



Volume 33 No. 1, Januari 2018  
DOI: 10.20473/ydk.v33i1.7202

Fakultas Hukum Universitas Airlangga, Jalan Dharmawangsa Dalam Selatan  
Surabaya, 60286 Indonesia, +6231-5023151/5023252  
Fax +6231-5020454, E-mail: yuridika@fh.unair.ac.id  
Yuridika (ISSN: 0215-840X | e-ISSN: 2528-3103)  
by http://e-journal.unair.ac.id/index.php/YDK/index under a Creative  
Commons Attribution-NonCommercial-ShareAlike 4.0  
International License.

FAKULTAS HUKUM UNIVERSITAS AIRLANGGA



Article history: Submitted 3 September 2017; Accepted 2 December 2017; Available Online 1 January 2018

## IMPLEMENTATION OF THE BEST INTERESTS OF THE CHILD PRINCIPLES IN INTERCOUNTRY ADOPTION IN INDONESIA

Leonora Bakarbesy dan Dian Purnama Anugerah

leonora@fh.unair.ac.id

Universitas Airlangga

### Abstract

Adoption of Indonesian children by foreigner is a form of intercountry adoption. In Indonesia such adoption is not prohibited but conditions are more difficult because it is a last effort or ultimium remedium for the best interests of the child. Therefore petition for intercountry adoption through the court, its decision in the form of a court decision, because the proof as the same as the evidence in civil suit. This is different from the petition of national adoption. This paper discusses the implementation of the best interest of child's principle in Indonesia and how to conduct intercountry adoption in Indonesia in order to avoid any attempts of illegal adoption. This paper concludes that the Indonesian Government has issued a number of laws and regulations govern the intercountry adoption. These laws require implying the principle of the best interest of children in order to protect the interest of children who is adopted by foreigner. In order to undertake the adoption, the court should decide that it is eligible after the Ministry of Social of the Republic of Indonesia approves adoption application.

**Keywords:** Inter Country Adoption; the Best Interests of the Child; Indonesia.

### Abstrak

*Adopsi anak Warga Negara Indonesia oleh calon orang tua angkat Warga Negara Asing merupakan salah satu bentuk dari adopsi internasional atau intercountry adoption. Di Indonesia adopsi seperti itu tidak dilarang tetapi syarat-syaratnya diperberat karena merupakan upaya terakhir atau "ultimium remedium" yaitu demi kepentingan terbaik bagi anak "the best interest of the child". Oleh sebab itu permohonan adopsi internasional di Indonesia putusannya dalam bentuk putusan pengadilan karena pembuktiannya sama dengan pembuktian dalam gugatan perdata, hal mana berbeda dengan adopsi nasional. Masalah yang dibahas dalam artikel ini yaitu bagaimana pelaksanaan "prinsip the best interest of the child" di Indonesia serta bagaimana proses pelaksanaan intercountry adoption di Indonesia agar tidak terjadi upaya-upaya illegal. Kesimpulan artikel ini adalah Pemerintah Indonesia telah mengeluarkan sejumlah peraturan perundang-undangan yang mengatur tentang syarat-syarat adopsi internasional demi melindungi kepentingan yang terbaik bagi anak Warga Negara Indonesia yang diangkat oleh Warga Negara Asing dan adopsi tersebut harus dilakukan melalui putusan pengadilan setelah mendapat izin dari Departemen Sosial Republik Indonesia.*

**Kata Kunci:** Adopsi Antar Negara; Kepentingan Anak; Indonesia.

### Introduction

Children are not only a gift from God Almighty but also a mandate, and therefore their presence must receive a protection from parents or family where they

live and reside. Every child has the right to be raised and fostered by his/her birth parents<sup>1</sup> so that the child is guaranteed to develop appropriately, to survive properly, to be able to act responsibly and to contribute to public development as an adult. However, not all children receive the fostering and protection from their parents or family. In Indonesia, every day there are children who were born that cannot live a decent live due to parents' limited economy, were born out of wedlock, where the fathers do not give financial support and the mothers are unemployed or still at school, were raised in broken homes, where the father do not give financial support and the mother is unemployed, were unwanted children in the family probably because the pregnancy was the result of rape/sexual assault.

On the other hand, there are families who do not have any children or have desire to have more children through adoption process. There are two types of adoption in Indonesia:

1. Adoption between Indonesian Citizens (domestic adoption);
2. Adoption between Indonesian Citizens and Foreign Nationals (intercountry adoption), which consist of: Adoption of Indonesian children by Foreign Nationals and Adoption of Foreign Nationals children by Indonesian Citizens.<sup>2</sup>

Intercountry adoptions in the form of transaction inter parties i.e. executed privately between parents of Indonesian children who are being adopted by prospective adoptive Foreign Nationals parents in Indonesia is prohibited in accordance to Circular Note number JHA 1/1/2 dated February 4<sup>th</sup> 1978, as issued by the Minister of Justice. This is addressed to all public notaries, temporary vice notaries, substitute notaries across Indonesia. The circular stated that adoption of a Indonesian children by Foreign Nationals can only be executed by the issuance of Court Order and it is flawed if the adoption is executed using a notary deed legalized by a District Court.<sup>3</sup> This Circular is issued based on several reasons; one

---

<sup>1</sup> Article 14 point 1 Republic of Indonesia Regulation Number 35 Year 2014 Amendment of Regulation Number 23 Year 2002 regarding Child Protection.

