether there is a statutory or common law power which would authorise Court Service to retain these documents from the adoptive parents or from them on behalf of ~P~?
 - (d) If there is a power for Court Service to retain these documents does the court have residual discretion to order the release of these documents to the adoptive parents or to them on behalf of ~P~?
 - (e) If there is such a residual discretion then what are the factors that should be taken into account in the exercise of discretion.
- [7] Before considering those issues I refer to -
- (i) the Hague Convention,
 - (ii) international considerations regarding nationality,
 - (iii) the practise in Northern Ireland for storing adoption files,
 - (iv) the practise in England and Wales as to the lodging of original documentation and the return of that documentation

Hague Convention

[8] The Hague Convention of 29 May 1993 on *Protection of Children and Co-operation in Respect of Inter-country Adoption* provides in Article 30 that:-

“(1) The competent authorities of a contracting State shall ensure that information held by them concerning the child’s origin, in particular information containing the identity of

his or her parents, as well as the medical history, is preserved.

(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, insofar as is permitted by the law of that State."

[9] I consider that the obligation under the Hague Convention to preserve information does not entail an obligation to retain original documents. The obligation to preserve information can be fulfilled for instance by the preservation of good quality photocopies.

International considerations regarding nationality

[10] Whilst an adoption order granted in the United Kingdom has the effect of terminating the legal relationship between the child and his birth parents, no loss of the child's nationality by birth occurs, unless the child's country of origin has so regulated. In the report on "*Nationality and the Child: Nationality and the Protection of Children across Frontiers - The case of inter-country adoption*" prepared for the 3rd European Conference on Nationality (Strasbourg, 2004) by William Duncan, Deputy Secretary General of The Hague Conference on Private International Law it is stated:

"With regard first to loss of nationality, the current position is still broadly that described by Hans van Loon in his Hague lectures on inter-country adoption:

'Few countries have expressly regulated the question of loss of nationality as a result of adoption by a foreigner. In the absence of an express rule, the conclusion must be that no loss of nationality occurs. Some countries have a procedure for dismissal of nationality (e.g. Greece). A number of States provide that adoption abroad automatically leads to loss of nationality (e.g. Korea).'

In fact some countries provide expressly for the retention by the child of that country's nationality."

[11] From experience Russia and the Philippines actively protect the nationality and citizenship of adopted children. On reaching the age of 18 years adopted persons from such countries may, if they wish, renounce their citizenship.

[12] The United Kingdom makes provision for children adopted by a British citizen to automatically acquire British citizenship. But this does not prevent the child from also retaining the nationality of his country of origin. Indeed the same protections apply to a British child adopted by foreign nationals in a foreign country. The British child retains British citizenship but may on reaching the age of 18 (or on marriage, if married under 18 years) renounce such citizenship, provided he has acquired the citizenship or nationality of another country.

[13] Nationality and citizenship are not acquired by the issuing of a passport. The passport is, nevertheless, the official proof of nationality and citizenship afforded directly to the child by the authorities in his country of origin and, as such, is an important evidential document.

The practice of Court Service in Northern Ireland in relation to the retention of adoption files

[14] I have been informed by Court Service that there is a policy that the court files in relation to adoption applications are not destroyed but rather that they are kept permanently. That upon conclusion of an adoption application the file is transferred from the Royal Courts of Justice to a highly secure off-site storage facility. I have been informed by the Office of Care and Protection that they have access to adoption files in the off-site storage facilities from 1953 onwards. I have also been informed that earlier adoption files are held by the Public Record Office of Northern Ireland and that these date from 1931.

[15] I am satisfied that Court Service presently have and have maintained for years a system of keeping safe these important documents.

The practice in England and Wales as to lodging original documents and their return

[16] Applicants applying under Section 46 of the Adoption and Children Act 2002 for an adoption order (excluding a Convention adoption order) where the child is habitually resident outside the British islands and is brought into the United Kingdom for the purposes of adoption are required to complete Form A60. They are required to attach to the form two "photocopies" (emphasis added) of each of the following:-

- (a) The photo page of the child's passport.
- (b) The page of the child's passport showing date of entry stamp by Immigration.

