

**APPLYING THE PRINCIPLE OF THE BEST INTERESTS OF
THE CHILD IN INTER-COUNTRY LEGAL GUARDIANSHIP
AND ADOPTION MATTERS: EXPERIENCES OF THE
FAMILY COURT IN UGANDA**

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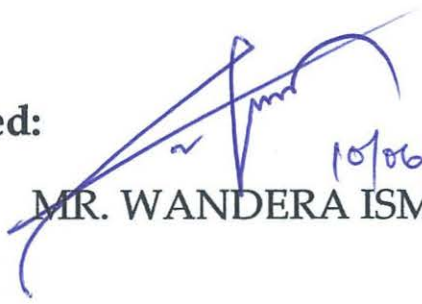
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DECLARATION:

I, BENJAMIN BEN AVUTIA hereby declare to the best of my knowledge, that this dissertation as being my original work has never been submitted to any University, College or Educational Institution for the purpose of meeting any academic requirement. All sources and authorities have been dully acknowledged.

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Hod Pub/comp Law
11/6/14

DEDICATION

This Study is dedicated to my beloved daughter EYOTARU PEACE PHILLIPAH ANNA who tirelessly kept on perusing through my work and giving me advise in pursuit of the research.

To my beloved late parents SIMON AGAMILLE AND ANNA ENDRAA who gave the whole of their life to educate me despite the various short comings. May their souls rest in peace.

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immensely grateful to my entire family for believing in me every step of the way. It is this emotional and physical support that gave me the courage and impetus to continue running the race to the finish line.

List of Acronyms

ACPF	African Child Protection Forum
ACWRC	African Charter on the Welfare and Rights of the Child
AG	Attorney General
ANPPCAN	African Network for prevention and Protection against Child abuse and Neglect
BIP	Best Interests of the Child Principle
CA	Court of Appeal
CRBA	Rights-based approach
CRC	Convention on the Rights of the Child
CRIN	Child Rights Information Network
FC	Family Court
GC	General Comment
HC	High Court of Uganda
HCCH	Hague Conference on Private International Law
HCIA	Hague Convention on Protection of Children and Cooperation in respect of Inter- Country Adoption
JLOS	Justice Law and Order Sector
KCCA	Kampala Capital City Authority
LAP	Legal Aid Project of the Uganda Law Society

LG	Legal Guardianship
MGLSD	Ministry of Gender, Labour & Social Development
OVCs	Orphans and Vulnerable children
PSWOs	Probation and Social Welfare Officers
ICA	Inter-Country Adoption
UN	United Nations
UNICEF	United Nations Children's Fund

Abstract

This study analyses the child’s best interest principle as applied in inter country adoptions and legal guardianship decision made in contemporary Uganda. The international human rights regime particularly the Convention on the Rights of the Child (CRC) elaborately delineates how children should be treated in particular situations to ensure that decisions or initiatives undertaken promote, rather than inhibit, their best interest.

Uganda is a state party to the CRC and as such under an obligation to implement the convention. The role of courts of law in inter-country adoptions is of particular interest in this study. Firstly, as it is the courts of law that evaluate and assess the circumstances under which adoptions are made. In Uganda they are the competent authority within the meaning of the Hague convention on ICA. Secondly, courts of law, besides domestic legislations, use other subsidiary laws, international human rights law inclusive, as well as their inherent discretion in adjudication of cases.

In other words the courts of law are highly empowered to promote and protect the BIP of children in ICA, more than any administrative organ in Uganda. Be that as it may, the study reveals that child's best interest principle in its broad sense receives peripheral attention in court decisions on adoption matters. Instead physical and financial related welfare and other considerations take a centre stage. The results of this have been injurious to the rights of the children because it has produced an environment that has allowed clandestine activities associated with child trafficking to flourish within the context of ICA in Uganda. This paper contends that courts of law are an indispensable organ in the dispensation of justice and thus shouldn't overlook critical issues like the child's best interest in taking critical decisions as in adoption of children. They have the duty to protect, and fulfill the children rights within the ICA settings.

Adoption is a lifelong undertaking, implying that a flawed adoption process portends irreversible damage to the child's wellbeing, survival and development.

CHAPTER ONE

1.0 INTRODUCTION

My heart is at pain because of my child, if I knew I would not have given him up. I would live with him and he would have grown just like any other children. I was never informed by court that, I was totally giving up my right. I thought my child was being taken for education. Lamentation of a mother, Hasifa Nandawula on learning that her adopted son was taken for ever and she would never have another chance to live with him¹

1.1 Statement of the Problem

Stewart Bukenya was born to Festo Matovu and Hasifa Nandawula in the Kiwumu village near Kampala in Uganda. In 2009, Stewart aged 2years was handed over to the Hodge family in Forest County, State of Mississippi under a legal guardianship order (LGO) issued by the family court (FC) in Uganda.

According to media reports² and affidavits on court record³, Stewart's parents later contended that they gave up their child thinking that the

¹ (Sserwanja NTV:2013)

² (Sserwanja NTV 2013)

legal guardians were merely to provide him with education and care. Reportedly, they were assured continued access to their son through telephone and regular visits. However on reaching their home country the Hodges applied for adoption and subsequently changed his name from Stewart Bukenya to Silas Hodge. To date the family is grappling and paying the price for a decision they made four years ago when they gave up their child⁴.

The adoptive parents cut off contact and are not ready to relinquish their legal rights back to the biological parents. Hodge the adoptive father in his response to court wrote:

While I do understand that we have a legal guardianship status with Uganda, we are adoptive parents according to USA law...Stewart is now our child we would be happy to provide any documentation⁵.