<sup>2</sup> Article 7 and 11 paragraph (1) The Republic of Indonesia Government Regulations Number 57 year 2007 on The Execution of Child Adoption.

<sup>3</sup> Pandika Rusli, *Hukum Pengangkatan Anak* (Sinar Grafika 2012).[93].

of the reasons being the legality procedure of the said child adoption where at times is questionable by the Governments of other countries where their citizens adoptive Indonesian children.<sup>4</sup>

There is a notion that the adoption practice executed privately as it occurs in the United States and other European countries i.e. between biological parents with agencies that arrange child adoption has encouraged the growth of illegal activities and violation of human rights. UNICEF assesses that such adoption executed privately is categorized as a high risk activity and it requires an international framework to reduce the possibility of child abuses.<sup>5</sup> This UNICEF concerns have encouraged the emergence of The Hague Convention on Intercountry Adoption in 1993. The objective of this Convention is to protect children's rights, the biological parents' rights, the rights of the adoptive parents and to prevent child abuse and kidnapping, and child trafficking.<sup>6</sup>

In Indonesia, based on the data received from the Indonesian Child Protection Committee from 2011-2015, there are a total of 842 cases related to child trafficking and exploitation. According to Erlinda, the General Secretary of the Child Protection Committee in Indonesia, 20% of cases of child trafficking in Indonesia are in the pretext of adoption.<sup>7</sup> Meanwhile, in 2011, the Child Protection Committee received reports of 120 cases of missing children, 35 of the cases were reported occurred at maternity health centers which handle child labor (Hospitals, Clinics, or Community Health Centers, locally known as Puskesmas) that the motive of these kidnappings and selling of children under the age of one year old is to adopt illegally, both for domestic and intercountry/international adoption.

The Indonesian Government has therefore issued a number of regulations

---

<sup>4</sup> M. Budiarto, *Pengangkatan Anak Ditinjau Dari Segi Hukum* (Akademika Pressindo 1985). [19-20].

<sup>5</sup> Faith Merino, *Global Issue: Adoption And Surrogate Pregnancy* (Facts On File Inc 2010). [8].

<sup>6</sup> *ibid.* [12].

<sup>7</sup> Davit Setyawan, 'KPAI Catat Ratusan Anak Diperjualbelikan, Tangkap Penjual Bayi Rp25 Juta Lewat Online' (*Komisi Perlindungan Anak Indonesia*, 2015) <<http://www.kpai.go.id/berita/kpai-catat-ratusan-anak-diperjualbelikan-tangkap-penjual-bayi-rp25-juta-lewat-online/>> accessed 5 October 2015.

in order to protect the best interests of the child in the execution of international adoption. Based on the above mentioned description, we are going to address on how to apply principles of the best interests of the child in intercountry adoption in Indonesia and how to execute the process of intercountry adoption in Indonesia.

### **Implementation of Principles of the Best Interest of the Child in Intercountry Adoption in Indonesia.**

Initially, the purpose or function of adoption in various countries is for the best interests of the adoptive parents i.e. to have offspring(s) that will devote to ancestors. In such case, parents would prefer to adopt a boy; such practice is common in China, Japan, and other Asian countries.<sup>8</sup> In Indonesia, one motive to adopt is due to childless, or feeling of compassion, or has not been endowed with a child of specific gender, a hope that the child will support the parents in the future, the child acts to strengthen family ties, to continue line of offspring and to allow the adoptive child to receive proper education.<sup>9</sup> Adoption in today's modern trend in western countries functions as the best interests of the child as presented by O'Halloran (2006): "In all modern western jurisdictions, the legal function applied by the court or similar body in concluding adoption proceeding is that of making a determination which is at least compatible with the best interests of the particular child".<sup>10</sup>

The intercountry adoption began after the end of the World War II. Nowadays, developed countries started to have an aspiration to adopt children from the third world countries, as presented by John Triseliotis as:

"Intercountry adoption became prominent after the end of the Second World War and they have been closely associated with wars and destruction. More recently there has been a match between an acute scarcity of white babies free

---

<sup>8</sup> Sudargo Gautama, *Hukum Perdata Internasional Indonesia Chapter III Part 1* (2nd edn, Alumni 1981).[ 87].

<sup>9</sup> Muderis Zaini, *Adopsi: Suatu Tinjauan Dari Tiga Sistem Hukum* (4th edn, Sinar Grafika 2002).[15].

