

**THE HIGH COURT
JUDICIAL REVIEW**

[2012 No. 654 J.R.]

BETWEEN

MARIA CALDARAS AND SARA STANCU (A MINOR SUING BY HER MOTHER AND NEXT FRIEND MARIA CALDARAS)

APPLICANTS

AND

AN tARD CHLARAITHEOIR (REGISTRAR GENERAL)

RESPONDENT

JUDGMENT of Kearns P. delivered on 7th day of June, 2013

This is an application brought by way of judicial review to challenge the decision of the respondent delivered on the 4th day of July, 2012 which refused to amend the particulars of the second named applicant's birth record pursuant to the provisions of the Civil Registration Act 2004.

The first named applicant is a Romanian national born in Gataia in the Timis province of Romania on 20th July, 1972. She is from a large family of gypsy background and can not read or write. She arrived in this country illegally travelling in a truck with Ion Stancu, whom she subsequently married on 1st February, 2008 in Co. Louth.

The second named applicant is the daughter of the first named applicant, and was born in Limerick on 2nd April, 2000. Sara's birth was registered in the normal manner and an Irish birth certificate was produced. The name of the mother on the birth certificate was Sorina Cirpaci.

In the affidavit grounding the application for leave, the first named applicant deposes that in 2000 she believed Sorina Cirpaci to be her real or official name. In her community in Romania she had always been known by the nick name "Vandana". She had a birth certificate in the name Sorina Cirpaci which she took with her from Romania, but later discovered this was not her true name. Some months after Sara was born, she discovered that her real name was Maria Caldaras. In reality, "Sorina Cirpaci" was the birth name of a relative of the first named applicant who had lived in the same encampment in Romania, and she had been given the wrong birth certificate on leaving Romania. She deposes that her correct birth certificate was located by her mother in Romania and that she was granted a Romanian passport in her true name, Maria Caldaras, in September 2002.

Thereafter she successfully sought to regularise all her documentation with the Department of Justice and Equality, including *inter alia* her Garda National Immigration Bureau (GNIB) card, and these changes were effected by the relevant authorities without any difficulty. The first named applicant went on to have five further children in Ireland and her correct name was used on all of their birth certificates.

In September 2006, the first named applicant deposes that she experienced difficulty in getting an Irish passport for her daughter Sara because Sara's birth certificate showed "Sorina Cirpaci" to be the mother, not Maria Caldaras.

Accordingly, on 4th January, 2007 the first named applicant applied to the Office of the Registrar of Births, Deaths and Marriages in Limerick to have the mother's name on the second named applicant's birth certificate changed. In response, she received a request for a number of documents and DNA evidence to prove that the person now identified as Maria Caldaras was in fact the natural mother of Sara Stancu. All of this documentation, including DNA evidence, was provided by October 2007.

Some desultory correspondence between the applicant's solicitor and the Registrar General's Office ensued between 2007 and 2009. A number of different documents were requested, including a request for proof that the first named applicant's Romanian passport be "authenticated". This request was duly complied with. In the following years, further letters were sent by her solicitor to the Registrar General's Office, but no decision was forthcoming. Following a threat of judicial review proceedings, a decision finally issued on 4th July, 2012.

The respondent refused to amend the birth record, and in particular the inclusion of the incorrect name for the mother, on the basis that the register was a historical record of the correct facts at the time the record was created.

In relevant part the letter reads as follows:-

"I have considered the application in the light of all the evidence available. While I've no doubt that Sorina Cirpaci and Maria Caldaras are one and the same person, and that she is the mother of the child, as evidenced by DNA report, I am unable to conclude that there is an error in the register of births in respect of Ms. Caldaras. This conclusion is mainly based on the evidence of Ms. Caldaras herself and your letter to the Superintendent Registrar's Office in Limerick, dated 4th January, 2007, in which it is stated that Ms. Caldaras was unaware that her name was Maria Caldaras at the time of birth of her daughter. As Ms. Caldaras was using the name Sorina Cirpaci at the time of her daughter's birth, and believed this to be her true name, this is the name that should have been, and is, correctly entered in the Register of Births."

