Nationality of ‘Foundlings’: Are your parents really ‘unknown'?

Executive summary

Article 2 of the 1961 Convention on the Reduction of Statelessness (hereinafter the1961 Convention) is a provision that leads to the acquisition of nationality by a 'foundling' 'found' in a member territory, to prevent her or his statelessness. Out of 193 UN member States, of which 73 are parties to the 1961 Convention, at least 139 States or approximately 72% have domestic provisions granting nationality to persons of unknown parents born or found in the territory. However, the wording of such 'foundling provisions' and their implementation differ significantly between States.

This dissertation examines and proposes an appropriate definition for, and interpretation of, 'foundlings' 'found' in States' territories and 'proof to the contrary' (also contained in article 2) as well as some key aspects of procedural standards such as the applicable burden and standard of proof in assessing unknown parentage - which have been largely unexplored in the scholarship to date. This is done mainly by referring to the object and purpose of the 1961 Convention, the preparatory work and documents interpreting the Convention, as well as by conducting a review of the text of relevant national legislation in all 193 UN member States and its actual implementation for a number of States including those that are not State parties to the 1961 Convention.

An examination of the preparatory work of the 1961 Convention; the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Law; different UN language versions of article 2, and as the wording of foundling provisions in domestic jurisdictions around the world, have confirmed that the term 'foundling' under article 2 of the 1961 Convention essentially refers to a child of unknown parents whose birthplace is either known or unknown.

The research has further found that in many States, the most typical cases that benefit from foundling provisions are babies found abandoned in public places, or left in baby hatches or boxes operated by public or private organizations. In a number of countries, babies surrendered through a form of 'anonymous birth' where the biological mother is factually known but not legally known make up the majority of the cases who acquire nationality based on the foundling provision. In several States the foundling provision is interpreted to cover many other categories of persons, including babies left behind at a hospital by the birth mother soon after delivery, or who are entrusted to, or informally adopted by, a third person. In many cases fragments of information regarding their parent(s)' identities do exist, which however, cannot be firmly established. In at least one of the countries, persons whose parent(s) go missing after registering their birth with invalid identity information have been confirmed nationality.

It was also found that being of 'unknown parentage' essentially means being of 'legally unknown parents', which means specifically that the person's legal parents do not exist, including where such existence of legal parents cannot be proven. This is because for one to acquire nationality under nationality law, legal parentage rather than

factual parentage matters. Naturally, having 'legally unknown parents' include instances where the parents are factually unknown.

The dissertation also found that under some States' practice or legislation, some children of unknown parentage who are otherwise stateless who are not necessarily recognised as 'foundlings' are granted nationality through other avenues including: By relaxing the requirements for late birth registration; on the basis of adoption by nationals; by being hosted at a child custody institution within the territory, or via recognition as stateless persons and facilitating their naturalization under the 1954 Convention relating to the Status of Stateless Persons. The existence of other avenues appears to reduce the need to interpret the foundling provision in the 1961 Convention in an 'inclusive' manner in such countries.

The dissertation reveals that *being found* on the territory of a State is a *condition* (rather than being part of the definition of a 'foundling') that gives rise to the obligation of that State to grant nationality to the person found, and includes the situation where the person's birth within the territory is indeed established. One does not have to be literally 'abandoned' but she or he can be orphaned, lost, or informally adopted and later spontaneously approach or come in contact with the authorities.

Being 'found' should be broadly defined as 'having been seen in the territory by a person other than one's parents', or something to that effect. Notably, some States have previously applied their foundling provision in a full and inclusive manner, such as by confirming nationality for persons of unknown parents who have voluntarily approached the authorities at a much older age, in their 40s-60s. In such cases, their presence in the territory in their childhood were established by evidence such as their own statements, school records or testimony by non-State third persons such as neighbours.

In relation to the 'age' of the person to be considered a 'foundling' – which is not specified in the 1961 Convention - my review of the foundling provisions of 139 States show that the legislation of at least 18 States only grants nationality to persons of unknown parents who have been *born* in the territory, and at least 35 States limit the grant of nationality to persons who are 'new-born (or recently born)' when found. At the same time, ten States provide for the application of their foundling provisions to older children (3-15). At least 11 States explicitly provide for the provisions to apply to all 'minors' (the age of majority being dictated by domestic legislation). Many of the remaining 65 States (ie 47% of 139 States) do not explicitly specify the age of the child who should be granted nationality under their foundling provisions.