<sup>10</sup> Kerry O'Halloran, *The Politic Of Adoption, International Perspectives On Law, Policy & Practice* (Springer 2006).[88].

for adoption in developed countries and the extremes of poverty in a number of Third World countries".<sup>11</sup>

In Indonesia, intercountry adoption is not prohibited, but the terms to adopt have been made to be more difficult<sup>12</sup> e.g. the prospective adoptive parents of foreign national have legally resided in Indonesia for two years; they have to receive permit from their home country, have received a written permit from the Ministry of Social Welfare of the Republic of Indonesia, the couple must have been married for at least 5 years, have fostered the prospective adoptive child for at least six months since the approval is granted, the prospective adoptive parents have to have the same faith with the adoptive child, etc.<sup>13</sup>

Even though the terms of intercountry adoption in Indonesia is designed to be more difficult, it doesn't mean that children of Indonesian citizen adoptive by Foreign Nationals would totally lose contact with their biological parents. In International Civil Law, plenary adoption is very common whereby the terms are designed to be more difficult because it disconnects the legal relationship between the child and its biological parent(s).<sup>14</sup> Sudargo (1992) stated that the terms of disconnection of biological relation in intercountry adoption in Indonesia, is in the context of nurturing, caring, educating and providing support, to the adoptive child as if it is their own biological child up till the child reaches a success in his life.<sup>15</sup>

The evidence that intercountry adoption in Indonesia does not disconnect any legal relationship, i.e. abolishing blood relation between the Indonesian adoptive children with their biological parents is that the Foreign Nationals adoptive parents must write a statement that the adoptive parents shall not become marriage guardian of the adoptive child if the child is a Muslim and ready to get married. In addition,

---

<sup>11</sup> John Triseliotis, *Inter Country Adoption; in Whose Best Interest?*, in *Intercountry Adoption Practical Experiences* (Routledge 1993).[119].

<sup>12</sup> Sudargo Gautama, *Masalah-Masalah Perdagangan, Perjanjian, Hukum Perdata Internasional Dan Hak Milik Intelektual* (Citra Aditya Bakti 1992).[85].

<sup>13</sup> See Article 12 -17. Regulation of the Government of the Republic of Indonesia. Number 5 4 Year 2007 regarding Execution of Child Adoption.

<sup>14</sup> Sudargo Gautama, *Soal-Soal Aktual Hukum Perdata Internasional* (Alumni 1981).[66].

<sup>15</sup> Sudargo Gautama, *Masalah-Masalah Perdagangan, Perjanjian, Hukum Perdata Internasional Dan Hak Milik Intelektual*(Citra Aditya Bakti 1992).[110].

the adoptive parents must write a statement that they will inform the adoptive children about their backgrounds and their biological parents once the adoptive child is deemed ready.

Many countries such as Quebec, USA, and most of European countries recognize only the plenary adoption, but not France and Belgium where intercountry adoption does not disconnect relationship with the children's biological parents, moreover, the family of the adoptive parents is considered as an extended family of the adoptive child.<sup>16</sup> Application of the best interests for the child principles in Indonesia began after the issuance of Law of the Republic Indonesia Number 4 Year 1979 regarding Child Welfare. The law states that child adoption is executed with the priority for child's welfare. Considering that children are potential successor of the state aspiration, children therefore have the rights towards their welfare, nurture, upbringing and guidance based on affection, both within the family or in a special upbringing to grow and develop. Therefore, the law focuses on the child's welfare.

In further development, the government has ratified the Convention on the Right of Child ratified through Presidential Decree of the Republic of Indonesia Number 36 Year 1990. Implementation of this ratification in year 2002 where the government stipulated Laws of the Republic of Indonesia Number 23 Year 2002 which declared that: "Child adoption may take place for the best interests of the child" (Article 39 point 1). The statement is confirmed by the implementation of the regulation i.e. Government Regulation of the Republic of Indonesia Number 54 Year 2007 regarding Child Adoption. It is stated in Article 2 that: "The aim of child adoption is for the best interests of the child in order in order to achieve the child welfare and child protection, the execution is based on local practice and statutory provisions". In general, in all child adoptions it is mandatory to apply the best interests of the child principles.

Specifically, principle of the best interests of the child is also adopted by The Hague Convention 1993 on Intercountry Adoption recognized as The Hague

---

<sup>16</sup> Diana Mare and Laura Briggs, *International Adoption, Global Inequalities and The Circulation of Children* (New York University Press 2009).[69].

Convention on The Protection of Children and Co-operation in Respect of Intercountry Adoption 1993. One of the Convention's Introduction paragraph states that: "Convinced of the necessity to take measures to ensure that intercountry adoption are made" in the best of the child" and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children." Likewise, the principles of the best interests of the child consecutively implemented in the convention's articles are as follow:

Article 1.a).states:

"to establish safeguards to ensure that intercountry adoption take place" in the best interest of the child "and with respect for his or her fundamental rights as recognized in international law".

Article 4.b) states:

"have determined, post possibilities for placement of the child with in the state of origin have been given due to consideration that an intercountry adoption is "in the child s best interests".

Article 16.d) stated:

"determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is" in the best interests of the child".<sup>17</sup>

In the latest development, by the stipulation of Act of the Republic of Indonesia Number 35 Year 2014 regarding the Amendments to the Act Number 23 Year 2002 Regarding the Child Protection, it is affirmed that child adoption, may only be executed for the best interests of the child (Article 39 point 1). This Principle of the best interests of the child is elaborated in the regulation of child adoption, which covers the requirements, procedure, execution and supervision. These requirements have been made further tightened both for the adoptee and adopter, the procedure consists of phases that requires quite a lot of time, the execution requires a comprehensive substantiation and documents justifications.