This is an unfortunate scenario involving a fight over a child that hardly understands what is going on around him. This case scenario is what motivated this study with the following question in mind:

Where is Stewart's best interest in the decision that was made by the duty bearers? What has led to such situations where courts are prompted to grant Inter-country adoption and Legal guardianship

³ Stewart Bukenya 2012

⁴ (Sserwanja: 2013)

⁵ (Hodge, letter to court)

orders in cases where children are not orphans? Whose rights should prevail in a situation where a child's rights conflict with the rights and or interests of other parties?

The vignette of Stewart is a tip of the iceberg illustrating some of the dilemmas that courts in Uganda face when determining the BIP in ICA. Particularly it is challenging for courts to assess and determine who is an adoptable child in situations where the process is marred with fraud, forgeries and inducements.

The situation is exacerbated by the fact that Uganda's child protection system is still weak as Freda Luzinda a child rights advocate observes: "we don't have a sieve to pick out an adoptable child from a non adoptable child".⁶ The absence of guidelines to support the sieving process coupled with circumvention of the safeguards under the children Act due to its prohibitive nature accelerates illicit activities related to ICA⁷

The result of all this has been compromising the child's interests in situations such as Stewart's case where orders were based on misrepresentation of facts by parties.

⁶ (Sserwanja NTV 2013).

⁷ (CRC Committee 2008;

1.2 Chapterisation

The paper is divided into four chapters with issue specific subsections. The first chapter explains the key concepts namely: inter-country adoption and best interest principle. The chapter also situates the problem and context of the study, mentions research objectives and questions, justification, scope and research methodology. The second chapter presents the conceptual and theoretical framework used to analyze the research findings with emphasis to the Child rights based approach and the best interest concept. The third chapter presents findings and analyses the interpretation and applicability of BIP in the ICA by the court. The fourth chapter draws conclusions from the study and suggest recommendations for academic, practice and policy changes.

1.3 Definitions

Inter-Country Adoption: Meaning and Trends

Adoption has been defined as “a multi-step legal process that culminates in the creation of a legally sanctioned parent-child relationship between the adopting parent and the adopted child⁸”

⁸ (Roby 2004: 304).

Adoption was originally meant for providing an heir to childless families but has evolved over the past few decades into a method of providing a permanent loving family environment to a child.

There is a thin line between adoption and legal guardianship, with the latter allowing the birth parents or care givers to maintain access rights to the child. ICA therefore involves moving a child from his/her country of origin to another country to live with the adoptive parents.

It implies the total and definitive rupture of a child's legal relationship with the biological family. ICA had its genesis in a Post-World War II climate when American soldiers returning home spotlighted attention on children orphaned by the war in Europe. It later took a markedly distinct tack when, instead of committing resources to helping orphans within the country of origin, the solution was taken to provide them with homes elsewhere. While ICA at that time was child-driven intending to find a home for orphaned children, there were seeds of the larger ICA debate that would grow in the years to come with multifaceted reasons for the practice⁹. At the receiving side this was motivated by factors such as high infertility rates; decreased

⁹ (Martin 2007: 177).

availability of domestic children for adoption; and increasingly established networks for ICA.

On the sending side it was driven by difficult social and economic conditions, mainly: poverty and illness; migration to urban areas; the breakdown of extended families; high pregnancy rates among unmarried women; difficulty in obtaining abortions; and increase in female-headed households; as well as high unemployment rates¹⁰

Martin and Mezmur in their analysis of current trends in ICA both present different viewpoints that bring out the good and bad related to ICA.¹¹ According to Martin, proponents of ICA perceive that millions of children are in need of homes in developing and transition economy nations especially children who are abandoned, left in dismal orphanages, or living on the street. Such children in need may counter the ethical or political objections to ICA as lacking legitimacy¹².

Supporters of ICA according to Martin argue that: it fulfills a child's right not to be institutionalized; provides adults who wish to be parents the opportunity to do so; provides parents to children without families; alleviates the world's ills by taking children away from

¹⁰ (Martin *ibid*: 178).

¹¹ (Martin2007; Mezmur 2010).

¹² (Martin 2007:179).

countries with overtaxed resources and reducing the overall number of homeless children; promotes tolerance and diversity by creating families with different national and ethnic backgrounds and provides additional opportunities for non-traditional families¹³.

Critics of ICA on the other hand look at the practice as more or less a form of child trafficking because: it involves the transfer of children from poor nations to rich nations in order to meet the demands of those in rich nations; it strips children off their national identity, native culture and language and therefore represents a form of modern-day imperialism imposing a culture and set of values from the outside¹⁴.

Given this global context, ICA must be seen within the political perspective of human rights and human dignity and answers should be sought to the questions as to why western countries adopt frequently children from countries in economic/political turmoil such as Guatemala¹⁵ , and what are the drivers and mechanisms behind adoptive practices¹⁶.

¹³ (Martin 2007: 179).

¹⁴ (Martin ibid 179; Mezmur 2010:4; Kapstein 2003).

¹⁵ (Herrmann 1991)

¹⁶ (Makomane et.al 2011).

Global Trends and Concerns about Inter-Country Adoption

Country reports and CRC Committee observations have highlighted the widespread concerns about the trafficking in children for adoption¹⁷. Academic researchers, local regional and international child rights organizations allude to these fears and speculations surrounding ICA.

UNICEF in its 2004 statement had this to say:

Over the past years, the number of families from wealthy countries wanting to adopt from other countries has grown substantially. At the same time lack of regulations and oversight, particularly in the countries of origin, coupled with potential for financial gain, has spurred the growth of an industry around adoption, where profit, rather than the best interests of the children, takes the centre stage. Abuses include the sale and abduction of children, coercion of parents and bribery as well as trafficking to individuals whose intentions is to exploit rather than care for the children¹⁸.

The African Child Protection Forum (ACPF) reports that ICA in some countries in Africa Uganda inclusive is marred with serious procedural problems, and illicit activities (ACPF Report 2012).

¹⁷ (CRC committee 2008).

¹⁸ (Roby 2007:59).

