



**Monthly Review N° 7/2009  
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EDITORIAL

**How to strike a balance between the right to respect the private and family life and the protection of the child's interest in adoption? **

*The adoptee's rights and those of his biological parents on the one hand, as well as those of his adoptive parents on the other can sometimes lead to conflict. It then becomes a matter of seeking solutions that respect the needs and rights of all concerned parties with those of the child as a priority.*

**T**he right to respect the private and family life and the principle of the child's best interest are protected by the majority of international and regional legal instruments. They might, however, come into conflict in their adoptive relationships particularly because of their broad concept and the absence of a clear definition. As the article on p.3 shows, the legal system of the regional courts, such as the European Court of Human Rights can be a valuable guide for striking a balance between these sometimes

divergent rights. The professionals in the field also have a major role to play in finding solutions that respond to the needs of all those involved in the adoption triangle (the child, the adopters, and the biological family).

**The best interest of the child and the right to respect the biological family's private and family life.**

It is now widely recognised that the search for origins is often fundamental for numerous adoptees and can become a key stage in their quest for an identity. Under these

conditions a refusal of contact on the part of the family of origin can be very sensitive to handle and could prove to be destructive for the adoptee. However, by virtue of the right to respect the private and family life, these families have the right to not want to be found again or even contacted. For example some mothers or families have no wish to revive the past because of the surrounding taboo or the sharp suffering that the incident can revive. There are also cases where the mother has completely hidden the abandonment from her family and cannot divulge the secret, sometimes for her own security and that of her family

In these conditions how can we strike a balance between the rights of the different people involved? It is often a matter of dealing with the situation on a case by case basis and as far as possible with recourse to a professional multidisciplinary team, capable of striking a balance for all those involved.

#### **A response adapted to every case.**

In cases where the mother's safety and /or that of her family is in danger, a renewal of contact is naturally very difficult to consider. However in many other cases, it is possible to work with the family of origin in order to gradually change their mind-set and to reach a compromise.

When there is a categorical refusal other solutions can be envisaged, like for example, sending unidentified information to the adoptee about the conditions of his birth and of his abandonment, the context of his adoption etc. In more and more frequent cases, it is the biological family who are trying to renew contacts with the adoptee. These cases raise, once again, the question of striking a balance of rights. Here too it is certainly the wishes of the child that must be decisive (in whether or not) to make contact. To neglect a refusal can create a brutal shock for the child and must be avoided. A training course is also recommended before contact is made.

Even more sensitive cases can crop up if the adoption was distorted by irregularities

and when a few years later, the biological family asserts its rights to see or even take back the child (see article p.3). Here too it is a matter of understanding to what extent such a renewal of contact, or even a return to the family of origin, might respond to the child's best interest. Yet other alternatives may be envisaged, like a gradual reestablishment of ties by sending letters, organising visits etc. But in this type of environment, the view of the adoptive family is of course crucial with regards to the possibility of undertaking whatever steps might be necessary.

#### **The interest of the child and his right to respect for the private life of the adoptive family.**

The child's interest might also turn out to be contrary to that of his adoptive family. Follow-up reports required for long periods can be considered too intrusive. The adoptive family being legally responsible for the child in just the same way as a biological family, they can be reticent to being subject to a form of control until the child reaches majority. This reticence can be understandable, even if the follow-up itself has not been called into question.

The question of follow-up reports must also take into account everyone's interests. A reasonable length of time should be acceptable for the follow-up in countries of origin (between 2 and 4 years). This compromise would make it possible to ensure the child's sound integration in his new environment and should reassure the country of origin about the child's welfare, without the task being too heavy for the adoptive family (as well as the social services responsible for the reports).

#### **The search for a fair balance**

Whatever it may be, every case must be considered in its context and shouldn't be anticipated in a general manner. The needs of the child must be assessed for what they are according to his life style and with respect for international principles.

The ISS/IRC Team

#### **ACTORS IN MATTERS OF ADOPTION**

Source: Permanent Bureau of the Hague Conference: [http://hcch.e-vision.nl/index\\_en.php?act=conventions.authorities&cid=69](http://hcch.e-vision.nl/index_en.php?act=conventions.authorities&cid=69).

