

Abstract

This study considers the law governing adoption of children in Nigeria and the impact on reunion attempts between the adopted children and the adopter-parents in the diaspora. A doctrinal approach has been utilized in analyzing the laws with findings derived from the author's years of experience working as consular investigator in a law firm dedicated to providing legal immigration services to the Austrian Embassy in Nigeria. Our confidential findings show that 50% of persons adopting children for travel purposes do so illegally or illegals from sheer ignorance of the law. The study concludes that the major challenges in adoption of Nigerian children by foreign adopters lies either in the failure to follow legal procedure or the failure to conclude the legal procedure. An embassy would readily deny an application for a visa for reunion where these two steps are lacking. A claim of an abuse of international human rights or a denial of the rights of the child would not arise in such circumstance. The study therefore recommends a proper understanding of the laws on adoption in Nigeria to forestall rejection of applications for family reunion.

Keywords: Adoption, International Human Rights, Rights of the Child, Welfare of the Child

1. Introduction

Nigeria has a huge population of over 216.7 million people as of 2022¹, the largest in Africa² and sixth largest in the world as of 2023³. This population size presupposes an equally huge child population and inadvertently a sizeable population of children in need of economic protection, fosterage or adoption, considering the country's inflationary status. This provides an opportunity for adult persons desiring to have children to seek adoption of otherwise un-parented children. Sadly, some people abuse the opportunity to adopt children by going about it unlawfully. This underscores the need to properly understand the requirements placed by law on intending adopters and the procedure to be followed to stay compliant with immigration processes. Overall, undergoing a validated adoption process gives the adopted child the lifelong legal cover he needs to stand anywhere in the world as a *bona fide* family member of the adopting family.

2. Case Study

In 2009, in the case of three juveniles and their adopter mother (Ms. Anthonia⁴), the issue of proper adoption arose in an application for reunion. The juveniles had applied for reunion with their new mother in Austria. Her new maternal status was assumed via three different adoption orders given respectively for the named juveniles. The Austrian Embassy had demanded an inquisition to evaluate the legality of the orders and their acceptability in the application.

3. Adoption and Relevant Statutes

Meaning of Adoption

Adoption is the cessation or extinguishing of parental rights exercised by natural parents over their children and re-establishing same between the child and a third party. Under the United Nations Convention on the Rights of the Child 1989, adoption is recognized as one of the forms of alternative care for children who have been temporarily or permanently deprived of their family environment, and also for children who are unable to remain in their family environment⁵. Larry Chukwu writes that 'the factors that necessitate the adoption of a child range from the mere fact of being childless to the desire to replace a dead child, to acquire a companion for an only child, to stabilize a marriage, to legitimate an illegitimate child, to sustain a particular line of descent, to rescue a child who is in an irreversible situation of abandonment or to relive parents who are unable to take care of their child. Adoption touches upon the adopted child's status; hence it affects his legal rights, welfare and obligations⁶.' Chukwu further opines that these provisions clearly affect the current state of international human rights law, which is that adoption should be regarded as principally a child care device rather than a means of providing succor to childless persons or relief to incapable parents, as it was conceived under the old international legal order. The Child's Rights Act, he says, thus duly recognizes the paramountcy of the welfare and the best interests of the child in adoption proceedings, as indeed in 'every action concerning a child'.

Applicable Statutes

For the purpose of this study, four laws will be referenced: Eastern Region Adoption Law 1965 (ERA Law), Eastern Region Adoption (Juvenile Courts) Rules 1966 (ERA Rules), Child's Rights Act 2003 (CRA), and Births, Deaths, etc

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¹National Bureau of Statistics: Demographic Statistics Bulletin December 2022, accessed at https://www.nigerianstat.gov.ng/pdfuploads/DEMOGRAPHIC_BULLETIN_2022_FINAL.pdf on 31-03-2024

² <https://www.statista.com/statistics/1121246/population-in-africa-by-country/> accessed at 31-03-2024

³ <https://www.statista.com/statistics/262879/countries-with-the-largest-population/> accessed at 31-03-2024

⁴ True identity concealed

⁵ See Article 20 (1) and (2)

⁶ L. Chukwu, Lecturer, as he then was, Faculty of Law, University of Lagos, Nigeria in his paper: "Adoption of Children in Nigeria Under the Child's Rights Act 2003"