Applicants are also required to attach a certified copy of the child's original birth certificate, any abandonment certificate or where the child has been adopted, a certified copy of the entry and the register of adoptions as recognised in the state of

origin or a certified copy of the adoption certificate. They are however not obliged to attach a birth certificate if they are unable to do so but in those circumstances they are required to enter the place (including the country) of the child's birth, if known.

[17] Accordingly there is in England and Wales no requirement to lodge the original passport though there is an obligation to lodge a certified copy of the child's original birth certificate if the applicants are able to do so.

[18] The Office of Care and Protection have contacted the Principal Registry in London. They have been informed that the original birth certificate and any other original documents lodged in court in England and Wales in relation to foreign adoptions are returned to the applicants upon their undertaking that they will return them to the court if so required.

[19] The practice in England and Wales is that the original passport of the child need not be lodged in court but in any event there is a practice not to be to retain original documentation but rather to return original documentation to the applicants.

[20] The information obtained as to the practice in England and Wales has not only been obtained by the office of care and protection but also by Dr Hilary R Harrison OBE of the Department of Health, Social Services and Public Safety. In view of the specialised nature of inter-country adoption, certain courts in England and Wales have now been designated as 'Inter-country Adoption Centres'. Dr Harrison, based on her understanding of the centres dealing the highest volume of inter-country applications in England, made contact by telephone with the court services in the adoption sections of the Birmingham, Manchester and Liverpool Centres and the Principal Registry of the Family Division which handles all applications from the London and South Eastern region. She also contacted the inter-country adoption centre in Cardiff. Staff in each of these Centres confirmed to her that in inter-country adoption cases or domestic applications with a foreign element, applicants are not required to submit the child's passport to the court. The Principal Registry of the Family Division, however, requests applicants to supply a photocopy of the passport and visa documentation. This information is then forwarded to the UK Border Agency in order that that Agency can form a view as to whether to signify "no objection" to the adoption or to seek leave to intervene in the adoption application.

Whether there is a burden on Court Service to show that they lawfully retain the original passport and the original birth certificate from the adoptive parents or from them on behalf of the child?

[21] Whether there is a burden on Court Service to show that they lawfully retain the original passport and the original birth certificate from the adoptive parents or from them on behalf of the child depends on who owns or has rights in relation to those documents.

[22] I consider that the position in relation to original birth certificates is that the certificate is owned by the person who obtains it. The original birth certificate will have been obtained by the prospective adoptive parents and is therefore owned by them. Accordingly if the owners request the return of the birth certificate and if court service wishes to retain it then court service has the burden of showing that they are legally entitled to do so.

[23] The position in relation to ownership of a British passport is different. The person to whom the passport is issued does not own it. The power to issue a passport is a prerogative power exercised through Her Majesty's Ministers. A British passport is the property of the Crown not of the passport holder. It can be revoked or impounded at the discretion of the Crown. In *Suwalsky v Trustee and Official Receiver* [1928] B & CR 142, 4 BILC 780 a trustee in bankruptcy wished to retain the bankrupt's passport as a means of ensuring that the bankrupt remained in the country and therefore would be available to give evidence on behalf of the trustee in the action brought by him against a third party. The bankrupt wished his passport to be returned so that he could travel abroad submitting that the passport is the property of the Crown and was issued by the Passport Office for the personal use of the bankrupt. The court held that

“a passport issued by the British Passport Office on behalf of the Secretary of State for Foreign Affairs to a person who afterwards becomes bankrupt is the property of the Crown and not the “property” of the bankrupt within the meaning of section 167 of the Bankruptcy Act, 1914: and where a bankrupt has passed his public examination and has not been guilty of any misconduct and desires to go abroad to earn his living the Court will, in a proper case, direct the passport to be handed to the bankrupt.”