If it is carefully comprehended, the principle of "the best interests of the child"

---

<sup>17</sup> *The Hague Convention On The Protection of Children and Cooperation in Respect of Inter Country Adoption 1993*, as stated effective by 1 May 1995, however to day Indonesia is not a member.

is the core of other principles; because in the end, other principles will support the best interests of the child principle. Since the ratification of Convention on the Right of the Child year 1989 by the Government of Indonesia year 1991, as such child adoption in an intercountry adoption has to be done by referring to *Ultimum Remedium* principle. It is reaffirmed in Article 21(b) that intercountry adoption is the last alternative to care and nurture the children if they do not have any relatives in the country of origin of the adoptive parent.

*Ultimum remedium* principle in Intercountry Adoption is written in Article 39 point 4 Act of the Republic of Indonesia Number 23 Year 2002 regarding Child Protection. In the same article, it is also written in Act of the Republic of Indonesia Number 35 Year 2014 regarding the Amendment of Act Number 23 Year 2002 regarding Child Protection, also Article 5 of Government Regulation of the Republic of Indonesia Number 54 Year 2007 reaffirmed that The Adoption of a child of Indonesian Citizen by a Foreign National may only be executed as the last effort (*ultimum remedium*). In article explanations, there is no information which explains the meaning and purpose of the above mentioned *ultimum remedium*. If we examine and look at The 1945 Constitution, Article 34 states that “the destitute and the waifs shall be nurtured by the nation”. Nurturing the waifs is therefore the state’s responsibility.

Based on the above procedure and technical guidelines for child adoption from the Ministry of Social of the Republic of Indonesia, the Directorate of Child’s Social Welfare differentiates the parenting by way of home care and out home care. Thus, every child has the right to be raised and nurtured by his own parents (in home care), so that he receives the guarantee to be reasonably raised and fostered, well survived, has the ability to be responsible and contributes to the state development when he grows up. Nevertheless, the reality of life in public, not all children receive care and protection from their parents or family, either because of family inadequate economy condition, or issues within parent personal relationship, or even by obscurity marital status of the parents which creates obscurity status of the child, in particular children born out of wedlock. When parents cannot raise their children



due to certain reasons or cannot guarantee a proper fostering for their children that will cause them being neglected therefore require protection, there is an alternative need for out Home Care. Alternative out Home Care includes: first, care provided by relatives (kinship care); second, are provided by substitute family (foster care); third, care provided by guardian (guardianship); fourth, adoption.<sup>18</sup>

The above mentioned child's alternative care (out home care) is carried out when it is impossible for the biological parents to take care of their children (in home care). Thus, when parents are incapable of caring the children, the children have the right to be raised by relatives (kinship care), if the relatives are incapable or aren't willing to do so, then the children may be fostered by a substitute family (foster care). If there is no foster family, the child care can be done through guardianship. As the last alternative, child care and protection may be carried out through child adoption. Therefore, in the application, based on the procedure and technical guidelines of child adoption proclaimed by the government, the Intercountry Adoption is the last effort based on the *ultimum remedium* principle.

In further development, the above mentioned nurturing pattern is supported and reaffirmed through *ultimum remidium* as stated in the Act of the Republic of Indonesia Number 35 Year 2014 regarding the Amendment to Act number 23 Year 2002 regarding Child Protection. In Article 14 paragraph 1 on Child Protection Act 2014, it is stated that: "...all children have the right to be nurtured by their own parents, except when there is a legal reason or rule of law that the separation is for the best interests of the child and is the last consideration". The terms "Child's separation" from the biological parents, "for the best interests of the child" and "is the last consideration" indicate that the *ultimum remedium* principle is closely related and supports the best interests of the child principle. As previously explained, Indonesia is yet to become member of the convention, however, the principles in the said convention is adhered and manifested in the laws and regulation.

---

<sup>18</sup> Directorate Child Social Welfare, Technical Guidance on Child Adoption Procedure, (Ministry of Social of the Republic 2012). [1-2].

## **The Procedure of Adoption of Indonesian Children by Foreigner through Court in Indonesia**

The procedure of intercountry child adoption in Indonesia must go through several stages:

1. Before the application is brought to the court;
2. At the time the application is filed in court;
3. Intercountry Adoption Case – Trafficking in Indonesia.

### *Ad.1. Procedures Before the Court*

Prior to submission of the application for intercountry child adoption to the court, based on Article 14 of Government Regulation of the Republic of Indonesia Number 54 Year 2007 regarding the Execution of Child Adoption, it is stated that in order to submit an application to adopt Indonesian children by Foreign Nationals, the prospective adoptive parents must obtain a written permit from the Ministry of Social through the foster care Institution. There are a number of Foster Care Institutions in Indonesia, however foster care institutions allowed to carry out child adoption are only the ones appointed by the Minister of Social of the Republic of Indonesia. The Foster Care Institution which received the permit from the Ministry of Social of the Republic of Indonesia to perform intercountry adoption is Sayap Ibu Agency of Jakarta branch, and therefore, adoption of Indonesian children by a prospective Foreign National parents, shall be done through one access<sup>19</sup> i.e. through Sayap Ibu Agency, Jakarta branch, and forwarded to the Ministry of Social of Republic of Indonesia in order to receive the permit.