The Registrar General then proceeded to refer to certain passages from the judgment of McKechnie J. in *Foy v. An tArd Chlaraitheoir* (No. 1) [2002] IEHC 116, before concluding:-

"Owing to the nature of the Register of Births as stated in *Foy*, that is, to record the facts as they pertained on the date of birth of Sara Stancu, I am unable to accede to the request to amend the entry in the Register of Births as requested."

The leave application in the present proceedings was moved on 24th July, 2012, with the grounds upon which relief was sought being as follows:-

- (1) Section 65 of the Civil Registration Act 2004 permits the respondent to make an enquiry as to whether the particulars contained in a birth entry are correct and, if this is not the case, to proceed to amend or correct the entries.
- (2) In circumstances where the respondent has conducted an enquiry and accepts that Maria Caldaras (the first named applicant) is the mother of the child and that the name on the birth record, Sorina Cîrpaci, is not her true or real name, he has erred in law in finding that the birth record, including the wrong name for the mother, is a historical record of the correct facts at the time the record was created (2000) and cannot therefore be amended. Sorina Cîrpaci was never the true or real name of Maria Caldaras. However, she mistakenly believed Sorina Cîrpaci to be her true or real name at the time.
- (3) The respondent has acted in breach of the second named applicant's personal rights under Article 40 of the Constitution in failing to change the mother's name on the birth record to her mother's true name (Maria Caldaras) leaving the second named applicant in a state of "limbo" vis-à-vis the grant of a passport.
- (4) Further or in the alternative the respondent failed to have regard to the Article 8 ECHR Charter of Fundamental Rights of the EU "Private Life" rights of the applicants to have the correct name for the mother recorded in the birth record.

In his statement of opposition, the respondent asserts that he has, in accordance with the Civil Registration Act (As amended), made an enquiry as to whether the particulars contained in the Birth Register in relation to the second named applicant, the subject matter of these proceedings, were correct. Having concluded the said enquiry in accordance with law, the respondent determined there was no error contained in the particulars entered in the register and therefore no basis for amending or otherwise changing the entry in the register. The particulars entered reflected precisely the information submitted by the first named applicant on the birth of the second named applicant and in particular the name in use by the first named applicant, on her own admission. The Birth Register entry thereby recorded the correct historical facts pertaining to the birth of the second named applicant as they appeared on the date of her birth.

The statement of opposition also asserts that, at the time of issuing proceedings, no application had in fact been made to the Passport Office and accordingly the second named applicant had never been refused a passport, nor did the absence of a change to the Birth Register entry represent an impediment to the second named applicant's obtaining a passport to which she is entitled as an Irish citizen. The respondent contends that, in these circumstances, the present proceedings are misconceived, having been brought on the false premise that the second named applicant cannot obtain an Irish passport unless the Birth Register entry for her is changed by the respondent.

In this respect, the factual contentions of the respondent are borne out. An application for a passport for Sara Stancu was received on 2nd November, 2012 by the Passport Office on Molesworth Street through the standard post passport service. The passport was later issued to her on 13th November, 2012 in accordance with the terms of the Passports Act 2008.

Furthermore, the respondent relies on the evidence supplied by the first named applicant herself to argue that the appropriateness and correctness of the birth registration of her daughter derives entirely from information supplied by the first named applicant, who had used the name Sorina Cîrpaci when seeking to register Sara's birth and had also used the name in her asylum application. The respondent thus asserts that there was no error on the part of his office in the registration of the birth and contends that there are strong public policy reasons why the Register of Births should not be amended in such "dubious" circumstances, not least being the integrity of the system, the prevention of fraud and the effective policing of anti-terrorism measures. He contends that "changing the register in such circumstances would render the system open to abuse".