- **Ecuador, Germany and Latvia:** These countries have updated the contact details and persons within its Central Authority


### **Peru: suspension of dossiers from countries that are not accredited**

The Peruvian Central Authority has seen the necessity to suspend the demand for intercountry adoptions starting from this year. This decision was taken after the demand became too large which resulted in disequilibrium between prospective adoptive parents and the number of children with adoption plans as well as long delays in processing. The Central Authority also adopted this decision in an effort to better uphold the principle of subsidiarity given that the adoption culture has developed well at the national level. Only accredited countries that already collaborate with the National Adoption Secretariat will be able to submit dossiers (Germany, Belgium, Spain, Canada, Italy, Denmark, Scotland, France, Luxembourg, Malta, Norway, Switzerland, Israel and certain countries from South America).

Source: [http://www.mimdes.gob.pe/sna/inform\\_adop\\_internacional.htm](http://www.mimdes.gob.pe/sna/inform_adop_internacional.htm) and [http://www.mimdes.gob.pe/sna/adopcion\\_internacional.pdf](http://www.mimdes.gob.pe/sna/adopcion_internacional.pdf)

## LEGISLATION

### **The right to respect the family life and the child's best interest: the responses from the European Court of Human Rights in cases of conflict.**

*The analysis of the European legal system brings to light a purely legal vision of the protection of the child, forgetting that the latter is also changing within a social structure.* 

**A**s this month's editorial emphasises, the protection of family life and the best interest of the child are widespread principles, and it is often incumbent upon the legal system to lay down the law in cases for which literature can only give very blurred answers. A recent judgment of the European Court of Human Rights (ECHR) has shed new light on the scope of the right to family life (see Todorova judgment below), but before turning to this judgment, it is worth defining the implications of the right to family life.

#### **Family ties according to the Court**

If the desire to begin a family is not protected as such by the right to respect family life, the notion of family ties applies to other cases than that of legitimate families, according to the judgments of the Court *Pini and others vs Romania*, *E.b. vs France* and *X, Y and Z vs the United Kingdom*.

In this context the notion of the family is not merely limited to marital relationships but can include de facto relations that exist between the child and his parents. That makes it possible to protect the child and to keep him in his family, even if he was born out of wedlock or has not been recognised or has been adopted.

The relationship between the adoptive parent and the adopted child is then equally protected, on the condition that there be proof of the existence of a family or a potential relationship between interested parties.

Thus, the point of view and the interests of the biological or adoptive family of the child must be taken into account by the local authorities. Elsewhere, there is a certain margin of appreciation for related questions that could be referred to as the «sovereign rights» of a country such as for example the authorisation or not of adoption by single persons or by homosexuals (judgments *Keegan versus Ireland* and *Fretté vs France*).

#### **Conflict between the legal and the social approach by the Court in interpreting the best interest of the child**

Despite the difficulty of deciding what will be best for the child, the biological family link should in principle be given preference in the context that it permits children to grow up with their parents. Nonetheless, in certain special cases, the social reality dictates alternative measures in order to preserve the child's best interest. The aim of such measures is to ensure that the child is not prevented from benefiting from legal

protections and integrating himself in his adoptive family as well as his new country. It is then a matter of awarding him the most favourable legal status.

In this sense, in *Wagner and JMWL vs Luxembourg* judgment (inter-country adoption of a Peruvian child by a Luxembourg national) the Court believed that it was appropriate to apply the law which enabled the best possible protection of the child's interest. It emerged that the search for the most optimal solution should not be limited to a strict application and reading of the black letter law. That would run the risk of ousting consideration of the social aspect of the case, and in so doing not respond at best to what the child's best interest call for.

For example the European Court of Human Rights rendered on 13 January 2009 a judgment for *Todorova vs Romania* leaning towards maintaining the biological family ties. The Court decided that there was a breach of article 8 European Convention on Human Rights because of the exclusion of the claimant (ie: biological mother) from the procedure that led to the successful adoption of her twins. In fact, the view of the claimant had not been asked for before the declaration of adoptability, 27 days after the birth of her children, even though she had asked to be heard, having begun to doubt her choice of abandonment.