When the prospective foreign national adoptive parent submit an application to adopt a child through the Provincial Social Office, the office shall issue a recommendation to be forwarded to the Ministry of Social of the Republic of Indonesia to be processed further. In Indonesia there are many Foster Care Institutions, however, only certain Foster Care Institution or Orphanages have

---

<sup>19</sup> Interview with Arie Soraya, Head of Social Rehabilitation and Service and Elderly Section East Java Provincial Social Office in Surabaya, July 30 and Oct. 8, 2015.

the permit from the Minister of Social of the Republic of Indonesia to process child adoption. There are 10 Foster Care Institution which has a permit to process adoption and amongst those 10 Foster Care Institution, only 1 one Foster Care Institution has the permit to adopt Indonesian children by Foreign Nationals i.e. Sayap Ibu Agency of Jakarta branch.

Before the Minister of Social of the Republic of Indonesia granted the permit of Indonesian child adoption by Foreign Nationals, the Minister of Social is supported by the Central CALC team, i.e. Children Adoption License Consideration Team (*Tim Pertimbangan Perizinan Pengangkatan Anak*). The team provides suggestions to the Minister in granting the permit to adopt a child executed between an Indonesian Citizen and a Foreign Nationals or child adoption where one of the prospective adoptive parents is of Foreign National or the prospective parent is a single parent.<sup>20</sup> Membership of the CALC team consists of the related Institution/Government Institution which includes representatives from<sup>21</sup> Ministry of Social, Coordinating Ministry of People's Welfare subject, Ministry of Foreign Affairs, Ministry of Law and Human Rights, Ministry of Women Empowerment and Child Protection, Ministry of Health, the Republic of Indonesia National Police Headquarter, Ministry of Internal Affair, Ministry of religion, Protection of Indonesian Child Commission, National Commission on Child Protection, Association of Indonesian Professional Social Worker.

Members of the CALC team execute their assignments and roles in accordance to each of their authorities. Guidelines to obtain a permit from the Ministry of Social follow the following steps:<sup>22</sup>

1. To process a child adoption, the prospective adoptive parents, has to do a first visit the Ministry of Social or Sayap Ibu Agency;
  - a. If the prospective adoptive parents, hereafter referred to as (PAP), visited the Sayap Ibu Agency first, Sayap Ibu Agency shall then inform PAP that prior

---

<sup>20</sup> Regulation of Minister of Social of the Republic of Indonesia , Number 37/HUK/2010, Article 1.

<sup>21</sup> *ibid*, Article 7.

<sup>22</sup> Regulation of the Director General of Social Rehabilitation Number 2 Year 2012 regarding Technical Procedure Guidance on Child Adoption Ministry of Social RI.2012.[45-83].

to child adoption PAP has to visit the Ministry of Social since the Ministry of Social requires to examine the child adoption motivation directly from the PAP;

- b. If the Ministry of Social and the agency grant an approval to PAP then the process may continue.
2. PAP should visit the Ministry of Social, if PAP fulfills the requirements, the Ministry of Social shall direct PAP to return to Sayap Ibu Agency for further process. They should bring along an application letter, marriage certificate, birth certificates and passports of the husband and wife;
3. The Ministry of Social c/o Directorate of Child Social Welfare should submit an application addressed to the Minister of Social to request for their approval for the PAP to adopt a child/children;
4. Sayap Ibu Agency shall provide explanation/consultation regarding the adoption process and the required documents;
5. After the consultation, PAP must send a copy of the required documents;
6. The Minister of Social shall grant a disposition to approve the process;
7. After the documents are complete, then the Sayap Ibu Agency, shall submit a request to the Ministry of Social to arrange a first home visit and PAP must send a copy of the documents to the Ministry of Social;
8. Directorate of Child Social Service shall issue a written statement to Sayap Ibu Agency for first home visit;
9. After the first home visit, the social worker from the Ministry of Social and a social worker from the agency shall make a social report of the PAP approved by the official of Ministry of Social and the agency;
10. The Ministry of Social of the Republic of Indonesia, shall issue a Fostering Permit signed by the Director of Child Social Welfare, based on the PAP social report made by PAP;
11. The Temporary Fostering permit shall be revoked if the PAP neglect their responsibility and the child shall be returned to the orphanage or Sayap Ibu Agency;
12. After the Fostering permit is granted by the Minister of Social, the agency shall handover the child to be fostered by PAP;
13. Fostering shall be performed by PAP for approximately six months;
14. After the child fostered six months by PAP, then a second home visit shall be conducted;
15. Based on the second home visit, the social worker shall prepare a child development report;
16. Afterward the Ministry of Social shall conduct a session with team members of the Children Adoption License Consideration (CALC) Team which will be attended by other related Institutions;
17. When CALC team session is conducted, all members give their response in accordance with their main duties and functions for each PAP file;
18. Once the adoption process is approved by the CALC team, then the Ministry of Social shall issue a permit for the Indonesian child Adoption by a Foreign Nationals;

19. After the Adoption Permit is issued, PAP shall submit the process to the District Court in accordance with the PAP desire.