In the event in *Suwalsky v Trustee and Official Receiver* the court directed the trustee in bankruptcy to deliver the passport not to the owner of the passport the Crown or to the passport office on behalf of the Crown but to the bankrupt. Accordingly I consider that the holder does not own a British passport but I consider that he or she has a right to hold the passport unless or until the Crown revokes or impounds it. The passport is issued for the personal use of the holder.

[24] The ownership of a foreign passport and the question as to whether it is owned by the authorities in the country of its issue or by the passport holder is a matter for the law of the country of its issue. There may be many permutations as between the different legal systems of different states of issue. However where, as here, the law of the particular foreign country, Bangladesh, has not been proved this court should apply the law of Northern Ireland. Accordingly the Bangladeshi passport is the property of the authorities in Bangladesh and not of the passport holder but the passport holder has a right to hold the passport unless or until the

authorities in Bangladesh revoke or impound it. Therefore in relation to this application the passport should be returned to the holder, the child, by giving it to his adoptive parents unless court service can justify its retention. In short there is a burden on Court Service to show that they lawfully retain the original Bangladeshi passport. If they cannot satisfy that burden then the passport should be returned to the holder which in the circumstances of this case would be by delivering it to his adoptive parents.

Has Court Service shown that it has a right to retain the original passport and the original birth certificate from the adoptive parents or from them on behalf of the child?

[25] In order to address this issue it is necessary to consider whether there is a legal obligation, either statutory or under the rules or at common law, to lodge in court the original of and/or a copy of the foreign passport and/or foreign birth certificate of a child in relation to whom there is an adoption application under the Adoption (Northern Ireland) Order 1987?

[26] There is no statutory provision or rule of court that requires an original passport or the original birth certificate to be lodged in court on the making of an adoption application. These documents have been required to be lodged by virtue of a protocol which has been in existence in the office of care and protection entitled "*Adoption applications. Documents required for adoption applications other than placement or step-parent cases.*" Eleven documents are set out and the fourth and the eleventh are respectively:-

"4. Long Birth Certificate of Child - Certified copy and 3 copies

11. Child's original Passport with valid visa (In respect of Inter-country Adoption only)"

The only remaining legal authority to require that these documents are lodged is the inherent jurisdiction of the court.

[27] A court in Northern Ireland has jurisdiction to order that any United Kingdom passport which has been issued to or contains particulars of a child be surrendered if there is in force an order prohibiting or otherwise restricting the removal of the child from the United Kingdom or from any specified part of it, see *Section 37 of the Family Law Act 1986*. That statutory power does not extend to foreign passports.

[28] The court's inherent jurisdiction has been considered in cases such as *R v Stobie [2001] NICC 7* in which Carswell LCJ stated that:

“The cases in which a court may exercise powers conferred by its inherent jurisdiction are diverse and not confined to a settled list. In essence they are those required to enable to function effectively as a court, to fulfil itself as a court, by maintaining its authority and preventing its process being obstructed and abused: *Connelly v DPP* [1964] AC 1254 at 1301, per Lord Morris. The two main powers are to punish offenders for contempt of court and to stay or dismiss actions for abuse of the process of the court. Master IH Jacob in a valuable article, *The Inherent Jurisdiction of the Court*, Current Legal Problems 1970 23 at 28 classified the cases, apart from contempt, as falling into three broad groups, control over process, persons and the powers of inferior courts and tribunals. The first two include such matters as rules of procedure and rights of audience, compelling observance of process and regulating matters which constitute an abuse of its process. They also extend to the control of officers of the court and those admitted to plead before the courts and to the charge of persons under disability. Master Jacob concluded his review by stating that the inherent jurisdiction of the court may be defined as –

‘the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them’.”

[29] One of the situations in which a court may exercise powers conferred by inherent jurisdiction is to require the surrender of a foreign passport in the interests of a child. If there is a threat of removal of a child by a foreign passport holder then there is an inherent jurisdiction to require the surrender of, not only the child’s foreign passport, but also the foreign passport of the individual who poses a threat of removing the child. Accordingly the practical restraint on travel brought about by the surrender of a passport includes not only a restraint on the child’s travel but also a restraint on the travel of the person posing the threat (see *Re A K (Foreign Passport: Jurisdiction)* [1997]2 FLR 569.

