



Australian Government
Migration Review Tribunal

Country Advice Pakistan

Pakistan – PAK36043 – Adoption –
Customary adoption – *kafala* – *Guardians*
and Wards Act 1890

28 January 2010

1 Please advise the situation in Pakistan regarding legal adoptions? Is there provision in the law for them?

Pakistan's legal system is based on the *shariah*, which does not recognise adoption in the legal sense – that is, to establish a parent–child relationship between individuals who are not related by blood. Consequently, there is no statutory provision for adoption in Pakistan. The following excerpt from *The Politics of Adoption* explains the tension between adoption and Islam:

Islam does not, strictly speaking, recognize the term 'adoption'. In most Islamic states, adoption as it is known in western nations is impossible. Any process that purports to alter family genealogy, to change the authentic identity of an individual and potentially disadvantage 'legitimate' children, is generally frowned upon in Muslim culture. Adoption in particular is anathema as it involves the permanent and absolute transfer of parental rights to adoptive parents, a denial of ancestry and falsifying of bloodlines.¹

(**Note:** The majority of citations in this research response are drawn from O'Halloran, K. 2009, *The Politics of Adoption: International Perspectives on Law, Policy & Practice*, 2nd edn, Springer, 22 January. The citations have been corroborated by other sources however O'Halloran provides the most comprehensive and up-to-date account of customary practice. The book dedicates an entire chapter to the adoption process in the Islamic context – a hardcopy is available from Country Advice–Sydney.)

Despite this, Pakistan law enables children to be placed under the guardianship of a suitable individual – as an alternative means of care. In 1994, the Pakistan government provided the following information concerning in-country adoptions, and the situation appears to remain current:

Adoption is not governed by any law in Pakistan/Islam. It does not mean that adoption is literally prohibited in Pakistan. Children in especial circumstances are placed under the guardianship of their near relatives or suitable person appointed by Court. In that case the children do not automatically adopt the parentage of their guardians. They will legally enjoy all social and economic rights except for inheritance of property from their guardian.²

(**Note:** The Pakistan government provided this information to the Committee on the Rights of the Child, in response to issues raised over its implementation of the UN Convention on the Rights of the Child.)

¹ O'Halloran, K. 2009, *The Politics of Adoption: International Perspectives on Law, Policy & Practice*, 2nd edn, Springer, 22 January, p.381 – Attachment 1

² Office for the UN High Commissioner of Human Rights, 1994. 'Reply to List of Issues: Pakistan: 24/01/94', UNHCHR website, 24 January
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/72953ec731e640b1c1256363004a5c29?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/72953ec731e640b1c1256363004a5c29?Opendocument) – Accessed 22 January 2010 – Attachment 2

2. Please advise the situation regarding customary adoptions? Are such processes available and if so, what are they?

In Pakistan, *kafala* defines a system of alternative care that could be considered a form of customary adoption. It provides a model of alternative care that – unlike legal adoption – preserves the blood ties between the child and its biological parents – an acceptable practice under Islam. An excerpt from *The Politics of Adoption* provides a definition of *kafala*:

Kafala is an Arabic legal term for a formal pledge to support and care for a specific orphaned or abandoned child until he or she reaches majority. A form of unilateral contract, it is used in various Islamic nations to assure protection for such minors, as these nations generally do not legally recognize the concept of adoption.³

Under *kafala*, children are placed under the guardianship of an individual – always the male in the case of a married couple – through either an informal or formal arrangement:

In Islam what can be termed adoption is at best an alternative care arrangement for a child whose parents have died or are unable to provide the necessary physical care, love and protection. Such children are then cared for by a set of parents or guardians who act as caregivers with the consent, whether written or verbal, from the natural parents or next of kin. Natural parents do not give up their parental rights. Instead, by mutual agreement, they make care arrangements with others for the upbringing of their child.⁴

Importantly, under *kafala*, adopted children have no inheritance rights and typically do not take on the family surname. This is due to the primacy Islam places on family relationships, parentage and lineage. However, adoptive parents may bequeath property rights on their adopted children, according to O'Halloran:

Islam places great importance upon respecting the inviolable integrity of the 'natural' family unit. While he or she [the child] has no inherent legal rights of inheritance in relation to their adopters, the latter may make arrangements during their lifetime to confer property rights on their adopted children.⁵

Kafala appears to take place without the state involvement in certain circumstances, for example between members of an extended family. Put by O'Halloran:

By far the majority of adoptions in Islamic states take the form of informal, long-term, first party, care arrangements (or *kafala*) within the child's extended family and, as there are no placement rights as such, the parties are essentially left to their own devices. In third party domestic adoptions, where all rights in respect of the orphan or abandoned child are vested in the designated government agency, the placement procedure is controlled by that agency.⁶

Kafala is also a practice that has UN recognition under the Convention on the Rights of the Child, to which Pakistan is a signatory:

UN Convention on the Rights of the Child

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering

³ O'Halloran, K. 2009, *The Politics of Adoption: International Perspectives on Law, Policy & Practice*, 2nd edn, Springer, 22 January, p.380 – Attachment 1

⁴ *ibid*, p.387

⁵ *ibid*, p.399

⁶ *ibid*, p.395

solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.⁷

3. It appears that the Guardianship and Wards Act 1890 governs custody of children in Pakistan. Is this relevant to either legal or customary adoption?

The *Guardians and Wards Act 1890* (originally promulgated under the British system) is relevant to customary adoption in that it formalises the guardian–ward relationship. Under the Act, the relevant district court can issue a guardianship order:

Guardians and Wards Act 1890

Article 7. Power of the court to make order as to guardianship

(1) Where the court is satisfied that it is for the welfare of a minor that an order should be made-

- (a) appointing a guardian of his person or property, or both, or
- (b) declaring a person to be such a guardian,

the court may make an order accordingly.⁸

(Note: The full text of the *Guardians and Wards Act 1890* is available at Attachment 4.)