*Ad. 2. Procedure in Court*

After the PAP fulfill all the requirements and administration, the adoption of an Indonesia Citizen child by a Foreign Nationals couple or even only one of the is a Foreign Nationals or the Child of a Foreign Nationals who is adoptive by an Indonesian Citizen will then be submitted to the court to obtain a court decision.<sup>23</sup> The Court that has the authority to review the child adoption of an Indonesian Citizen by Foreign Nationals is the court in the residential area (habitual residence) of the child to be adopted.<sup>24</sup> In the previous description it was explained that adoption of an Indonesian children by Foreign Nationals, that prior to submitting the process to the court, the said child has to reside within the care of Sayap Ibu Agency Jakarta Branch, located at Jl. Barito II No. 55 Kebayoran Baru - South Jakarta, and therefore the court that has the authorization is the South Jakarta District Court.

The act of child adoption is not a legal action as in a handover of an object, it is more of a sequence of events of family relationship and showing that there is goodwill, affection and full awareness of the following consequences to all parties which has continued for a long period of time.<sup>25</sup> Therefore the child to be adopted has to be fostered by the prospective adoptive parents six months in prior, and after the period end, a social worker will evaluate, whether or not the child to be adopted is willing to accept the prospective adoptive parents. Since the child to be adopted is a waif or due to certain reason the child could not be raised in a family, the Agency functions as a temporary accommodation for these children therefore assist the adoption process to the Foreign Nationals prospective adoptive parents.

In the court examination, the District Court shall listen directly from the prospective adoptive parents (husband/wife),<sup>26</sup> Sayap Ibu Agency of Jakarta Branch

---

<sup>23</sup> See Article 22 and 23 Government Regulation 54 Year 2007 regarding the Execution of Child Adoption.

<sup>24</sup> Point IV Supreme Court Circular No.6 Year 1983 regarding Improvement of Circular No.2 Year 1979 regarding Application for Approval Audit/ Child Adoption.

<sup>25</sup> *ibid.*

<sup>26</sup> Djatikumoro, *Hukum Pengakatan Anak Di Indonesia* (1 ed, Citra Aditya Bakti 2011).[150].

and other documents required such as, application for a child adoption permit from the Minister of Social of the Republic of Indonesia, social first visit home report to the prospective adoptive parents, birth certificate of both husband and wife to confirm their age which must be a minimum of 30 years old and maximum of 55 years old, a marriage certificate of the couple to confirm that their marriage is at least five years, passport of both husband and wife, a medical and a health certificate of both husband and wife, Police criminal record issued by the Indonesian National Police Headquarters for both husband and wife, income statement under both names i.e. the prospective adoptive parents, a statement from the government of the foreign couple that their government has no objection to the couple adopting Indonesian child. The prospective adoptive parents shall write a statement for the best interests of the child for the prospective adoptive Indonesian child, amongst these are, health insurance statement, education insurance, and others.

Based on Article 22 of Government Regulation No.54 Year 2007 regarding the Execution of Child Adoption, it is stated that an adoption of an Indonesian child by a Foreign Nationals who has met the requirements submitted to the court to be granted a Court Order. Article 11 paragraph 2 of the Government Regulation Number 54 Year 2007 states that child adoption as described in Article 11 paragraphs 1 is executed through a "Court Decision".<sup>27</sup>

Considering that the application of intercountry child adoption in the form of Court Decision and the fact that the intercountry child adoption is the last effort or *Ultimum Remedium*, therefore in reviewing and judging the intercountry child adoption, the Judge shall look at the facts as if there is a dispute and the order is not only based on sufficient facts but also a maximum substantiation in order to minimize the violation of the execution of child adoption. Therefore, intercountry adoption in Indonesia has to in the form of Civil Case Petition but decision in form Court Decison.<sup>28</sup> After the Foreign Nationals Adoptive parent accept the court order regarding child adoption, then in order to perform supervision by the Supreme

---

<sup>27</sup> For details read Article 11 PP.No.54 Year 2007.

<sup>28</sup> Interview with Judge Samiaji of District Court of Surabaya, July 28, 2015.

