Neutral Citation Number: [2020] EWCA Civ 1038

Case No: B4/2020/0047 & 0093

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM BIRMINGHAM FAMILY COURT**
**Her Honour Judge Tucker**
**BM800/2019 & BM801/2019**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 August 2020

**Before :**

**LORD JUSTICE McCOMBE**
**LADY JUSTICE KING**
**and**
**LORD JUSTICE PETER JACKSON**

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**Re Y (Children in Care: Change of Nationality)**

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**Harish Salve QC and David Josty** (instructed by **Greenwood GRM LLP**) for the **Appellant Father**
**The Appellant Mother** appeared with her **McKenzie Friend Ms Rao**
**Dorian Day and Matiss Krumins** (instructed by **Birmingham Children's Trust**) for the **Respondent Local Authority**
**Joanna Chadwick** (instructed by **Cafcass**) for the **Respondent Children by their Children's Guardian**

Hearing date: 21 July 2020

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# Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Thursday, 6 August 2020.

## Lord Justice Peter Jackson:

*Introduction*

1. This appeal raises the question of whether a local authority has the statutory power to take steps to change the nationality of a child in its care against the wishes of the child's parents, or whether it must first seek the approval of the court.

2. The question has arisen in proceedings concerning two children, now aged 11 and 9. They are Indian nationals who were born in the United Kingdom. Their parents, who came to this country in about 2004, were unsuccessful in obtaining leave to remain. In August 2015, for reasons which it is not now necessary to describe, the children were removed from their parents and placed in a foster home where they have lived ever since. Contact with the parents has not taken place since that time. The mother left the UK in November 2015 while pregnant and now lives in Singapore. The father has remained in England, but his antagonism towards the local authority has made contact unachievable. In the course of a complex set of proceedings, the children became the subject of placement orders. However, the search for adoptive parents was not successful and in December 2018 the local authority applied to discharge the placement orders. The parents responded with an application to discharge the underlying care orders in order to secure the children's return to their care or to the care of family members in India or Singapore. Those proceedings were heard by Her Honour Judge Tucker. By an order made on 19 December 2019, she discharged the placement orders but refused to discharge the care orders. The consequence is that the plan is for the children to remain in long-term foster care for the remainder of their childhoods. During the course of the proceedings, the local authority stated that it would seek to secure the children's immigration status by making applications for British citizenship, which would have the effect of removing their Indian nationality.

3. The parents applied on a wide range of grounds for permission to appeal from the refusal of their application for the discharge of the care orders. I refused permission except in relation to the single issue of the local authority's powers in relation to a change of nationality.

4. The hearing before the judge was a challenging one for everyone. The parents were unrepresented and interpreters were required. The father was in court, while the mother appeared by video link from Singapore with the assistance of Ms Rao, a legally qualified 'McKenzie friend' based in Delhi, who has also assisted her on this appeal. At the end of the proceedings, the judge gave an ex tempore judgment. I mention these features as being relevant to the court's treatment of the nationality issue.

5. The documentation contains these relevant extracts:

   (1) On 12 February 2019, the court made a standard order in Form EX 660 requiring the Home Office to provide information about the immigration status of the family members. On 5 April 2019, the Home Office replied, setting out the history and stating that the father and children had no valid leave to remain in the United Kingdom.

(2) The status of the children as Indian nationals was reflected in the interest that the Indian High Commission took in the proceedings, which extended to a solicitor and consular official attending some of the earlier hearings.

(3) In her final analysis of 1 May 2019, the Children's Guardian wrote:

> "I would highlight the need for the LA to make Citizenship applications for the children when they become of age to do so."

(4) The social worker filed a statement on 30 July 2019 that included this paragraph:

> "Enquiries have been made with the Children's Society in relation to [the children]'s immigration status and the process of making an application. The advice received from the Immigration Solicitor is that [the children] are Indian Nationality by default. It is the intention of Birmingham Children's Trust to seek British citizenship for the children and… the legal advice obtained is that the process is generally straight forward given that Birmingham Children's Trust are corporate parent for the children and hold parental responsibility to make decisions relating to their immigration."