Also Mezmur in his report to the Special committee of HCIA gave numerous examples from Ethiopia, Kenya, Malawi , Chad , South Africa, Uganda and many other African countries where the practice of ICA has been put in the spotlight for illicit practices that have culminated into a number of questionable adoption orders¹⁹.

The illicit activities highlighted include: falsification of documents; violation of “no initial contact rule”; improper financial gain, stringent residency requirements and abuse of guardianship orders. It is argued that although payments by adoptive couples may be made in good faith and without harm to the child, a system that puts a price on a child’s head is likely to encourage criminality, corruption and exploitation²⁰.

Mezmur confirm that such abuses is what has led to suspension of ICA in some countries such as Guatemala, Liberia etc shifting the focus to countries with less restrictive policies and protection measures on ICA like Uganda²¹. The practice is globally received with mixed reactions and views, with some equating it to child trafficking, modern-day imperialism and at its worst some critics calling it a “cultural genocide”.

¹⁹ (Mezmur 2010:4).

²⁰ (UNICEF 2007:298).

²¹ (Bruening & Ishiyama 2009).

In spite of ICA having a correlation with child tracking and other related child abuses, it is still a viable option for the children who are in need of care and protection in absence of domestic options. To address this gap the international human rights regime came up with legislations to ensure that ICA takes place in the children's best interest so that only deserving children are taken across borders for adoption. Article 21 of the CRC (1989) recognizes the system of ICA and provides for conditions within which ICA can take place.

Article 21(b) provides that "ICA may be considered as an alternative means of child care only as a last resort after exhausting all local remedies. This 'last resort' option is what has been referred to as the subsidiarity principle under The Hague

Convention for Protection of Children and Cooperation in respect of Inter country adoption²².

The treaties thus obliges state parties to make efforts to have a child raised by his or her birth. Every Child is an international development charity based in the UK working to stop children growing up vulnerable and alone²³.

²² (1993 Article 4; HccH guidelines 2008:46).

²³ <http://www.everychild.org.uk>

1.5 Defining the Best Interest Principle (BIP)

The concept of “best interest principle” is the basis upon which this research has been formulated. The BIP was deliberately left undefined at the helm of enacting the CRC to provide room for it to be interpreted and applied in accordance with specific features of national or local circumstances and decisions to be made on a case (Arts 2010).

The Hague Conference on Public International Law (HccH 1993: para16) in its guidelines to the convention added that the term was not defined in the convention because the requirements necessary to meet the best interests of the child may vary in each individual case, and the factors to be considered should not, in principle, be limited.

Art 3(1)) of the CRC states that: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

The BIP has also been given meaning in cases interpreted in different jurisdiction such as England's case of *J Vs. C*²⁴. Lord McDermott interpreted BIP to mean: a process whereby, when all relevant facts and relationships, claims and wishes of parents, risks and choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare. That is the paramount consideration because it rules upon or determines the course to be followed

The guidelines for interpretation of The Hague Convention on Cooperation and Protection of Children in ICA (HCIA) provides essential elements for consideration to include among others: efforts to maintain or reintegrate the child in his/her birth family; a consideration of national solutions first before the child is taken under ICA; ensuring the child is adoptable; matching the child with a suitable family; and imposing safeguards for protection.

BIP "as a primary consideration" therefore means that the child's interest in a given matter should be a subject of active consideration because there may be competing or conflicting human rights interests of other individuals or groups.

²⁴ (1970) AC: 710)

The interest of others should not be the overriding concern even though they may influence the final decision²⁵

1.6 The Context: Uganda and its booming ICA Industry

In Uganda today there is growing concern about the plight of children going for ICA. Media headlines like “Red flags waves over Uganda’s adoption boom” are signs that prompt cause for worry²⁶. This boom has been explained to be a result of a weak protection system and ICA becoming profitable business for the middle man²⁷.

In its 2008 concluding observations the CRC Committee noted with concern the rising number of applications for LG and reduced number of adoption of children in Uganda. The Committee warned that this may be aimed at circumventing the regulations which apply to adoption and result in practices contrary to the Optional Protocol to the CRC such as the sale of children, child prostitution and child pornography. The committee recommended that Uganda stringently scrutinizes applications for ICA and ratify the HCIA 1993. Almost 5 years after this recommendation, Uganda has not ratified the HCIA (High Court Report 2012). Justice Mukiibi in a Family Court user’s dialogue: expressed concern about the weaknesses and said: Uganda

²⁵ (UNICEF 2007:38; Save the children 2007:14).

²⁶ (Todd CNN 2013; Sserwanja 2013)

²⁷ (Sserwanja 2013).

has no law to establish safeguards to ensure that inter-country adoption takes place in the best interest of the child. There is no systematic cooperation between Uganda and where children are taken, there is no body or person designated to be central or competent Authority to control and coordinate matters relating to inter-country adoption

This fertile ground has created an adoption landscape with well-connected network agencies, 'manufacturing' orphans with a lot of mushrooming unregistered orphanages to keep up a steady supply flow. Kaboggoza estimates about 30 adoption agencies with commercial relationships with orphanages²⁸

A media report was made of about 76 children rescued from a local organization called Active Blessing Uganda, in Northern Uganda²⁹ while child earlier adopted was reported to have been dumped at a foster home. Activists (ANPPCAN) also recently called upon the Ugandan government to issue tougher laws on ICA because they suspect child trafficking was disguised under ICA practice. The organization added that only in 2012 they had received and handled five cases of trafficking in which two children aged 17- girl and boy

²⁸ (Kaboggoza 2013:4).

²⁹ (Natukunda NV 2013)

who were allegedly trafficked were deported back to Uganda by the Swedish Immigration Board.