(Compulsory Registration) Act 1990 Note that the CRA is a federal law. There have been arguments that this federal law cannot be applied directly in a state but that a similar state enactment only, on the matter, can. Chukwu has stated that by section 274 of the CRA, the provisions of the Act supersede those of any other enactments on the same subject matter and where the latter are inconsistent with any provisions of the Act, they shall be void *pro tanto*. He states, however, that ‘although the Act is deemed to have come into force since 2003, the Adoption Laws enacted by the States on adoption, in particular, and the rights and welfare of children, in general, are matters within the legislative competence of the states under the Constitution of the Federal Republic of Nigeria 1999. Hence the National Assembly has no constitutional power to foist the Act on the states. This Act is enforceable as such only in the Federal Capital Territory’. In practice, nevertheless, we are quick to note that most states choose to apply the CRA alongside other relevant state laws on the matter and even allow it to prevail in circumstances of inconsistencies. At the time of writing, at least fifteen states have passed their respective Child’s Rights laws. This debate is further expressed under ‘Citizenship of Applicant’. The ERA Law was enacted in 1965 for the then eastern region of Nigeria and was inherited by all the states that were later created out of that region namely: Abia, Akwa-Ibom, Anambra, Cross River, Ebonyi, Enugu, Imo and Rivers states. With respect to the case study, the state of the three juveniles has no Child’s Rights Law. However, the ERA Law and the Child’s Rights Act are referenced in juvenile matters. Where inconsistencies arise in the application of these two laws, the Child’s Rights Act prevails.

4. Statutory Requirements

Who May Adopt?

Any of the following persons may adopt: i) Father or mother of the juvenile⁷ ii) Husband and wife (joint applicants)⁸ iii) Sole applicant. But note that:

- a. Under the ERA law, a sole male applicant of opposite sex as the juvenile cannot adopt unless in exceptional circumstances⁹. However, under the CRA, no one is allowed to adopt a juvenile of opposite sex, thereby balancing out the provision as it affects the gender of the adopter and the adoptee¹⁰
- b. Consent of spouse of a married sole applicant may be required¹¹

- ii. A married couple where each of them has attained the age of 25 years and there is an order authorizing them jointly to adopt a child¹²
- iii. A married person, if he has obtained consent of his spouse as required under section 132 of this Act¹³
- iv. A single person if he has attained the age of thirty-five years, provided that the child to be adopted is of the same sex as the person adopting¹⁴
- v. In all cases specified above, a person of good repute and commendable character and suitable to adopt the child¹⁵, a person who has not been bribes or agreed to receive any payment/reward for the adoption¹⁶

Age of the Applicant

Applicant (or if joint applicants one of them) must not be less than 25 years old and at least 21 years older than the juvenile, except applicant is the parent or a relative who is not less than 21 years old¹⁷. Note the provision of section 129 (c)CRA where it is stated that if it is a single person, he must have attained the age of thirty-five years to be eligible to adopt a child.

Who may be Adopted? (Age, Citizenship and Status)

The following persons may be adopted:

- i. A person under 17 years of age¹⁸. However, under the CRA, any child to be adopted must be under the age of 18 years¹⁹, which provision prevails
- ii. A Nigerian citizen or a non-Nigerian juvenile who resides in a state where adoption laws exist

⁷ Section 3(3) ERA Law

⁸ Section 3 (2) and (3) ERA Law

⁹ Section 4(2) ERA Law

¹⁰ Section 129 (c) CRA

¹¹ Section 6(2) ERA Law

¹² Section 129 (a) CRA

¹³ Section 129 9b) CRA

¹⁴ Section 129 (c) CRA

¹⁵ Section 129 (d) CRA

¹⁶ Section 133 (d0 and 143 (1) and (2) CRA

¹⁷ Section 4(1) ERA Law; section 131 (1) (a) CRA

¹⁸ Section 2 ERA Law

¹⁹ Section 277 CRA

- iii. Children whose parents or, where there is no surviving parent, the guardians, consent to their adoption. Thus, where a child's parents are ill-equipped economically, socially, psychologically or otherwise to take care of the child, they may voluntarily give up the child for adoption²⁰
- iv. An abandoned, neglected or persistently ill-treated juvenile and there are compelling reasons in the interest of the child why he should be adopted²¹

Residence of Juvenile and Applicant

Both applicant and juvenile to be adopted must be resident in the same state²². Residence connotes a settling, a degree of permanence.