He further asserts that if the first named applicant chooses, for whatever reason, to subsequently use another name (i.e., Maria Caldaras) that that does not alter the fact that at the material time her name was actually Sorina Cîrpaci and thus the birth certificate is an accurate historical record. In his second affidavit he asserts:-

"I say and believe that this is equivalent to a situation where one changes one's name by deed poll under Irish law that would not warrant a change in the birth certificate of that person"

He further asserts that the fact that, while the first named applicant could legitimately effect a change to her name on other documentation, such as GNIB card, the law on the registration of births does not permit a change in registration simply because of a subsequent change of name by a parent.

RELEVANT STATUTORY PROVISIONS AND LEGAL AUTHORITY RELIED UPON BY THE RESPONDENT

The relevant legal provisions for effecting an amendment to the Register of Births are those contained in the Civil Registration Act 2004 and in particular the following sections:-

- "63.—(1) An alteration shall not be made in a register maintained under paragraph (a), (b) or (d) of section 13 (1) otherwise than in accordance with the provisions of this Act.
- (2) On the application in that behalf of a person having an interest in the matter to a Superintendent Registrar in writing, he or she may—
- (a) correct in the manner specified by an tArd-Chláraitheoir a clerical error in any register maintained under section 13 , or
 - (b) correct an error of fact in a register specified in the said paragraph (a) or (d) if the person gives to the Superintendent Registrar such evidence as he or she considers to be adequate and a statutory declaration, in a form standing approved by an tArd-Chláraitheoir, of the facts concerned made by—
 - (i) a person required by this Act to give to the registrar the required particulars in relation to the birth, or death, concerned, or
 - (ii) if such a person as aforesaid cannot be found, two credible persons having knowledge of the facts

concerned.

(3) Where an error of fact (other than one relating to the cause of death) occurs in the record signed by a coroner of the verdict returned at an inquest held by him or her and the coroner or his or her successor is satisfied by evidence on oath given orally or by statutory declaration of the existence of the error—

(a) he or she may give a certificate to a Superintendent Registrar stating the nature of the error and the relevant facts, and

(b) the officer shall, in such form as an tArd-Chláraitheoir may direct, correct the appropriate entry in the register of deaths and the original entry shall be retained in the register.

(4) On the application in that behalf by a person having an interest in the matter to an tArd-Chláraitheoir in writing a correction or addition to an entry in the register of stillbirths may, if an tArd-Chláraitheoir so directs, be made by but only by a person authorised in that behalf by him or her.

65.—(1) An tArd-Chláraitheoir may conduct or cause to be conducted such enquiries as he or she considers necessary to ascertain—

(a) whether a birth, stillbirth, death or marriage required to be registered under this Act or the repealed enactments in the register maintained under paragraph (a), (b), (d) or (e), as may be appropriate, of section 13 (1) has occurred and if it has—

(i) whether it has been so registered, and

(ii) if it has been, whether the particulars in relation to it in the entry in the register concerned are correct and complete.

(2) An tArd-Chláraitheoir may, by notice in writing served on a person whom he has reason to believe may be able to provide him or her with information relevant to an inquiry under subsection (1), require the person to provide the information to him or her within such time (not being less than 28 days) from the date of the giving of the notice and in such manner as may be specified in the notice.

(3) If an tArd-Chláraitheoir is satisfied that an event referred to in subsection (1) has occurred and that it has not been registered in the appropriate register referred to in that subsection or, if so registered, that the particulars in the entry in the register concerned in relation to it are incorrect or incomplete, he or she may register the event, or cause it to be registered, in the appropriate register or, as the case may be, correct or complete, or cause to be corrected or completed, the entry aforesaid."

DISCUSSION

There is no real dispute between the parties as to the jurisdiction of the Registrar General to correct an error in a register, including an error of fact, and to correct the particulars in relation to the entry.