The Court believed that in the present case dealing with family ties had consequences of extreme importance. Moreover the Court found that the State had misunderstood its obligation to ensure that the consent given by the claimant to the abandonment of her children was explained and covered by adequate guaranties. In making this decision the Court considered that the procedure followed had prevented the claimant from protecting her right to lead a private and family life. The Court could not ignore the potential relationship that might have developed between the claimant and her children if she had had the chance to bring her choice before the tribunal on another occasion.

However one should ask about the interests of the claimant's children, who had been adopted 4 years earlier. At the time of the decision, the court's solution of returning the children to live with their biological parents, even if it was a legal priority might not have been the best option. Perhaps an alternative combination should have been considered that includes the interest of the child and the rights of the biological parents, while taking into account the interests of the adoptive parents?


### **Solomon's judgement**

Cases where there are conflicts between biological and adoptive families cannot be solved by a purely legal analysis, and one can only regret that the ECHR has not provided more room for the real circumstances of children and the implications that this decision is going to have on their development and their future life. This type of problem runs the risk of imposing itself more and more in the future especially when generations of adoptees become adults and question the conditions of their adoption. But if justice is believed to be blind, the "choice" between two families is an extremely complicated task that requires more than a legal approach. In this context, we find the parable of King Solomon becoming a reality.

See CRC 1989 (articles 10 and 16); THC-93 ; the European Convention to safeguard Human Rights and basic freedoms of 04/11/1950 (article 8) ; The African Charter of Human Rights and of the people (article 18), the African Charter for rights and the welfare of the child (article 10), The American Convention on human rights (article 11), The international pact on civil and political rights (articles 17 and 23), the United Nations Convention on the protection of the rights of migrant workers and of members of their family (article 14), the Declaration of the General Assembly of the United Nations of 3 December 1986 ; The European Court on human rights : *Keegan versus. Ireland* 26/05/1994, *R. versus the United Kingdom* 08/07/0987, *Fretté versus France* 26/02/2002, *EB versus France* 22/01/2008, *Pini and others versus Romania* 22/06/2004, *Wagner and JMWL versus Luxembourg* 28/09/2007, *Todorova versus Italy* 13/01/2009 (the judgement is available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=todorova&sessionid=23222271&skin=hudoc-f>)



## Committee adopts General Comment 12 on the right of the child to be heard

*The UN Committee on the Rights of the Child (Committee) elaborates the rights of the child to be heard by preparing General Comment 12, which outlines their views on the subject in 28 pages.* 

In May 2009 the Committee adopted General Comment 12 which aims to strengthen the understanding of article 12 Convention on the Rights of the Child which deals with the rights of the child to be heard. The other objectives of the General Comment are to elaborate the scope of legislation, policy and practice as well as highlight positive approaches with respect to article 12. The Committee recognises that the right to be heard can be broadly conceptualised as 'participation', although the word itself is not mentioned in article 12.

### Participation in alternative care situations

General comment 12 addresses participation in the context of separation from parents and alternative care in paragraphs 53 and 54. For example, the Committee recommends that 'the child's views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family.'

The participation of the child in the context of adoption and kafalah are dealt with in paragraphs 55 and 56 of General Comment 12. The Committee emphasises that when a child is to be placed in either of these situations, their best interests must be the primary consideration. The Committee further 'urges all States parties to inform the child, if possible, about the effects of adoption, kafalah or other placement, and to ensure by legislation that the views of the child are heard.' This recommendation mirrors article

4(d)(2)THC-93 and the requirement that 'consideration has been given to the child's wishes and opinions'.

General Comment 12 also lists a variety of examples in paragraph 97 of how to implement the right to be heard in alternative care settings. This includes developing legislation to provide children with information about their options in alternative care, the establishment of a competent monitoring body where the child's views and concerns can be heard and the introduction of representative councils within institutions where children have the mandate to participate in the development of policies and rules. The ISS/IRC has showcased various other participation practices across the globe in alternative care settings in the Monthly Review 1/2009.