(5) The father filed a statement on 14 August 2019, in which he asserted that the local authority had no power in law to grant or even to apply for British citizenship for his children.

(6) An order made on 10 September 2019 identified the "key issues" in the proceedings. These were (a): whether the placement orders should be discharged, (b) whether the children should remain in the care of the local authority or be placed in the care of the parents or family members, (c) whether an order authorising the local authority to withhold contact should be made; and "(d) "Whether the children should be made British citizens" – meaning, whether the local authority should make an application for citizenship.

(7) Despite this, the final care plans dated 7 November 2019 made no reference to the children's immigration status or to the issue of citizenship.

(8) On 26 November 2019, written closing submissions on behalf of the local authority stated that the local authority would make an application for the children to obtain British citizenship.

(9) On 26 November 2019, written submissions on behalf of the Guardian stated that the children are entitled to British citizenship and that without it they would be liable to deportation once they reach the age of 18. The local authority was described as taking active, although somewhat slow, steps to progress their applications.

(10) On 26 November 2019, written submissions on behalf of the mother strongly opposed the obtaining of British citizenship, describing it as a means of

frustrating the children's placement with family in India by depriving them of Indian citizenship.

(11) In her judgment on 19 December 2019, delivered orally through interpreters, the judge considered the issue of the children's future placement at appropriate length. She specifically addressed questions that had arisen about language lessons and religious education and that these should be included in amended care plans. She stated that she approved the local authority's plan for long-term foster care, but she did not refer at all to the issue of the children's immigration status or their nationality.

That represents the whole of the consideration that was given to this subject during the proceedings.

*The legal framework*

Nationality

6. Article 15 of the United Nations Universal Declaration of Human Rights (1948) declares that every person has the right to a nationality. Citizenship was memorably described by the political theorist Hannah Arendt as "the right to have rights", because it is through membership of a nation state that a person acquires and exercises legal rights. In addition to the practical benefits conferred by citizenship, a person's nationality may be a matter of profound psychological importance to them. Article 8.1 of the United Nations Convention on the Rights of the Child (1989) emphasises that nationality is part of one's identity:

> "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

7. Despite having been the subject of placement orders with a care plan for adoption, these children remain members of their birth family. On behalf of the local authority, Mr Dorian Day did not pursue a submission that the previous placement orders somehow made a change of nationality a matter of lesser significance.

Care plans

8. Care plans were put on a statutory footing by the Adoption and Children Act 2002. Section 31A Children Act 1989 ('CA 1989') provides that where an application is made on which a care order might be made, the local authority must prepare a care plan for the future care of the child, giving information prescribed in regulations, now the Care Planning, Placement and Case Review (England) Regulations 2010. Regulation 5 (a) and (b) provides that the care plan must include the long-term plans for the child, including the arrangements made to meet the child's needs in respect of health, education, emotional and behavioural development, identity (with particular regard to the child's religious persuasion, racial origin and cultural and linguistic background), family and social relationships, social presentation and self-care skills.

9. Section 31 (3A) CA 1989 reads as follows:

"(3A) A court deciding whether to make a care order—

(a) is required to consider the permanence provisions of the section 31A plan for the child concerned, but

(b) is not required to consider the remainder of the section 31A plan, subject to section 34(11).

(3B) For the purposes of subsection (3A), the permanence provisions of a section 31A plan are—

(a) such of the plan's provisions setting out the long-term plan for the upbringing of the child concerned as provide for any of the following—

(i) the child to live with any parent of the child's or with any other member of, or any friend of, the child's family;

(ii) adoption;

(iii) long-term care not within sub-paragraph (i) or (ii);

(b) such of the plan's provisions as set out any of the following—

(i) the impact on the child concerned of any harm that he or she suffered or was likely to suffer;

(ii) the current and future needs of the child (including needs arising out of that impact);

(iii) the way in which the long-term plan for the upbringing of the child would meet those current and future needs."