The adoption law in Uganda is prohibitive in that the Children Act³⁰. Section 46 provides for a minimum of 3 years of residence by foreigners and 6 months of foster care under supervision of the Probation and Social Welfare Officer (PSWO). Mezmur (2010) says this has been circumvented by applicants instead seeking for legal guardianship. The current manner in which LGO are processed has created a fertile ground to abuse. It is marred with fraud, forgeries improper financial gain, coupled with unreasonable short period of stay and acquaintance by the applicants. This has in turn led to suspicions that ICA/ LG in its current form is contributing to the unfortunate child trafficking and sale of children going on within the country. This volatile situation has consequently led to a situation where some receiving countries like Netherlands after own independent investigations have taken a decision to suspend ICA Programme until they assured and convinced that the current problem issues with the law, procedures and monitoring mechanisms have been addressed.

³⁰ Cap 59

1.7 Justification and Scope of the Study

Research findings demonstrate that adoption is not a single life event, but a life-long process that needs careful handling and well thought through choices. The need to know one's identity is not confined to young adult adoptees only but even after childhood the dilemmas associated with choice made might keep haunting the givers and beneficiaries.

The focus of this study was put on the Family Court division of the High Court of Uganda because it is mandated by law under Section 44 of the Children Act cap 59 to entertain all foreign legal guardianship and adoption matters. This court therefore plays a very critical role in deciding who is an adoptable child by foreigners within the meaning of the law and circumstances .The study also makes a critical review of the current regulatory and policy framework and how it enhances or constrains the application of the BIP. It examines the processes of ICA paying more attention on how the courts apply the BIP safe guard the interest of the children involved, draws conclusions and recommendations

1.8 The Study Objectives and Guiding Questions

This research intends to add value to human rights and social justice studies by analyzing the interpretation and application of the BIP by courts of law in Uganda in ICA/ LG matters .The research was guided by the following questions:

1. How has family court in Uganda applied the principle of the best interest of the child in Inter-country legal guardianship and adoption cases?
2. How does the Family Court in Uganda interpret the BIP of the child in ICA matters?
3. To what extent is the BIP manifested in the decisions and choices made by Courts in ICA cases? and
4. What are the gaps in the legal and policy framework of the ICA process in Uganda?

1.9.0 Research Methodology

The study utilised a child rights-based approach and qualitative interviewing methodology that involved processes of data collection and analysis.

1.9.1 Using the Child Rights-Based Approach (CRBA) as an Analysis Tool

Interpretation and analysis of the academic and non-academic literature, court decisions and data gathered from interviews has been premised on international and national human rights framework using the lens of the CRBA.

1.9.2 Qualitative interviewing as a research method

Both primary and secondary data collection and analysis methods were used in this study. These methods provided a distinct process of assessing how the BIP is understood and applied by persons who are engaged with or witness the process of ICA such as the court users, court staff and judicial officers and policy makers.

The methods for qualitative primary data collection used in this research included interviews and observations. Through this method the research tapped on experiences of duty bearers. Purposeful observation was useful in getting the non verbal cues from responses received during the process of interview.

Primary data was gathered using semi-structured interviews. In total 20 informants were interviewed and 5 public opinions on adoption were collected. The interviews targeted informants who included Court support staff, judicial officers, lawyers, Probations and Social

Welfare officers, CSOs actors and policy makers within government institutions such as MGLSD and JLOS.

1.9.3 Limitations and Challenges

During the research I was party to sensitive information especially in relation to situations and personalities who are exploiting and benefiting from this booming ICA industry. This sort of derailed the original purpose of the study because at some point the research tended to become more investigative than academic.

CHAPTER TWO

INTER COUNTRY ADOPTION AND THE BEST INTERESTS OF THE CHILD PRINCIPLE: EMERGING TRENDS AND PRACTICES IN A GLOBAL CONTEXT

This chapter presents the conceptual and theoretical framework related to the BIP. The chapter gives a conceptual over view of BIP and CRBA and discusses relevancy and implication of these concepts in the child rights discourse. The chapter also discusses the theories of power and agency in a global context and analyses how they impact on the decisions and choices made in by the justice system that are related to ICA.

2.0 The conceptual overview of Best Interest Principle (BIP)

UNICEF in its handbook stated that the concept of the best interests of children has been subject of more academic analysis than any other concept included in the Convention on the Rights of the Child 1989 (CRC). The concept is not new in international human rights law as its inclusion in some national legislations pre-dates ratification of the Convention (UNICEF 2007:36).

UNICEF adds that at the heart of all legislation regarding children's rights lie the BIP which is a lynchpin of the CRC and the HCIA 1993 (ibid). The principle is also reflected in other regional and international legislations such as Article 4 of African Charter on rights and welfare of the child, the convention on Elimination of All Forms of Discrimination against Women (1979). Article 16(1) (d) of CEDAW provides that in matters relating to marriage relationship, the best interest of the children shall be the paramount consideration.

Apart from Article 3 of CRC that provides for a broad scope of what BIP entails, the concept is also spread into other Articles of the convention as well. These include Article 9(1) and (3) which bars Separation of a child from his/her parents against his/her will subject to a judicial decision; and Article 21 of the CRC which provides that the BIP shall be the "primary consideration" in relation to adoption matters. States that are member parties to the CRC have domesticated the provision of CRC in their national laws. For example Uganda's 1995 constitution Article 34 provides that all laws relating to children should be enacted in their best interests. Uganda's Children's Act cap 59 under Section 2 and 3 operationalizes the principle by first defining a child as one below

the age of 18 years. Then its first schedule obliges the authorities to consider a child's welfare to be of paramount consideration by giving due regard to: ascertainable wishes and feelings of the child concerned in light of age and understanding; a child's physical, emotional and educational needs; likely effects of any changes; a child's sex, age, background and any other relevant circumstances; any harm that the child has suffered or is at risk of suffering; and the capacity of guardians.