Based on these findings, and in light of the object and purpose of article 2 of the 1961 Convention and the right to nationality under article 7 of the 1989 Convention on the Rights of the Child contracted by 192 States, it is argued that an ideal foundling provision should cover all persons of unknown parentage found in the territory of a State before reaching the age of majority. This is because imposing various younger age limits is

arbitrary under international law. Many persons of unknown parentage are not able to account for the identity of their parents regardless of how old they become. The object and purpose of the foundling provision is essentially to prevent statelessness of persons of unknown parents (and often unknown birthplace) for whom there is no basis to determine (or acquire) nationality by *jus sanguinis* or *jus soli*.

The dissertation further examines the term 'in the absence of proof to the contrary' in relation to two points in time i.e. *pre-facto* assessment for the purpose of (confirming) one's nationality acquisition based on the foundling provision, and *post-facto* withdrawal of such nationality.

As to *pre-facto* assessment, while current State practice generally shows that evidence of birth outside the territory constitutes 'proof to the contrary' and disqualifies the person concerned from acquiring nationality based on the foundling provision, the travaux records of the 1961 Convention, and limited statements from some administrative and judicial authorities indicate the room for an alternative interpretation. According to such an alternative interpretation, a child of unknown parentage found in the territory but born in another State could nonetheless acquire nationality of the State where found, as long as she or he is otherwise stateless. In other words, under such an alternative interpretation, having been born in another State does not constitute 'proof to the contrary' *pre-facto* (and naturally *post-facto* as well), but possession of another nationality, does. This interpretation will be particularly relevant in today's climate of global migration, displacement and human trafficking, where persons move between borders without necessarily securing evidence on their parentage.

With regard to the withdrawal of nationality *post-facto*, author asserts, also in light of the majority of States' legislation which explicitly and clearly regulates such loss - that only when the person is found to have another nationality, that nationality granted based on a foundling provision can be withdrawn, with non-retroactive effect. Such withdrawal is also subject to the procedural safeguards and general principles of law, including legal certainty. In particular, after the person has lived with a particular nationality for certain number of years, that nationality should be maintained even if the parentage or birthplace has granted her or him another nationality.

The dissertation also examined the burden and standard of proof when a dispute occurs as to the 'unknown-ness' of one's parentage at the initial determination of a person's nationality. I concluded that, as long as the person concerned asserts unknown parentage and duly cooperates and provides all the reasonably available evidence regarding the parents' unknown-ness, States should bear both the burden of producing evidence and the burden of persuasion regarding the *existence* of a legally recognised parent. If such a burden of proof is not fulfilled, the State should affirm the unknown-ness of the parents.

In relation to the standard of proof or the 'degree' of unknown-ness of parentage, it is recommended that decision-makers recognise the 'unknown-ness' when they cannot be convinced within a pre-set deadline, that one of the child's legally recognised parents is

definitively identified to the extent that it enables the confirmation of the child's nationality acquisition by *jus sanguinis*.

The dissertation concludes by proposing a model provision that can serve as an inspiration in reflecting article 2 of the 1961 Convention into domestic law or in drafting a new regional instrument:

> Paragraph 1. A person whose **legal parentage cannot be proven** who is **found as** a **child** in the territory shall **acquire the nationality** of the State where found, **unless her or his possession of a foreign nationality is proven**.
>
> Paragraph 2. The nationality acquired under the preceding paragraph **may** be **withdrawn** if it is proven that the person concerned **possesses foreign nationality** within **10 years** from the date the State concerned takes an action to confirm her or his nationality under the preceding paragraph.

This sort of wording will help ensure a full and inclusive application of article 2 in accordance with its object and purpose, and also prove particularly useful in cases involving States under the effects of armed conflicts, or where documentation of civil and nationality status is not yet systematic, or where migration, displacement and trafficking is widespread.