10. Mr Day accepted that an up-to-date care plan was required in the present case, where a fresh decision had to be taken about the children's future in the light of the applications before the court. He also accepted that the issue of citizenship was a permanence provision that the court was required to consider. Both acceptances were in my view correct.

The parental responsibility of the local authority

11. Parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property: CA 1989 s. 3 (1).

12. The effect of a care order is prescribed by s.33 CA 1989:

"**33 Effect of care order.**

(1) Where a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force.

(2) …

(3) While a care order is in force with respect to a child, the local authority designated by the order shall—

(a) have parental responsibility for the child; and

(b) have the power (subject to the following provisions of this section) to determine the extent to which

(i) a parent, guardian or special guardian of the child; or

(ii) a person who by virtue of section 4A has parental responsibility for the child,

may meet his parental responsibility for him.

(4) The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.

(5) Nothing in subsection (3)(b) shall prevent a person mentioned in that provision who has care of the child from doing what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting his welfare.

(6) While a care order is in force with respect to a child, the local authority designated by the order shall not—

(a) cause the child to be brought up in any religious persuasion other than that in which he would have been brought up if the order had not been made; or

(b) have the right—

(i) …

(ii) to agree or refuse to agree to the making of an adoption order, or an order under section 84 of the Adoption and Children Act 2002, with respect to the child; or

(iii) to appoint a guardian for the child.

(7) While a care order is in force with respect to a child, no person may—

> (a) cause the child to be known by a new surname; or
>
> (b) remove him from the United Kingdom,
>
> without either the written consent of every person who has parental responsibility for the child or the leave of the court.
>
> (8) Subsection (7)(b) does not—
>
> (a) prevent the removal of such a child, for a period of less than one month, by the authority in whose care he is; or
>
> (b) apply to arrangements for such a child to live outside England and Wales (which are governed by paragraph 19 of Schedule 2 in England, and section 124 of the Social Services and Well-being (Wales) Act 2014 in Wales).
>
> (9) The power in subsection (3)(b) is subject (in addition to being subject to the provisions of this section) to any right, duty, power, responsibility or authority which a person mentioned in that provision has in relation to the child and his property by virtue of any other enactment."

13. On a literal reading, this provision would allow a local authority to make profound and irreversible decisions about a child, up to and including consenting to the withdrawal of life-sustaining medical treatment. This court has however held that, for the protection of the rights of children and of other holders of parental responsibility, certain decisions are of such magnitude that they should not be determined by a local authority without all those with parental responsibility having an opportunity to express their view to a court if necessary as part of the decision-making process. It held that the use of statutory powers in such cases would be a disproportionate interference with the rights of family members. In the recent decision of *Re H (A Child) (Parental Responsibility: Vaccination)* [2020] EWCA Civ 664, Lady Justice King put the matter in this way:

> "26. On a strict reading of s.33(3)(b), and subject only to the exceptions already highlighted, the extent to which a local authority may exercise its parental responsibility is unlimited, provided that it is acting in order to safeguard or promote the welfare of the child in its care.
>
> 27. However, whilst that may be the case when considering the section in isolation, local authorities and the courts have for many years been acutely aware that some decisions are of such magnitude that it would be wrong for a local authority to use its power under s.33(3)(b) to override the wishes or views of a parent. Such decisions have chiefly related to serious medical treatment, although in *Re C (Children)* [2016] EWCA Civ 374; [2017] Fam 137 (*Re C*), the issue related to a local authority's desire to override a mother's choice of forename for her children. The category of such cases is not closed, but they will

> chiefly concern decisions with profound or enduring consequences for the child."