The real dispute in this case centres on the proper interpretation of the relevant statutory provisions. It is quite clear that in this case, the Registrar General, in his decision, formulated his ruling by reference to the decision of McKechnie J. in *Foy v. An tArd Chlaraitheoir (No. 1)*. In his letter dated 4th July, 2012, the Registrar General stated:-

"The nature of the Register of Births was considered in detail in *Foy v. An tArd Chlaraitheoir*. In paragraph 101 of his judgment, McKechnie J. refers to the evidence of Mr. O'Cléirigh (former assistant registrar), as follows:-

"In Mr. O'Cléirigh's opinion the Register is a historical document recording facts and events in particular, not even to the date of registration but at the date of birth itself. It is intended to reflect such matters at a given time and is not seen as a document capable of recording later events in one's existence, such as marriage or death, or any other event irrespective of its importance. It is not an identity document. It is confined to the recording of particulars specified in and mandated by statute. Whilst in practice he concedes that, as with a variety of documents, it may have some uses in the obtaining of services, nevertheless its legal status is and remains that as described by him."

The Registrar General also relied on para. 170 of the judgment in which McKechnie J. stated:-

"I have no hesitation in immediately coming to the conclusion that the State on behalf of society has legitimate interest in having in place and in operating a system of registration dealing, *inter alia*, with births which may occur within this jurisdiction. Every modern society must be entitled to have a means of obtaining and thereafter recording vital particulars which surround the birth of its citizens and all others born in its country. The resulting register is a document of historical value, being current only at the date of birth and not beyond. It is no more than that. It is not a continuum record of one's travel through life or even of the most important and most significant events of that journey. It is, it has been said "a snapshot" of matters on a particular day and does not purport to be otherwise."

Counsel for the applicant makes two points in relation to the Registrar General's reliance on this decision. Firstly, the legal test for the correction of the register does not necessitate any finding of error or mistake on the part of the Registrar General or his staff. Rather, counsel contends, the legal test is whether the particulars contained in the register entry concerned are "correct and complete" or whether there is an "error of fact" in the register. The birth certificate in the present case is not correct and does contain an error of fact in that the mother is incorrectly identified as a different person. This is so notwithstanding that the Registrar General himself accepts in his decision letter of July 2012 that Maria Caldaras is the mother of the second named applicant, Sara Stancu.

More particularly, however, counsel on behalf of the applicant contends that the Registrar General has misinterpreted the provisions of ss. 63-5 of the Civil Registration Act 2004. He contends that the Registrar General's reliance on the first round of proceedings in *Foy v. An tArd Chlaraitheoir (No. 1)* is misplaced, because the facts of *Foy* were entirely different from those operative in the present case, having concerned the characterisation of a person's sex at the time of birth. The applicant in *Foy* was a transgender applicant

who had surgery in later life to effect a change from male to female.

DECISION

At the outset I should make clear that I regard as mistaken the submission advanced on behalf of the respondent that the issue before the Court is now moot by reason of the fact that a passport has been secured for the second named applicant. While the obtaining of the passport was a matter of importance to the first named applicant and may well have motivated the bringing of the proceedings, the applicant has a quite separate and legitimate interest in ensuring that accurate details of ancestry appear on her daughter's birth certificate. A practical example of this requirement for clarification is referred to at para. 9 of the second affidavit of Maria Caldaras in which she deposes to her belief that the birth certificate should be accurate

"... for reasons of inheritance, citizenship and, of course, the bureaucracy and hassle that the child may endure for the rest of her life with inaccurate information on her only birth record. Any form that Sara fills out that makes reference to the name of her mother/mother's maiden name, etc., may well be challenged when it is accompanied by a birth certificate with a completely different name for the mother. For example, when Sara recently changed schools due to her move to Drogheda, the school requested an explanation of who Sara's real mother and legal guardians were."

I am satisfied that neither of the applicants can be effectively deprived of *locus standi* to maintain these proceedings, simply because a passport has issued to the second named applicant. Without engaging in an unnecessary trawl through submissions filed in respect of personal rights in the context of correct registration, I am satisfied that both a parent and a child have the right to have the correct identity of the parent recorded in a child's birth certificate. In terms of the Irish Constitution, the "double construction rule" requires that statutory provisions be given an interpretation which allows for the personal rights of individuals to be respected. Furthermore, s. 2 of the European Convention on Human Rights Act, 2003 provides that in interpreting and applying any statutory provision or rule of law a court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

In this context, McKechnie J. in *Foy v. An tArd Chlaraitheoir (No. 2)* [2007] IEHC 470 considered whether he could apply the interpretative obligation under s. 2 of the Act of 2003 to the Civil Registration Act 2004. However, on the facts of that particular case (which involved a sexual change of identity in adulthood), he felt unable to hold that the section could extend to producing a meaning which was "fundamentally at variance with a key or core feature of the statutory provision or rule of law in question".