Citizenship of the Applicant

A non-Nigerian applicant, or in a joint application, where one of them is a non-Nigerian, he/she cannot adopt.²³ Nwogugu²⁴ writes that with regard to nationality, the rules in Anambra, Imo, Rivers and Cross Rivers States require that where an applicant or in the case of joint application, one of them is not a Nigerian citizen, the court shall refuse the application for adoption. In Edo, Delta, Lagos and Ogun states, if the applicant is not a Nigerian citizen, the court is enjoined to postpone the determination of the application for a period of not less than 6 months and make interim order in respect of that period. But the laws are silent on what would follow at the expiration of the 6 months. Debates have been on to justify the refusal of the grant of adoption order to a foreigner by the juvenile court stating that only the Federal Government has the competence to legislate on citizenship. If that argument is to be followed, it would mean therefore that the appropriate law to apply is a federal law dealing with the matter, presently being the Child's Right Act enacted by the National Assembly.

Furthermore, the question arises: can a state juvenile court apply federal law? The answer by judicial decision is yes, on the condition that the federal law has been enacted by the state as a state law²⁵. In the alternative, a state may choose in practice to apply that federal law alongside other relevant state laws and allow such federal law to even prevail where there are inconsistencies. Please see discussion under 'applicable laws' above.

Consents Required

Three categories of consents are required namely:

- i. Consent of the other spouse, where husband or wife is a sole applicant²⁶
- ii. Consent of the parents if the parents are known²⁷. This may however be dispensed with by the court discretionally of if the application was made within one year of the commencement of the adoption law, the juvenile had for a period of 2 years immediately preceding that date had been brought up, maintained and educated under a de facto adoption²⁸
- iii. Consent of any third party who has some rights or obligations in respect of the juvenile arising under an agreement, a court order, under customary law or any other manner²⁹

Note that:

- It is not necessary for the person giving any consent to know the identity of the applicant for an adoption order³⁰
- Consent may be conditional or subject to conditions with respect to the religious persuasions in which juvenile is to be brought up³¹
- Court may dispense with any consent required if it is satisfied that the person whose consent would have been required:
 - Has abandoned, neglected or persistently ill-treated the juvenile or
 - Cannot be found or is incapable of giving his consent or is unreasonably withholding his consent³²

The Welfare of the Child

The welfare of the child at all times is the primary consideration³³

²⁰ Section 128(a) CRA

²¹ Section 5(2) ERA Law and section 128(b) CRA

²² Section 4(4)(a) ERA Law; section 131(1)(c) CRA

²³ Section 9 ERA Law; section 131(1)(d) CRA

²⁴ E.I. Nwogugu: *Family law in Nigeria*, Revised 3rd Edition, 1990 Heinemann Books at page 316

²⁵ See *Ikonne v State* (1986) 4 NWLR Pt.36 Pg. 473

²⁶ Section 6(2) ERA Law

²⁷ Section 5(1) ERA Law

²⁸ Section 5(3) ERA Law

²⁹ Section 5(4) ERA Law

³⁰ Section 5(4) ERA Law

³¹ Section 5(4) ERA Law

³² Section 5(2) ERA Law

³³ Section 5(4) ERA Law

Duty of the Court

The court before issuing the order must ensure that the necessary prerequisites as to consent is observed³⁴. The court is to ensure that the order is given to ensure the maintenance, care, education and welfare of the juvenile. The juvenile should be asked his wishes if he can understand the purport of the adoption. The court must satisfy itself that the applicant has not received or agreed to receive, and no person has made, given or agreed to make or give to the applicant any payment or other reward in consideration of the adoption other than what the court may approve³⁵. The court shall, in reaching a decision relating to the adoption of a child, have regard to all the circumstances, first consideration being given to:

- i. The need to safeguard and promote the welfare and best interest of the child, and
- ii. Ascertaining, as far as practicable, the wishes and feelings of the child regarding the decision and giving due consideration to those wishes and feelings, having regard to the age and understanding of the child³⁶

Furthermore, the court may, in making an adoption order, impose such terms and conditions as it may think fit and, in particular, may require the adopter, by bond or otherwise, to make for the child such provision as in its opinion are just and expedient³⁷.

Requirements from the Applicant

In the case of the Child's Rights Act, with regard to the applicant, these are the requirements, as specified under section 131(1):

- i. The applicant or in the case of a joint application, one of them is not less than 25 years old and is at least 21 years older than the child
- ii. The applicant or in the case of joint application, both or, at least, one of them and the child must be resident in the same state
- iii. The applicant has been resident or in the case of a joint application, both of them have been resident in the state in which the application is made for a period of, at least 5 years
- iv. The applicant is a citizen, or in the case of a joint application, both applicants are citizens of Nigeria
- v. The child has been in the care of the applicant for a period of at least three consecutive months immediately preceding the date on which the order is made.