Court of the Republic of Indonesia, all copies of the Adjudication and all copies of the Child adoption Order shall be sent to the Supreme Court eg. The Registrar of the of the Supreme Court, Department of Social, Department of Law and Human Rights c/o Directorate General of Immigration, Department of Foreign Affairs, Department of Health, District Attorney and the Police.<sup>29</sup>

### *Ad. 3. Intercountry Adoption Case – Trafficking in Indonesia*

#### **Tristan Dowse (Erwin)**

The practice of child trafficking disguised as adoption attracted public interest in early 2000. The case that caught the public attention in 2001 in Indonesia is the adoption of Tristan Dowse (Erwin), a child from a poor family in Tegal. The case began with an adoption process of Erwin by Foreign Nationals, Joseph Dowse (Irish) and Lala Dowse (Azerbaijan). The couple has difficulty in having children. Therefore they decided to adopt an Indonesian baby. At that time, Joseph was promoted by his company to work in Indonesia; as such he tried to adopt a child from Indonesia since he thought it would be easier to adopt a child from Indonesia.<sup>30</sup> Joseph then met an Indonesian woman named Rosdiana who assisted him to find a child for the couple. According to the National Police of the Republic of Indonesia, from the investigation it was identified that Rosdiana was known to sell babies of poor families. These babies are sold to buyers with prices ranging from 25 to 50 million rupiahs each. The price already included processing the documents related to the adoption. Rosdiana stated that Joseph wished that the child shall not get too attached to the birth mother, he provided the birth mom all nutrients during the pregnancy, and covered all labor cost.<sup>31</sup>

Tristan's adoption process was executed through a District Court Order, South Jakarta No.192/Pdt.P/2001/PN.Jak.Sel. dated 10<sup>th</sup> August 2001. The Judge's

---

<sup>29</sup> Supreme Court Circular No.3 Year 2005 regarding Child Adoption.

<sup>30</sup> Dawyer, 'The Curious Case of Tristan Dowse' (2015) <<http://www.independent.ie/life/family/mothers-babies/the-curious-case-of-tristan-dowse-26512267.html>> accessed 8 October 2015.

<sup>31</sup> *ibid.*

consideration on the verdict stated his opinion that there was no application for adoption in the written permit from the Minister of Social or the appointed authorities.<sup>32</sup> The Judge also quoted that the child adoption of an Indonesian child by a Foreign Nationals is carried out as the last effort, and the Court has the opinion that these efforts have been made however had not yet succeeded. The second consideration in the mentioned point that since the Reformation Government era, the Department of Social has officially been removed by the government, and as such all vertical or horizontal activities under the Department is legally declared as no longer in function and is directly transferred to the related Regional Government Institution. In the same point, the Judge suggested that as long as the said permit had not been further governed (it was questionable who issued the permit), then the administrative requirement from the evident P1-P23 was considered sufficient, reasonable and did not violate any existing regulations. It turns out that the adoption did not go well as the couple previously thought, Joseph-Lala. Even though they had received the adoption permit from the government of Ireland and the order from the District Court in South Jakarta, however Lala felt that she could not built a relationship with Tristan. The Lala's actual reason about how it could happen was unknown. Approximately 18 months later, Lala finally bore her own child and Joseph was assigned back to Azerbaijan, and as the result Joseph left baby Tristan at Emmanuel Orphan Home in Bogor, an Orphan Home which did not have any permit from the Ministry of Social. Such action is known as "disruption" which is an action conducted by the adoptive parents who decided to end an adoption. In general, disruption process occurs to adoption process which is not yet official or is still in the process; however this term is now used for all actions which ended the relationship between adoptive parents and adoptee. Joseph's action leaving Tristan at an Orphan home is the reason how this case was revealed and afterwards received criticism from national and international community.

Ireland Prime Minister responded to this issue. Through its state Ambassador

---

<sup>32</sup> Check Point 8:9. Judge Consideration in Order number 19192/Pdt.P/2001/PN.Jak.Sel.



in Singapore they traced Tristan's whereabouts, because at that time Tristan was officially adopted and became the son of Joseph Dowse by the Irish Adoption Board and by law an Ireland Citizen. In the end, The Court of Ireland decided that Tristan remained to have Irish citizenship and remained to have rights towards the property of Joseph and Lala Dowse also this couple were ordered to give a financial compensation in the amount of 20,000 Euro and a monthly support of 350 Euro each month until Tristan reached the age of 18 years old.

### **Conclusion**

Despite the fact that Indonesia has not ratified Hague Convention on Intercountry Adoption, 1993 on Protection of Children and Co-operation in Respect of Intercountry, but The Best interests of The Child principle proclaimed by the said convention has been adopted and elaborated in several terms and regulations, such as Child Welfare Act, Child Protection Act, and related rules and regulation. Technically, the adoption process of Indonesian children by a Foreign Nationals is executed through one gate, i.e. Sayap Ibu Agency, Jakarta Branch and submitted to the Minister of Social to obtain a permit, henceforth submitted to the South Jakarta District court to obtain an order.

It is expected that Indonesia become a member of international conventions or bilateral agreements to facilitate any possible arising problems in Intercountry Adoption especially regulations related to the impacts of adoption which still require adjustment, though they do not have to be the same, so as to achieve a harmony. The execution of child adoption process of Indonesian Citizens by Foreign Nationals (intercountry adoption) in Indonesia is based on a number of rules and regulation. Those rules and regulations reduce the efficiency of law enforcements especially for the Judge in considering legal aspects to approve or reject adoption application(s) of Indonesian children by prospective adoptive foreign national parents. Therefore, it is necessary that our government create a comprehensive act especially ruling adoption issues which regulates child adoption between Indonesian Citizens or known as domestic adoption, or even intercountry adoption of an Indonesian child

with the prospective adoptive parents of Foreign Nationals.