Similarly the South African Constitution and its Children Act (2005) under Section 7 also provides for the BIP standards in a more elaborate way. The standards prescribed include: giving consideration to the nature of the personal relationship between child and parents or caregiver(s); the attitude of the parent or caregiver towards the specific child and their ability to exercise parental responsibility including the capacity to provide for needs; the likely effect on the child of any changes in circumstances including the separation from one or both parents, brothers or sisters; practical difficulties for the child in having contact with the birth parents; giving priority for the child to remain in care of parents, family or extended family, culture or tradition; the child's age, maturity and stage of development; gender, background or other relevant characteristics of the child; the

child's physical and emotional security and intellectual, emotional, social and cultural development; and any disability or chronic disease that the child may have.

Although one would argue that according to the CRC context welfare is just an element of BIP, when considering different circumstances and legislation it's imperative to give room to the local meaning attached such as in the case of Uganda where the term welfare principle has the same meaning attached to it as BIP. Therefore for purposes of clarity and analysis of the research findings, in the Ugandan context the welfare principle will be discussed and analysed with the same meaning as attached to the BIP under the CRC and other academic interpretations.

2.1 The Child Rights Based Approach (CRBA) to Realizing Rights

According to a former member of the CRC Committee Norberto³¹

The CRC recognises a child as an active subject of rights, and the state parties as bearers of non-transferable responsibility for creating the necessary conditions for full exercise of these rights as enshrined in the UN instrument and other enabling national laws. Legitimacy of

³¹ (Save the Children 2007):

the CRC thus lies in the capacity of states to employ a rights based approach to policy making. The CRC puts children at the centre of any legal and administrative action undertaken by authorities. It recognizes children as rights holders that need to be engaged in their own development. It promotes accountability to the citizens by making government the main duty bearer in fulfilling children's rights³².

Any action to be undertaken therefore requires having a child rights situational analysis that is asking the 'right' questions so that children stay at the centre of the analysis (Ibid). Specifically on the BIP, the CRC Committee advised:

"... Every legislative, administrative and judicial body or institution is required to apply the BIP by systematically considering how children's rights and interests are or will be affected by their decisions and actions..."

³² Save the children 2007.

2.2 The relationship between the Best Interest Principle and other CRC General Principles

The CRC Committee has repeatedly stressed the interrelations between each of the CRC's general principles. The principles of non-discrimination (Article 2), child participation (Article 12), and child survival and development (Article 6) are all relevant when determining the best interests of a child in a given case scenario³³

The principle of child participation for example is a key pillar in ensuring the best interests of a child because it affirms children as rights holders putting them at the centre of decision making. It is associated with other rights such as the right to information; expression and participation in decision-making³⁴.

It also emphasizes rights related such as freedom of thought conscience and religion on the freedom of association, and cultural expressions (Articles 14,15,30,31 of CRC). Other regional instruments like ACRWC (art 4) also give prominence to this principle and provide that in all judicial or administrative proceedings affecting a child who

³³ (UNICEF 2007:33 & 45).

³⁴ (Save the Children, 2005:31).

is capable of communicating his or her views an opportunity to that extent should be provided directly or indirectly through an impartial representative as a party to the proceedings.

2.3 CRBA in ICA: Putting safeguards against abuse and exploitation of children

Cheney (2013: 163) wrote that “orphans have been commoditized in a chain of local and global support that makes them both potential burdens and opportunities for kinsmen”. This leads to their being traded across the globe as commodities by those who seek to benefit from their vulnerability (Kapstein 2003).

In a bid to save children from being commoditised the CRC (art 21 & 35) and HCIA (art. 8, 29 & 32) all prohibit improper financial gains and initial contact of adoptive parents with birth parents or care givers of children. The provisions makes it a duty for state parties to put in place measures to prevent improper financial gain connected with ICA and to prevent the sale of children for any purpose. The attendant guidelines to the HCIA against improper financial gain are more explicit. They provide for the Central Authority with a critical role to prevent and regulate against corrupt tendencies.

The guidelines implore states to set up structures and procedures to monitor activities of institutions; put in place policies regarding fees and penalties for those involved in illicit activities, a child protection and funding strategy with post follow up mechanism to support children adopted³⁵.

Adding to what is recommended in Hague guidelines UNICEF (2007:302) proposes specific benchmarks for state parties to adopt. First it emphasise the requirement for adoption to be a last resort measure granted by competent authorities, who should base their decision on pertinent and reliable information, views of all children involved including those of prospective adopters .

Secondly that child's right to know and be cared for by his or her parents should be emphasized and; priority should be given to preservation of the child's identity, continuity of the child's ethnic, religious, cultural and linguistic background.

Thirdly the authorities should be satisfied that the adoption is permissible and all consents required by law have been given by the persons concerned with proper counseling is administered.

³⁵ (HccH: 1993: Par 89, 91, 92 and 616).

Fourthly that all adoption placements are centrally monitored and periodically reviewed by the authorities and lastly that, if a country has ratified the HCIA all its provisions relating to law or administrative procedures have been implemented as well those related to the Optional Protocol to the Convention on the Rights of the Child on the sale³⁶.

While the Uganda Children Act (s48 (1) (c) (d) legislated against payment in favour of adoption, mechanism to support the courts to assess and prevent such errors is not evident in the law and procedure. The study puts into consideration the law and practice and how courts have played their duty to protect and actualise the conditions set for ICA in view of the increasing illicit activities related to ICA in Uganda.

³⁶ (UNICEF 2007: 302)

CHAPTER 3

INTER-COUNTRY ADOPTIONS: THE FAMILY COURT AND THE CHILD'S BEST INTEREST PRINCIPLE IN THE UGANDAN CONTEXT

This chapter presents findings and analysis based on the research questions namely, how court interpret and apply BIP, choices made in ICA and existing legal frameworks. The chapter highlights the views and choices made by courts in ICA setting. It also analyses controversies and illicit activities surrounding the ICA processes in Uganda and how they impact the realisation of rights specifically in relation to the best interest of the child.