The ERA Law on the other hand under section 4(4)(a) and (b) provides that:

- i. Applicant must inform the welfare officer or probation officer of his intention to adopt the juvenile at least 3 months before making of an adoption order
- ii. Juvenile must have been continuously under the care of the applicant for three consecutive months immediately preceding an adoption order. The rationale here is to provide applicant and the juvenile an opportunity to be familiar with each other. This in turn eventually determines the continuance or not by parties with the proceedings.

Jurisdiction

Both the High Court and Magistrates' Courts within the state where the applicant or the juvenile resides at the date of the application has jurisdiction over adoption applications³⁸. Under the Child's Rights Act³⁹, the court has the exclusive jurisdiction to deal with an application for an adoption order in the Family Court established by section 149 thereof for the purposes of hearing and determining matters relating to children. The court shall have a two-tiered structure namely, the court at the High Court level and the court at the Magistrates Court level. An appeal shall lie to the court at the High Court level from the court at the Magisterial level in respect of a decision on any application for an adoption order⁴⁰. However, a decision of the court postponing the determination of an application for an adoption order and making an interim order is non-appealable. Where the court at the High Court level exercises original or appellate jurisdiction, an appeal shall lie to the Court of Appeal⁴¹

5. Procedure for Adoption

The procedure for adoption under the extant laws is as follows:

³⁴ Section 7(1) ERA Law

³⁵ Section 133(d) CRA

³⁶ Section 126 (3) CRA

³⁷ Section 134 CRA

³⁸ Section 11(1) ERA Law

³⁹ Section 136 and 162(1) CRA

⁴⁰ Section 138(1) CRA

⁴¹ Section 138 (2) CRA

1. Application for adoption is made in the prescribed form and submitted to the registrar of the competent court⁴². Section 126(1) of the CRA stipulates that an application for an adoption order shall be made to the court in such form as may be prescribed and shall be accompanied with:
 - a. Where the applicant is a married couple, their marriage certificate or a sworn declaration of marriage
 - b. The birth certificate or sworn declaration of age of each applicant
 - c. Two passport photographs of each applicant
 - d. A medical certificate of the fitness of the applicant from a government hospital, and
 - e. Such other documents and information as the court may require for the purposes of adoption
2. Court appoints guardian *ad litem* to represent juvenile in the proceedings or a welfare or probation officer or someone suitable. The essence is to safeguard the interests of the child in the adoption proceedings. Under the CRA, the court shall order an investigation to be conducted by the child development officer, a supervision officer and such other persons as the Court may determine to enable it to assess the suitability of the applicant as an adopter and of the child to be adopted⁴³. It can be stated that the expression ‘such other persons as the court may determine’, as contained in section 126(2)(c) of the CRA is wide enough to accommodate the appointment of a guardian *ad litem* in adoption proceedings as provided for in the state rules. Besides, by virtue of section 89 of the CRA, the court may, for the purpose of any specified proceedings, appoint guardian *ad litem* for the child concerned to safeguard the interests of the child.
3. Guardian *ad litem* investigates the circumstances relevant to the proposed adoption and reports confidentially in writing to the court⁴⁴
4. The court if satisfied with the investigation and considers that all requirements by law have been met grants the order
5. Court may postpone the determination of the application and make an interim order granting the custody of the juvenile to the applicant for a probationary period not exceeding two years, on certain terms relating to maintenance, education, supervision welfare and location of the juvenile. Note that an interim order is not regarded as an adoption order⁴⁵.
6. The adoption order shall contain a direction to the Chief or Principal Registrar to make entries in the Adopted Children Register in a specified form which provides for the following information –date of entry, name and sex of adopted child, name, surname, address and occupation of adopters, date of birth of adopted child, and date of adoption order⁴⁶

Note that a certified copy of an entry in the Adopted Children Register if stamped or sealed by the Registrar’s office shall be proof of such adoption as is specified therein. See the Supreme Court decision in *Olaiya v. Olaiya*⁴⁷. It was held to the effect that where a child is alleged to have been adopted under an Adoption Law, the best evidence of the adoption should come from the Adopted Children Register established under the law. It is to be noted, however, that such a certified copy shall not be issued or any information contained therein disclosed by the Chief Registrar to any person except in pursuance of an order made by the court⁴⁸. This is to ensure the confidentiality of adoption records and non-disclosure of the identity of both the adoptive and biological parents of the child.