[30] The court's power under its inherent jurisdiction to order the surrender of a foreign passport extends not only to situations where there is a need to protect children but also arises for example to prevent a foreign national leaving the jurisdiction where a hearing shortly to take place would be frustrated by his absence, see *Re S (Financial Provision: Non- Resident)* [1996] 1 FLR 148 at 152C-D. There is not only an inherent jurisdiction in such circumstances but also a jurisdiction to grant an injunction under Section 91 of the Judicature (Northern Ireland) Act 1978, see *B v B (Restraint on Leaving Jurisdiction)* [1997] 2 FLR 148.

[31] I consider that there is a power under the court's inherent jurisdiction to require that the child's original foreign passport and original birth certificate be lodged. There is a distinction between the existence of a power under the court's inherent jurisdiction and the purpose for exercising it in any particular case. There can be a whole series of purposes in children's case for exercising the power to order the retention of a foreign passport or birth certificate for instance to prevent abuse of dual identities.

[32] The purpose of exercising the power under the court's inherent jurisdiction in this case is to ensure that the public policy issues in relation to foreign adoptions are fulfilled. Foreign adoptions can be open to abuse one instance of which being the payment of money to "secure" a child in a foreign country. The circumstances in which foreign adoptions can occur are circumscribed by domestic law. In circumstances where a child has come from a foreign jurisdiction to Northern Ireland the courts exercise its power under its inherent jurisdiction to ensure that the child remains in Northern Ireland until the checks involved in the adoption process have been performed and an adoption order has been made. The practical method by which that has been achieved is to restrain travel by requiring the original foreign passport to be lodged. In addition until an adoption order is made the practice has been that if the proposed adoptive parents wish the child to leave the jurisdiction then an application has to be made to the court for the temporary return of the passport to facilitate such travel. The purpose for exercising the power under the inherent jurisdiction in this case has come to an end on the making of the adoption order. There is no further purpose in this case for exercising the court's power under its inherent jurisdiction. These documents do not belong to court service. There has been no transfer of ownership or of the right to hold the documents by virtue of the fact that they have been lodged in court. The original documents should be given by court service to the adoptive parents on behalf of ~P~ on condition that the parents provide to court service colour photocopies of both documents which will be kept on the court service file. Those photocopies enable court service to comply with their obligations in Article 30 of the Hague Convention of 29 May 1993 on *Protection of Children and Co-operation in Respect of Inter-country Adoption*.

Discretion

[33] If I am incorrect in that analysis then I consider that I have discretion to order that these documents should be given by court service to the adoptive parents on

behalf of ~P~ on condition that the parents provide to court service colour photocopies of both documents which will be kept on the court service file. Further I would exercise that discretion in favour of returning the original documents. There is no restriction on the free movement of ~P~ by retaining the passport on the court file as after an adoption order has been made ~P~ can obtain a British passport. Also I see no reason why there should be a difference between foreign and domestic adoptions in this case. There is no obligation to lodge in court the original British passport of a child in relation to a domestic adoption. However, fundamentally the adoptive parents are now the parents of ~P~. The adoption means that parental responsibility for ~P~ is fully vested in the adoptive parents. The court retains no control whatsoever over the day to day and year to year decisions that the adoptive parents will make for ~P~. The adoptive parents are entitled to manage all aspects of ~P's~ life including keeping safe important documents which are of such significance emotionally and evidentially. I cannot envisage any other conclusion to the exercise of discretion given that overwhelming factor.

Conclusion

[34] There is a power under the court's inherent jurisdiction to require that the original Bangladeshi passport and original Bangladeshi birth certificate be lodged in court. On the facts of this case an adoption order having been made the originals should be given by court service to the adoptive parents on behalf of ~P~ on condition that the adoptive parents provide to court service colour photocopies of both documents which will be kept on the court service file.