3.1 Applying BIP Standards in LG/ICA Process: The role of Court examined

According to the Ugandan context the BIP has been defined as welfare principle under Children Act (s3) with its ingredients enumerated in the first schedule of the Children Act mentioned earlier in the paper. Justice Mukiibi interprets applicability of welfare principle as three rule dimension: First as a paramount consideration in determining matters related to children's development; secondly that it considers the issue of time to be of essence, any delay might be prejudicial to a

child's welfare and thirdly that the criteria for any decision should have regard to the wishes and feelings of the child, her/his physical and emotional and educational needs, any harm the child has suffered or is likely to suffer and the capacity of parents, guardians or others involved to meet the needs of the child (Mukiibi 2013:1-2).

The policy makers state that applicability of BIP in ICA to mean that: Efforts should be made to ensure that the person applying for adoption is really the right person, having lived with the child for some time, and after being satisfied that he or she is the right person. It must be ascertained that the child in question has no other alternative locally. It is a right for the child to remain Ugandan explains the commissioner (Interview 17).

The study findings do show that the justice system actors are cognisant of what is entailed in BIP however due to other factors at play its application in practice is limited consideration of current needs of the child. In the study analysis I argue that the FC in Uganda has applied a narrow interpretation of BIP in their ICA decision. They have taken a less stringent approach to interpretation and application of the principle by using more of needy lenses, than the wider context of the principle when making their decisions .As explained by many of persons interviewed, courts have anchored their decisions more on the welfare aspects of BIP that emphasize economic and physical well

being of the child, paying less attention to other aspects embedded in the principle, such as emotional, psychological, religious and cultural identity. In the rest of the chapter I present supporting evidence to the argument advanced above.

3.2 Finding an adoptable child? Examining whether the selection criteria puts into consideration tenets of BIP.

The CRC (Article 21) and the HCIA, sets up standards and obligations for states to follow in order to ensure that ICA /LG take places in the best interest of the child. Such standards among others include: ensuring that the child is adoptable after exhausting all domestic options, the adoptive parents are competent and eligible; no improper financial gain by parties involved; no prior contact between adoptive and birth parents.

The courts therefore are obliged to consider the circumstances of the child and satisfy themselves by law and procedure that the child is adoptable within the meaning of Article 21 of the CRC and section 45 and 46 of the Children Act. In practice the FC arrives at their decisions basing on affidavits sworn by applicants, caretakers and birth parents, consent documents, PSWO's and home study reports. According to some of the reports and responses from the field the reliability of this process is doubted because probation reports are often cut and paste,

home study reports often one-sided, consent of the parties normally induced with coached affidavits. There are no deliberate efforts to verify the authenticity and suitability of applicants because the court process is missing out on independent child representations³⁷.

Therefore despite efforts by courts the processes remain challenged and full of flaws. There is no conventional hearing where parties can testify in open court; the process is through miscellaneous applications that rely mainly on documentary evidence filed on court record, judicial observations and questions to parties and submissions of lawyers. This procedure is also challenged by lack of independent children representation (friends of court). The fact that the PSWO's function has been compromised presents a delicate situation where orphanages and birth parents are representing own interest; ICA agencies and lawyers motivated by the monetary gains and the applicants by selfish or benevolent interest. It is true on record the application will be well supported by documentary evidence to prove that child is adoptable, but beneath the surface there are more possibilities that the child has a network of surviving kinship who the parties with vested interests will ensure never appear anywhere near during court proceeding.

³⁷ (Kaboggoza 2013; Sserwanja 2013; Interview 7; interview 18; interview 10).

3.3 Engaging in ICA as a Business Rather than a Service: The duty to prevent improper financial activities and inducement

A review of secondary data and findings from the field reveal that ICA in Uganda has been commercialised with corruption tendencies mainly benefiting the middle man. The beneficiaries range from adoption agencies, high level government officials, lawyers, PSWOs, court officials, orphanages and baby homes and birth parents³⁸.

It is a booming business particularly for lawyers that are putting a lot of pressure on the judges to expedite the process. Most of the respondents estimated a single adoption case going for between 25,000 to 30,000 USD usually paid to meet the adoption costs including travels, orphanage fees, court fees, legal and agency fees (Briton, Sserwanja *ibid*) This money is usually received through the processing law firms, Kabogozza says lawyers are paid up to 30,000 USD (Kaboggoza 2012) This improper financial gain is in contravention of the provisions of CRC Article 21, HCIA, and the Uganda's Children Act section 48 .Ethically and professionally no money should be exchanged because it is a non profitable service to children.

If any money should be paid it should be a small fee determined by courts of law, as advised by the Assistant Commissioner MGLSD

³⁸ (Sserwanja 2013; Kaboggoza 2013; Farmer's wife 2013).

(Interview 17), approaching it from a profitable point of view is a violation for the children's rights because it is an abuse and exploitation of the sanctity of childhood. This is what one of the judges in a whisper called "baby theft" confirming Kapstein's view that ICA is a global business in a "baby trade" (Kapstein2003:115)

However despite this questionable operating environment judicial officers have continued to exercise their discretion by increasingly granting LGO as Judge 2 confirms: When I joined the FC I found uncertainty about how to handle ICA matters. People were not sure they were doing the right thing; a lot of stigma surrounded the issue. I reviewed the circumstances, law available and learnt of what was happening elsewhere and now we are certain on what happens and nobody can challenge us to do otherwise because when you find challenges you study and come up with a solution (Interview 8).

There is no doubt individuals participating in ICA process are benefiting from the booming ICA industry with no specific guidelines regulating the fees to be paid to the adoption agents and neither a provision to penalize offenders a situation that impairs courts judgment to adequately address the flaws. All this contravenes CRC which emphasizes that placing of children

for adoption should not result in improper financial gain for those involved³⁹.