The Act enables an individual to obtain legal guardianship of a child (a practice consistent with *kafala* but not mandatory). All sources appear to indicate that *kafala* can be done in conjunction with the state, but this is probably more common when an orphanage or third party is involved.

To obtain legal guardianship, an application must be submitted to the relevant district court for consideration. O'Halloran provides an overview of the judicial process in Pakistan:

Generally, domestic adoption arrangements in Islamic states proceed with a minimum of formality. ... In Pakistan, applicants may seek a guardianship order in respect of an orphan or foundling and, as a first step, will be assessed by government officials known as Deputy Commissioners. The assessment will take the form of a home study report accompanied by the usual references and an assessment of their eligibility and suitability to provide a home environment likely to safeguard the welfare of the child concerned. If approved, the child will then be transferred from an orphanage to their care and they will be vested with custody and guardianship rights. If the child's parents are known to the authorities, and the applicants wish to 'adopt', then they will have to enter into an irrevocable, bilateral, intra-familial agreement in writing in which the birth parent/s clearly waive any right to reclaim their child.⁹

Despite the availability of this process, the practice of *kafala* does not appear to stipulate a requirement to legalise guardianship. Moreover, O'Halloran notes that in '*Islamic countries, most domestic adoptions are first party informal care arrangements or kafala and are not necessarily endorsed by court orders.*'¹⁰ Jilani & Associates – a Pakistan-based law firm specialising in family law – also provides the following information:

⁷ Office of the UN High Commissioner for Human Rights 1990, *Convention on the Rights of the Child*, 2 September <http://www2.ohchr.org/english/law/crc.htm#art14> – Accessed 22 January 2010 – Attachment 3

⁸ 'The Guardians and Wards Act, 1890' 1890, Ministry of Women and Child Development, Government of India website, 21 March <http://wcd.nic.in/gawaact.htm> – Accessed 28 March 2009 – Attachment 4

⁹ O'Halloran, K. 2009, *The Politics of Adoption: International Perspectives on Law, Policy & Practice*, 2nd edn, Springer, 22 January, p.387 – Attachment 1

¹⁰ *ibid*, p.397

A guardian can be a de facto or a de jure one. Legal guardians and those appointed by the court are de jure guardians. A father is the natural guardian of a child under the age of 18 years under the GWA [*Guardians and Wards Act 1890*].

As opposed to a de jure guardian, a person, like the mother, brother, uncle, other relations except father and father's father, or an institution like an orphanage, may voluntarily place himself or herself in charge of the person or property of the minor; a mother, however, is the next possible guardian after a father, unless the latter, by his will, has appointed another person as the guardian of the child. She under certain circumstances can appoint a guardian by will. She can do so during the lifetime of her husband if he is incapable of acting; or after his death. A de facto guardian, as opposed to a de jure guardian, is merely a custodian of the person and property of the minor.¹¹

Consequently, it would be reasonable to expect that not all 'adoptions' are formalised in Pakistan. However, there is no information to indicate the extent to which either *de jure* or *de facto* guardianship is practised, nor is there any information to indicate which is preferred.

4. Please provide any other information which would shed light on how adoptions take place in Pakistan.

Relevant to the applicant, O'Halloran has provided some additional information on adoptions in Pakistan, indicating that the circumstances surrounding this particular case are not unique:

Fostering, in theory, is positively encouraged because it does not involve any transfer of parental rights nor does it obscure a child's identity. Indeed, there is always the possibility of such children being fostered by non-relatives. Childless couples (even foreign Muslim childless couples) may take in a child from an orphanage, or a 'spare' child from a large family, and then later, in another country, may adopt that child. In Pakistan, for example, as long as the child is to be brought up as a Muslim, the courts will agree to such arrangements and will give permission for the child to be taken abroad.¹²

Although in this case, the adoptive parents are related, the information at least indicates that large families do give up 'spare' children for overseas adoption and that Pakistan courts have agreed to such arrangements in the past.

List of attachments

1. O'Halloran, K. 2009, *The Politics of Adoption: International Perspectives on Law, Policy & Practice*, 2nd edn, Springer, 22 January
2. Office for the UN High Commissioner of Human Rights, 1994. 'Reply to List of Issues: Pakistan: 24/01/94', UNHCHR website, 24 January
[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/72953ec731e640b1c1256363004a5c29?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/72953ec731e640b1c1256363004a5c29?Opendocument) – Accessed 22 January 2010
3. Office of the UN High Commissioner for Human Rights 1990, *Convention on the Rights of the Child*, 2 September
<http://www2.ohchr.org/english/law/crc.htm#art14> – Accessed 22 January 2010

¹¹ Jillani & Associates, *Law of Guardianship in Pakistan*, Jillani & Associates website
http://www.jillani.org/LAW_OF_GUARDIANSHIP_IN_PAKISTAN.doc – Accessed 22 January 2010 – Attachment 5

¹² O'Halloran, K. 2009, *The Politics of Adoption: International Perspectives on Law, Policy & Practice*, 2nd edn, Springer, 22 January, p.384 – Attachment 1

4. 'The Guardians and Wards Act, 1890' 1890, Ministry of Women and Child Development, Government of India website, 21 March
<http://wcd.nic.in/gawaact.htm> – Accessed 28 March 2009
5. Jillani & Associates, *Law of Guardianship in Pakistan*, Jillani & Associates website <http://www.jillani.org/LAW OF GUARDIANSHIP IN PAKISTAN.doc>
– Accessed 22 January 2010