*The appeal*

14. On behalf of the father, Mr Harish Salve QC and Mr David Josty submit that the local authority is proposing to make a fundamental change affecting the children during their childhoods and for life. A change of citizenship is a matter of great moment. It may or may not be in the children's interests but the necessary information has not been gathered and a proper balancing up of the advantages and disadvantages has never been carried out. Instead the local authority has simply said that it is going to make the application. The issue was then missed in the lower court. The matter should be remitted for proper evaluation to the Family Court before a judge sitting as a deputy judge of the High Court, or to the High Court.

15. Speaking on behalf of the mother, Ms Rao concurred. She emphasised nationality as being fundamental to a person's life, and of an importance that is on a par with serious medical treatment. In seeking to change the children's nationality the local authority must, as she put it, hit that target. Deprivation of Indian citizenship has consequences for succession and for the children's ability to own land.

16. Mr Day accepted that the court did not have the evidence that would have been expected when there was an immigration issue of this nature, either in relation to English law or to Indian law. Nor had any distinction been drawn between immigration status, passports and travel documentation, and citizenship. In written submissions, he argued that the local authority does not require court approval for any steps other than those explicitly specified in s. 33 (7), but he accepted that that argument was not open to him in this court. He therefore fell back on the argument that a decision about a change of citizenship was not one of such magnitude that it had to be put before the court. It was akin to routine vaccination and not to serious medical treatment. Despite conceding that a change of citizenship is a permanence provision, Mr Day argued that the judge was entitled to sign off the care plan without giving specific consideration to the issue. She was entitled to assume that the local authority would deal with the matter under s.33. Requiring family courts to scrutinise the care plan in all cases where the child's immigration status was doubtful would have profound consequences for the conduct of care proceedings. The provisions of s.100 (4) CA 1989 would present the local authority with problems in applying for court approval. Finally, it was said that as long as the local authority consulted, it could act to take necessary steps. The remedy for parents would be to apply to the High Court, whether it be for an injunction under s.8 of the Human Rights Act 1998, or by judicial review proceedings, or by issuing an application to discharge the care order (a remedy described by Mr Day as a sledgehammer). If there was no parent in a position to take these steps, the matter would remain in the hands of the local authority.

17. For the Guardian, Ms Joanna Chadwick reiterates that the children's immigration position needs to be sorted out. She conceded that the question of nationality was not properly addressed in the lower court and that the appeal should therefore be allowed. She argued that the matter should now be referred to the High Court and not to the Family Court and that ideally the local authority should make the necessary

application, with an application by the parents or the Children's Guardian being a possible alternative.

*Conclusion*

18. Every local authority will encounter situations where action is needed to secure the immigration position of a child in its care. In some cases an application will be made for leave to remain. In others it may be possible for a child to have dual citizenship. These cases, where the child is gaining a benefit and losing nothing, are to be contrasted with cases where a child may lose his or her original nationality. In those cases the issue is of a magnitude that cannot in my view be resolved by a local authority acting in reliance upon its general statutory powers. In the absence of parental consent, it requires a decision of the High Court under its inherent jurisdiction. That is so whether the issue arises within or outside proceedings.

19. Although these children had been in the care of the local authority for several years, no steps had been taken to regularise their immigration position. That is a matter of justified concern, even though there is no immediate threat of removal. The children would clearly benefit emotionally from their position being regularised and from being able to travel in and out of the country, for example if opportunities for school trips or holidays were to arise.

20. The children's immigration status, as opposed to the question of nationality, could and should have been addressed within the existing proceedings. The judge is not to be criticised for not doing so: she was dealing with more immediate issues in difficult circumstances, but it is clear that this important question did not receive the attention it required. Even so, the court would surely have approved steps being taken to regularise the children's immigration position, short of an application for citizenship, and such steps can now be taken by the local authority under its s.33 powers. The integrity of the care orders is unaffected by this appeal.