This problem is further aggravated by lack of independent representation of children's interests. As advocate1 notes the right to participate and be informed of the implications of the actions especially by birth parents and children is not guaranteed during the process because they are not fairly represented. For example in the case of Stewart the fact that one lawyer acted for all parties indeed raised the question of his impartiality. The record does not show that the court went out of its way to explain to the mother the implication of her decision. Though not a legal requirement exercising due diligence calls for pro-activeness to probe and ascertain that no form of inducement or misrepresentation is involved in the transaction.

This is because individuals in the process like the adoptive parents and their advocate have the power to affect the agency of the birth parents because they are privy to the institutional knowledge of the law and its procedures. This power /knowledge as argued by Foucault works in the interest of this powered group⁴⁰ putting the ignorant class at a disadvantage of easily getting excited to relinquish their natural parental rights.

³⁹ (Kapstein Ibid 121).

⁴⁰ (Foucault quoted in Mill, Sara 29 2003:79),

This volatile environment discussed above is what has led to some receiving countries like Netherlands putting to a hold the ICA Programme. The reasons advanced include: failure to inform birth parents the repercussions of ICA; probation services still lacking in content and structure; lack of due diligence by courts of law and Corrupt practices.

3.4 The choices made by the court: The Pro-active Court and Liberalisation of LG and ICA

Inter-country LG is now a precursor for foreigners to get adoption orders in their own countries following the Court of Appeal (CA) decision in the case of Alitubeera (2011). The MGLSD officials consider LG for purposes of adoption child trafficking as conceptualised by (Muzmer 2010). By reversing its earlier decisions in the case of Amani and Palmer respectively, where it had imposed conditions requiring legal guardians to make an application for adoption in Uganda, the CA opened the door for foreign guardians to apply for adoption in their country where the law is perhaps more relaxed (Mukiibi 2013).

3.5 Court's approach to application of BIP in LG/ICA: Perspectives of court users

The success rate at which children are being taken across borders is based on an assumption that almost every applicant is competent, and eligible to adopt a child from Uganda. The court faces criticism from the court users as reflected through the various interview responses. Some respondents argue that the success rate of LG application is a reflection that the courts have negated the intention of the 3 year residence requirement that ensures that only substantial and deserving applicants take the children (Interview 18).

The policy makers also decried the easy procedure with LG and argued that it is not in the best interest of the children involved. The commissioner argues: Courts no longer follow the long procedure provided by the law; they use the guardianship process which has no well prescribed procedures. It is the judge sitting that determines, applicants just fly in for one week, the lawyers go through procedures and they take the child. We feel it is very easy and not in the best interest of the child. Courts look only at lack of care by parents and probation officers reports are normally prepared by lawyers (interview 17).

Registrar 1 supports this concern and regrets that it only satisfies the interests of the applicants as she explains: Applicants get in touch with lawyers on internet, fix hearing dates, fly in, and use dolls and sweets to get bonded with the children. When you probe the adoptive parents you find that they don't know the history of the child. When you ask them to offer assistance to the children for the three years as they foster the children they refuse, which means they don't qualify to become parents because a parent with natural love would do anything for their child irrespective of where they are living (Interview7).

According to Registrar 1 this practice of the FC granting LGO has weakened the supervision and follows up mechanisms of the safety of the children involved.

3.6 The thin line between child trafficking and ICA: The duty of court to avert likely abuse in ICA

ANPPCAN in its research associated a possible link between adoption practices and child trafficking (ANPPCAN 2007). Mezmur in his paper to the Hague Conference makes similar assertions. He refers to child trafficking or baby selling as “ the sins of the ‘saviours’” citing irregular activities undertaken by those presumably involved in, or tasked with, the “life saving” act, who instead contribute towards the

trafficking of children in the context of ICA in Africa. He makes references to practices such as child abduction , stealing, buying and selling, improper financial gain ,corruption , private adoptions, falsification of documents and circumventing adoption procedures as all attributes to trafficking(Mezmur 2010:4).

3.7 Uganda's Legal and Policy Landscape: How it impacts application of the BIP

Uganda ratified the CRC which it domesticated through the 1995 constitution and enactment of the children Act cap 59. The Children Act is the substantive law providing for the rights of the children. It outlines the duty to protect by specified duty bearers as well as the procedure to enforce these rights. Despite this legal framework in place respondents decried the gaps and weaknesses in its application particularly in the case of ICA.

The gaps identified included the restrictive nature of section 46 requiring 3 years residence and 6 month fostering before a foreigner can adopt; failure of Uganda to ratify the HCIA and lack of an explicit law and guidelines for LG. They said such limitations weaken the court's ability to properly interpret and apply the BIP leaving it to the whims of their discretion which is easily manipulated by other interes

CHAPTER FOUR

4.0 CONCLUSION AND RECOMMENDATIONS

This paper has demonstrated that effective application of BIP requires courts to adequately and procedurally weigh all choices and likely risks for the child and other irreparable damages associated with child trafficking. This is in conformity with the spirit of the CRC that makes the BIP a primary consideration in all decision taken by administrative bodies, courts of law or legislature (CRC Art 3, UNICEF 2007).

The study has also revealed that although the courts are required to make adoption orders based on well informed judgment and with terms and conditions that allow sufficient follow up and monitoring (UNICEF 2007) due to the broadness of BIP, competing interest, gaps in law and practice, often the criteria for decision making is disjointed focusing on physical and economic needs and is dependent on individual perceptions of a judicial officer.

It is my conclusion therefore that the FC in Uganda to a greater extent has applied a narrow and less stringent approach to interpretation of BIP in their ICA/ LG decisions. And it is my considered view that the continued issuance of ICA/LGO by the FC in Uganda, while the necessary supportive monitoring mechanisms are missing is not in the best interest of the child as it does not guarantee safety and wellbeing before, during and after post grant.