### Welcomed advance for children's rights

The ISS/IRC welcomes General Comment 12 as a means of giving meaningful and practical effect to the 'participation principle' which is viewed as one of the four pillars of the Convention. General Comment 12 clarifies that article 12 does not give children the definitive decision making authority but rather it reinforces the notion that they should be given the opportunity to participate in important decisions such as where they should live and with whom.

### Source:

<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

## INTERDISCIPLINARY RESOURCES

### Siblings in Adoption and Foster Care: An innovative book published

*A new book edited by Deborah Silverstein and Susan Livingston Smith has recently been published dealing with the separation(s) of siblings in alternative care and how and when such relationships should be preserved.*

When children are deprived of their family, alternative care solutions are limited and even more so, in the case of options that adequately meet the needs of sibling groups. The new book 'Siblings in Adoption and

Foster Care' addresses a number of vital issues relating to the placement of siblings, the importance of maintaining their ties as well as raises questions that encourage the reader to rethink certain assumptions.

## **Definition of sibling**

As part of the introduction, the authors deal with the definition of sibling, a not so easy task. Traditionally the definition is limited to two people with at least one biological parent in common. However given complex societal developments, this definition could be extended to two people who have lived in the same family without having biological ties (eg: foster siblings), biological cousins who are being raised by a grandparent and even perhaps two people who were conceived with the same sperm by an anonymous donor.

The authors aim to answer such conceptual questions by using the 'attachment theory' to guide definitions and decisions about siblings. The authors claim that it is important to identify whether there is a particular attachment to an individual person, recognising each persons need to belong.

## **Placement of siblings**

The book further deals with the timely placement of children and the conflict that professionals may face in this regard. These conflicts include whether professionals should wait till they can find a family that is willing to care for multiple children, let alone a family that has the capacity for such a task. The daily struggles of professionals can also include making decisions that may be in the individual interests of one child, but not necessarily that of the 'sibling' group, such as cases of abuse and violence. A number of programs are mentioned in the book to encourage the preservation of sibling relationships as well as practices to help siblings keep in contact, if it is not in their best interests to live together. For example, if siblings are separated, placement should be in the same geographical vicinity. If there is separation due to conflict, family or conjoint therapy should be implemented to address the problematic source as opposed to having

only individual therapy, to prevent the message being sent that conflict is best solved through separation and avoidance.

## **Some guidance for adoption of siblings**

A number of chapters are relevant to adoption practices, especially intercountry adoption, where biological siblings may exist or new sibling groups are formed. The book includes specific chapters on how to develop healthy sibling relationships, sibling adjustment reunion, and practice strategies to preserve sibling relationships.

A chapter is dedicated to the adoption of children from different families with varying levels of contact with the biological families. The documented research presented in the book can be used to help families anticipate issues that may arise with multiple adoptions (eg: why only one child has contact with biological family and another does not) and identifies helpful boundaries that can be put in place with biological families. The authors encourage professionals to work with adoptive families and children to define their family as including those who may neither have biological or legal ties with the child but may be part of the 'adoption kinship network' in order to cultivate such relationships.

## **Essential reading**

The ISS/IRC recommends this book as a must read for all professionals, families and others working with 'siblings'. It is a good resource that helps raise awareness of the key issues relating to adoption and fostering of sibling groups, as well as provides some practical examples of strategies to promote such relationships.

The book is available from Praeger Publishers [www.praeger.com](http://www.praeger.com), titled Siblings in Adoption and Foster Care (2009), Deborah Silverstein and Susan Livingston Smith (editors)

## Lobbying for the adoption of the Guidelines at the UN General Assembly

*In an effort to help individuals and groups lobby relevant Government Ministries as well as the Permanent Missions based in New York, to adopt the Guidelines for the Alternative Care of Children a few tools have been prepared.*

**W**hilst the latest resolution A/HRC/11/L.11 at the Human Rights Council is a major step forward (see Monthly Review 6/2009), more work and lobbying needs to be undertaken to encourage the final adoption of the Guidelines for the Alternative Care of Children at the UN General Assembly at the end of this year.