6. Legal Effects of Adoption

Nwogugu has written⁴⁹ that an adoption order in respect of a juvenile carries a number of important legal consequences. Making reference to the adoption laws in several states, he states that these consequences are two-fold: ‘First, it severs all parental rights and obligations between the juvenile and his natural parents. Second, and of immense importance, it establishes the legal relationship of parent and legitimate child between the adopter and the adopted juvenile. In respect of custody, maintenance and education, the juvenile shall stand to the adopter as if he was born in lawful wedlock’⁵⁰

7. Analysis of the Instant Case

In the instant case of three juveniles and their adopter mother (Ms. Anthonia⁵¹), the facts showed that the adopter resided in Austria and was related to the applicants. The applicants included a male aged 11 years, another male aged 9 and one female aged 7 years. All applicants were siblings and resided with their father in Anambra state in Nigeria. Applicants’ mother is late. The adopter obtained three different adoption orders in respect of applicants from a Magistrate Court in Delta State⁵² Nigeria. Adopter, having secured the adoption orders, applicants applied for visa for reunion with their

⁴² ERA Rules para 3(1)

⁴³ Section 126 (2) CRA

⁴⁴ Para. 9(1) and (2) ERA Rules

⁴⁵ See section 135 CRA

⁴⁶ Section 142 CRA

⁴⁷ 2002 8 NWLR Pt. 782, 652

⁴⁸ Section 142(9) CRA

⁴⁹ In his book *Family Law in Nigeria* (supra) at page 321

⁵⁰ See section 140(2), 141, and 147 CRA for these effects

⁵¹ True identity concealed

⁵² True State of order concealed

adopter mother at the Austrian Embassy in 2009. Some of the documents supplied by the applicants to the embassy included the adoption orders, National Population Commission (NPC) birth certificates, certificates of adoption issued from the Social Welfare Office, and certificate of death of their biological mother.

Having reviewed the documents supplied by the applicants against the legal requirements and procedure for adoption explained in the foregoing sub-sections, in addition to circumstantial evidence, the following inconsistencies were found:

- i. Neither the adopter nor the adoptees were at the material time or before then resident in Delta State where the order was issued, contrary to section 131 (1)(c) CRA and section 11(1) ERA Law. This is a gross violation of the matter of jurisdiction
- ii. NPC Certificates of Birth of the adoptees are invalid having been issued from Anambra State whereas adoptees were born in Edo State. See section 7 Birth, Deaths etc. (Compulsory Registration) Act LFN 1990
- iii. As of 2004, when the adoption orders were given, the adopter was not physically present in Nigeria contrary to section 131(1)(b) and (c) CRA and there was no record to show otherwise
- iv. Certificates of Adoption by the Social Welfare Office were issued in 2001, three years before the adoption orders were granted in 2004. And if at all such certificates were to be issued, they ought to be issued after the adoption orders had been given. They are thus invalid. Furthermore, paragraph 9(1) and (2) of the ERA Rules only states that the report (tendered prior to the making of the order) by the guardian ad litem, welfare or probation officer must be in writing sent confidentially to the court and not a certificate of adoption.
- v. No certified copy of the entry in the relevant Adopted Children Register was supplied, which is proof of adoption and nothing more
- vi. By section 129(c)CRA a single person (whether male or female) is not allowed to adopt a child of the opposite sex but the adopter in the instant case was female and had been granted adoption orders over two male children.
- vii. It is not certain if the adopter was a sister or relation to the applicant's father or their late mother from the inconsistencies in the data on father's and mother's brothers and sisters in their application form.

8. Conclusion and Recommendations

We recognize that the adoption orders in respect of the three applicants are genuine. However, from the facts of the case and documents supplied, we are of the opinion that there was evident non-compliance with some of the requirements and procedures in the adoption process leading to the award of the orders. We also recognize that the order of the court should be respected by all in respect of the matter of the adoption. However, we note that an Adoption Order on the face of it is not proof of adoption but the Adopted Children Register. Nevertheless, the Embassy has the right to grant or refuse the grant of a visa to any person wishing to go to its country according to its discretion. If within the Embassy's discretion it is satisfied with the applications and the documents tendered, then a visa for reunion may be granted. Where it is not, then a denial will occur. The case of the three juveniles and Ms. Anthonia serves as a good case to elucidate the requirements for adoption in Nigeria and as guidance to embassies, intending applicants and adopters, and immigration lawyers engaged for reunion advisory. It is recommended that attention be paid to the extant laws and practice relating to child rights in the state of residence of the juveniles as a fundamental starting point.