4.1 Revisiting the loopholes in Laws and Policies

The existing international, regional, national legal and policy framework is intended to ensure that adoption takes place in the safest terms possible.

Uganda has ratified most of these instruments namely the CRC, ACWRC and is not reinventing the wheel. It has to build upon the existing platform to address the structural and legal gaps affecting the courts effective application of BIP. This would call for ratifying the HCIA and domesticating it to provide for a national framework with sufficient safeguards.

In addition there is a need to harmonise the exiting legal framework and put in place guidelines on how ICA/LG matters should be processed; in addition to building capacity of duty bearers on CBRA implementation of the law and policies. Authorities need to fully internalise the general principles under the CRC 1989 to effectively the BIP using the CRBA which is in conformity with other International and national legal instruments.

4.2 Interpret and apply the BIP holistically

Judge Kay J in the Gyngall case¹⁰ stated that: “The term” welfare” must be read in the largest possible sense, that is to say, as meaning every circumstance must be taken into consideration and courts must do what under circumstances a wise parent acting for the interest of the child would or ought to do” (Mukiibi 2013: 13).

The BIP as applied in Uganda is now hinged on financial and health features of the child. In addition to the economic factors, the court should satisfy itself that the adoptive parents have the ability to provide for other emotional needs of the child. Love and care should feature prominently in the assessment criteria with the child’s wishes and aspiration put into consideration. Issues of culture, identity, religion, the child’s sex and that of applicants should all surface prominently in the selection criteria. In other words, interpretation and application should give meaning to all surrounding circumstances of the child and prospective adoptive parents.

Finally I re - echo the obligations that the CRC places on the state and duty bearers to be accountable to promote, protect and fulfil children rights by adopting a child rights-based approach that looks at children as rights holders and active participants in safeguarding their rights. In the exercise of its powers courts should be cognisant of the negative

elements and grant ICA as a measure of last resort after exploring all local remedies. The state should support the courts by putting in place a framework that supports their discretion such as assessment guidelines.

Statutes

The 1995 Constitution of the Republic of Uganda as amended

The Children's Act Cap 59 of the Laws of Uganda

The Evidence Act Cap 6 of the Laws of Uganda

References

ACPF, Report. (2012) 'Inter-Country Adoption of Children in Africa'.

African Union (1990) 'African Charter on the Rights and Welfare of the Child'. Treaty, Member States.

ANPPCAN "Activist call for tighter adoption laws:

[http://www.newvision.co.ug/news/642353-activists-call-for-tighter-laws-onadoption.](http://www.newvision.co.ug/news/642353-activists-call-for-tighter-laws-onadoption)

html accessed on 6th May 2014

Alitubeera D; (2012) In the Application for Legal guardianship by Daniel Ribbens

and Sarah Anne and Marie Sherpard Ribbens (Appllication for review Number38) published by CRIN at

<http://www.ulii.org/ug/judgment/highcourt/2014/4-0>

Alitubeera .D (2011) 'In the Matter of Application for Legal Guardianship by Andrew

Daniel Ribbens and Sarah Anne Marie Sherpard Ribbens (Civil Appeal Number 70), (a webpage of Uganda Legal Information Institute(ULII)).Accesse3-5,2014

<<http://www.ulii.org/ug/judgment/high-court/2012/4-0>>.

Arts, C.J.M. (2010) 'Coming of Age in A World of Diversity? an Assessment of the UN Convention on the Rights of the Child'.

Bainham, A. (1993) 'Family Law. By PM Bromley and NV Lowe. [London, Dublin,

Edinburgh: Butterworths. 1992. Lxi, 849, (Appendices) 7 and (Index) 20pp.

Paperback£ 24· 95 Net. ISBN 0-406-60935-7.], *The Cambridge Law Journal* 52(02): 336-337.

BBC News USA and Canada released on 10 September 2013 Last updated at 12:40

GMT <http://www.bbc.co.uk/news/world-us-canada-24035136>

Breuning, M. and J. Ishiyama (2009) 'The Politics of Inter-country Adoption:

Explaining Variation in the Legal Requirements of Sub-Saharan African Countries',

Perspectives on Politics 7(1): 89-101.

Breuning, M. and J. Ishiyama (2009) 'The Politics of Inter-country Adoption:

Explaining Variation in the Legal Requirements of Sub-Saharan African Countries',

Perspectives on Politics 7(1): 89-101.

Brinton.S (2013) 'Adoption, Orphan care, Poverty, Uganda, Vulnerable Children'

familyhopelove.com. Accessed 01/31 <<http://familyhopelove.com/my-blog/>>.

Brittingham, S. (2010) Birth Families and Inter-country Adoption in Addis Ababa,

Ethiopia. Erasmus University.

Cardarello, A. (2012) 'The Right to have a Family: 'legal Trafficking of Children',

Adoption and Birth Control in Brazil', *Anthropology & Medicine* 19(2): 225-240.

41

Cheney, K.E. (2012) 'Malik and His Three Mothers: AIDS Orphans' Survival

General interview guide

1. Particulars (Age group, profession or institution)

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2. How long have you been working with courts on adoption related matters

.....

.....

3. What exactly do you do to support the process of inter-country adoption

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4. How often do you handle cases of ICA? Do you think they are increasing?

If yes why,?

.....

.....

5. What is the nature of children eligible for ICA?

.....

.....

6. In your course of work how do you determine this eligibility?

.....

7. How do you interpret the term best interest of the child in course of your work?

.....

.....

8. How do you support the courts in ensuring that the best interest of the child in ICA adoption is upheld by court and prospective adoption parents

.....

.....

9. Do you involve the children, birth parents and foster parents,? if so how?

.....

.....

10. Do you feel satisfied that the best interest of the child is promoted by courts of law in ICA process? If yes why ,? if not why?

.....

11. Do you meet any challenges in ensuring promotion of children's best interest? If yes what kind of challenges do you face and how do you mitigate these challenges?

.....