In that particular case an interpretation could not be applied *contra legem*, nor could it permit the destruction of a scheme or its replacement with a remodelled one. McKechnie J. thus concluded at para. 57 of his judgment:-

"In my view, the practice and legal position in this case, i.e., the use of consistent biological factors to determine the sex of a child for entry purposes, and the refusal to subsequently alter that entry in the case of a transsexual person, is so well settled and so rigidly fixed that the provisions of s. 2, in themselves, do not allow ss. 25, 63, 64 and 5 of the 2004 Act to be read as the applicant would suggest. It seems to me that no matter what method of interpretation is used to reach a contrary conclusion would involve the creation of a new or fundamentally altered scheme. This I feel I can not do. Accordingly, I believe the Registrar General was correct in his application of these sections and therefore the applicant can not succeed on this ground."

However, the issue in the present case is altogether different from that considered by McKechnie J. in the *Foy* cases. In those cases the Registrar General was entitled, for the purposes of registering a birth, to treat observable biological characteristics of the newborn as determinative of the "sex" part of the entry on the register. The fact that a person might subsequently in adulthood undergo gender reassignment surgery did not render the initial registration of the sex of the individual an "error of fact". For that reason, McKechnie J. held that the relevant sections of the Civil Registration Act 2004 did not allow for a retrospective amendment of the entry. No such difficulty exists in the present case. The historic fact that the plaintiff in that case had been born with the characteristics of one gender remained, as a historic fact, unchanged and "correct", even though the individual subsequently underwent gender reassignment surgery.

This is where I believe the Registrar General has fallen into error in the present case. The applicants do not seek to amend the entry so as to reflect any subsequent change in factual circumstances. There has been no such change. The mother's true name is, and was at all material times, Maria Caldaras. The name recorded on the birth certificate, Sorina Cîrpaci, is incorrect. This is so irrespective of whether the mother, at the time of the registration, thought that her name was Sorina Cîrpaci. The mother's mistaken belief cannot change a fact. It was never a "historical fact" that the mother's name was Sorina Cîrpaci.

I also accept and agree with the submissions advanced on behalf of the applicant that, if one follows the Registrar's argument to its logical conclusion, it would be difficult to conceive of any circumstances in which an "error of fact" could be corrected under the relevant sections of the Act of 2004. If, as appears to be suggested by the Registrar, an entry merely has to reflect the beliefs, albeit mistaken, of the parties as at the time of registration, and that the purpose of the register is simply to faithfully record the beliefs at that time, then there would be no basis for later correcting the register to reflect the true or actual position. It seems to me, and was submitted on behalf of the applicants by their counsel, that the Registrar General read into the legal test a requirement which is not there, i.e., that there must be a mistake on the part of the Registrar General or his staff before a correction will be made.

I am mindful of the considerations to which the Registrar General has regard in matters of this nature, particularly with regard to the integrity of the register and the pressing requirement to prevent fraud or other well known forms of mischief which could conceivably undermine the integrity of the register. That being the case, I feel there is a heavy onus on an applicant when furnishing information in this context to ensure its accuracy and not to approach the process in a casual or off-hand manner. Where mistakes occur, the cost of remedying such mistakes should normally be laid at the door of the person supplying the mistaken information.

Be that as it may, a period of some five years elapsed before the respondent finally issued a decision on this particular matter in 2012. It is far from clear to me why such a period of delay ever occurred and indeed no clear or coherent explanation for same has been offered to the Court on behalf of the respondent.

In all the circumstances, I am satisfied the applicant is entitled to the relief sought and to have the register amended accordingly.