## **Bibliography**

### **Books**

Diana Mare and Laura Briggs, *International Adoption, Global Inequalities and The Circulation of Children* (New York University Press 2009).

Directorate Child Social Welfare, *Technical Guidance on Child Adoption Procedure*, (Ministry of Social of the Republic 2012).

Djatikumoro, *Hukum Pengangkatan Anak Di Indonesia* (1 ed, Citra Aditya Bakti 2011).

Faith Merino, *Global Issue: Adoption And Surrogate Pregnancy* (Facts On FileInc 2010).

John Triseliotis, *Inter Country Adoption; in Whose Best Interest?, in Intercountry Adoption Practical Experiences* (Routledge 1993).

Kerry O'Halloran, *The Politic Of Adoption, International Perspectives On Law, Policy & Practice* (Springer 2006).

M.Budiarto, *Pengangkatan Anak Ditinjau Dari Segi Hukum* (Akademika Pressindo 1985).

Muderis Zaini, *Adopsi: Suatu Tinjauan Dari Tiga Sistem Hukum* (4th edn, Sinar Grafika 2002).

Pandika Rusli, *Hukum Pengangkatan Anak* (Sinar Grafika 2012).

Sudargo Gautama, *Hukum Perdata Internasional Indonesia Chapter III Part 1* (2nd edn, Alumni 1981).

——, *Soal-Soal Aktual Hukum Perdata Internasional* (Alumni 1981).

——, *Masalah-Masalah Perdagangan, Perjanjian, Hukum Perdata Internasional Dan Hak Milik Intelektual* (Citra Aditya Bakti 1992).

### **Websites**

Davit Setyawan, 'KPAI Catat Ratusan Anak Diperjualbelikan, Tangkap Penjual Bayi Rp25 Juta Lewat Online' (*Komisi Perlindungan Anak Indonesia*, 2015) <<http://www.kpai.go.id/berita/kpai-catat-ratusan-anak-diperjualbelikan-tangkap-penjual-bayi-rp25-juta-lewat-online/>> accessed 5 October 2015.

Dawyer, 'The Curious Case of Tristan Dowse' (2015) <<http://www.independent.ie/life/family/mothers-babies/the-curious-case-of-tristan-dowse-26512267.html>> accessed 8 October 2015.

### **Regulations**

Constitution of The Republic of Indonesia Year 1945.

Law Number 4 Year 1979 regarding Child Welfare, LN Republic of Indonesia Year 1979 Number 32, TLN RI Number 3143.

Law Number 23 Year 2002 regarding Child Adoption.

Law Number 12 Year 2006 regarding Citizenship of the Republic of Indonesia.

Law Number 35 Year 2014 regarding Amendments of Law Number 23 Year 2002 regarding Child Protection, LL RI Year 2014 Number 297, TLN RI Number 5606.

Government Regulation Number 54 Year 2007 regarding the Execution of Child Adoption, LN RI Year 2007 Number 123, TLN RI Number 4768.

Presidential Decree Number 36 Year 1990 regarding Child's Right.

Ministerial Regulation of the Republic of Indonesia Number 110/HUK/2009 regarding Child Adoption Requirements.

Regulation of the Minister of Social of the Republic of Indonesia Number 37/HUK/2010 regarding Central Consideration on Child Adoption Permit Team (Central CCAP Team).

Regulation of the Directorate General of Social Rehabilitation of the Social Ministry of the Republic of Indonesia Number 2 Year 2012 regarding Technical Procedures Guidance on Child Adoption.

Circular of the Minister of Justice Number JHA1/1/2, dated February 24 , 1978 addressed to all notaries, deputies of temporary notaries, substitute notaries all over Indonesia, regarding Indonesian child Adoption Procedure by a Foreign Nationals.

Circular of the Supreme Court of the Republic of Indonesia Number 3 Year 1993 regarding Improvement of Circular of the Supreme Court of the Republic of Indonesia Number 6 Year 1979 regarding Application Audit Improvement/

### Child Adoption.

Circular of the Supreme Court of the Republic of Indonesia Number 6 Year 1983 regarding Improvement of Circular of the Supreme Court of the Republic of Indonesia Number 2 Year 1979 regarding Child Adoption.

Circular of the Supreme Court of the Republic of Indonesia. Number 3 Year 2005 regarding Child Adoption.

Circular of the Supreme Court of the Republic of Indonesia. Number 2 Year 2009 regarding Supplementing Child Adoption Application with a Birth Certificate.

### Conventions

The Hague Convention On The Protection of Children and Cooperation in Respect of Inter Country Adoption 1993.

Convention on the Rights of the Child 1989.

### Court Decision

South Jakarta Court Decision Number 192/Pdt.P/2001/PN.Jak.Sel.

**HOW TO CITE:** Leonora Bakarbesy dan Dian Purnama Anugerah, 'Implementation Of The Best Interests Of The Child Principles In Intercountry Adoption In Indonesia' (2018) 33 Yuridika.