21. As to citizenship, the local authority had sought some advice, but there was no evidence about the options for securing the children's position in the UK through applications short of an application for citizenship. There was a general understanding that the granting of British citizenship to the children would lead to the loss of their Indian citizenship, but there was no formal evidence to this effect. There was no acknowledgement of the intrinsic gravity of a change of nationality, to the extent that the issue did not feature in the care plans or in the judgment. No consideration was given by any of the agencies to any disadvantages that might flow to the children from the loss of their nationality of birth. Nor was any consideration given to whether it was appropriate to apply now, or whether it would be more appropriate to defer an application to a time when they could express a more informed view, as the Guardian at one point seems to have contemplated.

22. In these circumstances the judge should have made clear that the question of a change of citizenship could not be decided within the proceedings that were before her. If the local authority wished to pursue a change of citizenship at this stage, they could make an application under the inherent jurisdiction which should then have been referred to a judge of the Family Division or a judge sitting as a deputy judge of the High Court under s.9 Senior Courts Act 1981. Meantime, it was open to the judge to give directions for the necessary evidence of UK and Indian law to be gathered.

23. I do not accept the contrary arguments presented by the local authority:

(1) The characterisation of a change of citizenship as akin to routine vaccination is misplaced. Changing a child's citizenship is a momentous step with profound and enduring consequences that requires the most careful consideration. Recognising that fact does not have far-reaching consequences for the conduct of care proceedings, as claimed, and it is not asking too much of a local authority to put its case before the court for scrutiny. This case, in which local authority has arrived at a settled position without any of the necessary data, provides a good example of why such scrutiny is needed.

(2) It is no answer to say that the remedy for dissenting parents is to take legal action against the local authority. The difficulties with this course were touched upon in *Re C* at [76]. Further, for many parents, and particularly those whose immigration status is insecure, that will not be an effective remedy. They will only have legal representation within care proceedings, and they may have neither the knowledge nor the means to seek an injunction under the Human Rights Act or to bring judicial review proceedings. It is conceded that an application to discharge the care order would be disproportionate. Similarly, the children themselves have a central interest in the matter and in the absence of proceedings they will not have a Children's Guardian and will not be legally represented.

(3) The suggestion that the local authority would be prevented from seeking a judicial ruling by the terms of s.100 CA 1989 is not persuasive. The very existence of s.100 (3) and (4) demonstrates that there will be residual cases where the local authority's statutory powers under s.33 are inadequate. In the present case the local authority would require leave to apply for the court to exercise its inherent jurisdiction (ss. (3)) and the court could only grant leave if the result sought could not be achieved by other means (ss. (4) (a)) and where there is reasonable cause to believe that the children would be likely to suffer significant harm if the inherent jurisdiction was not exercised (ss. 4 (b)). The court would in my view be likely to find that these conditions were met in this case. Condition (a) is met as a matter of law. Condition (b) would be met by the court finding that, if it was in the children's interests for them to become British citizens, there is reasonable cause to believe that they would be likely to be significantly harmed by that course not being pursued; the nature of the harm being their liability to removal from their lifelong home country on reaching adulthood.

(4) Once it is concluded that the question of a change of citizenship is one that should be judicially decided at High Court level by reason of its importance and potential complexity, one matter that should not be overlooked is the question of the timing of any application. Depending upon expert advice, it may not need to be made as a matter of urgency, and consideration might be given to whether it should be taken at a time when the children would be more able to express their own views. That of course does not prevent an application being made now as it would be open to the court to approve an application being made at a later date.

24. As to the outcome, the care orders remain undisturbed and I would dismiss the appeals. However, reflecting the appellants' success on the issue of law that led to permission to appeal being granted, I would declare that s.33 CA 1989 does not entitle the local authority to apply for British citizenship for these children, in the face of

parental opposition and where that may lead to a loss of their existing citizenship, without first obtaining approval from the High Court. The local authority should now indicate whether it wishes to progress the matter, in which case we will give appropriate directions.

**Lord Justice McCombe**

25. I agree.

**Lady Justice King**

26. I also agree.