### **Fact sheet and letter**

A lobbying tool that has been developed is a one page 'fact sheet' that explains the necessity of the Guidelines as well as a short background of the process to date. This fact sheet can be accessed at the International Social Service webpage at <http://www.iss-ssi.org/2009/index.php?id=25>. In addition a model letter has been drafted that could be sent to the relevant Ministries in the concerned country as well as to Missions in New York. To find the address of the Permanent Mission representing the relevant country in New York, please see <http://www.un.org/en/members/index.shtml>.

This letter could also be signed by children and others involved in the care system as a type of petition, placing pressure on Governments to act in a positive manner. To access statistics about a particular region or country, please see the UNICEF webpage at <http://www.childinfo.org/statsbycountry.html>

### **Model Letter**

**DATE** (LETTER MUST SENT BE BEFORE OCTOBER 2009)

Dear **INSERT NAME**,

On June 17, 2009 the Human Rights Council (HRC) adopted by consensus a procedural resolution A/HRC/11/L.13 submitting the "Guidelines for the Alternative Care of Children" to the United Nations General Assembly (UNGA) in NY for consideration with a view to their adoption on the 20th anniversary of the UNCRC in November 2009. Over 40 countries co-sponsored this resolution showing their clear endorsement for the Guidelines, support which is strongly shared by the UN Committee on the Rights of the Child, UNICEF and civil society. Further information about the Guidelines is enclosed with this letter (**ATTACH FACT SHEET**).

There are millions of children in the world that would benefit from these Guidelines if they are adopted, not to mention the **INSERT STATISTICS** in **INSERT NAME OF STATE** who are in need of alternative care. While the UNCRC recognises the child's right to be cared for by his or her parents, and sets out States Parties' obligations to provide suitable alternative care, current international instruments offer only partial and limited guidance on steps to prevent separation and to ensure adequate care. The support of **INSERT NAME OF STATE** is critical to ensuring that children's rights are fully protected.

We would like to encourage **INSERT NAME OF STATE** to adopt the Guidelines for the Alternative Care of Children at the UNGA in 2009. It would also be worthwhile for you to consider what role you might play in mobilising support amongst members of the UNGA.

If you would like to discuss the Guidelines further, you can contact a representative of **NAME OF YOUR ORGANISATION OR ONE OF THE CO-CONVENORS OF THE NGO WORKING GROUP ON ALTERNATIVE CARE**.

Sincerely,  
**INSERT NAME**

**Source:** For A/HRC/11/L.13 and text, see [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/11/L.13](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/11/L.13)

### **Celebrations for the 20<sup>th</sup> anniversary**

Another way to lobby for the Guidelines is through aware raising activities. Given that many organisations are in the process of planning for the 20<sup>th</sup> anniversary of the UNCRC, it may be worthwhile to include an activity about the Guidelines as part of the celebrations. The Child Rights Alliance England (CRAE) has developed the UNCRC Anniversary Packs which are being sent electronically to schools and other interested

persons. The Anniversary Packs include ideas for schools, children and adults, which could be adapted to include information about the alternative care situation of children in a specific country or in the world. Such activities could be used as a means of introducing the Guidelines and reinforcing their necessity.

### **Further information**

If you would like further information about lobbying initiatives in New York or in your region, please feel free to contact the co-convenors of the NGO Working Group on alternative care spearheading the initiative, Alan Kikuchi-White, Geneva Representative,

SOS-Kinderdorf International at [KikuchiA@sos-kd.org](mailto:KikuchiA@sos-kd.org) or Mia Dambach, Children's Rights Specialist, International Social Service at [irc-cir@iss-ssi.org](mailto:irc-cir@iss-ssi.org). The co-convenors will also be able to provide some information about possible implementation tools for the Guidelines. It would also be great if you could let the co-convenors know of any initiatives that you have or will undertake to promote the adoption of the Guidelines as a means of collating information to be shared with other advocates.

Source: <http://www.crae.org.uk/news-and-events/news/unrcr-anniversary-packs-for-schools.html>

### FORTHCOMING CONFERENCES, SEMINARS, SYMPOSIA AND COURSES

- **France:** a) *Les liens parents-enfants en accueil familial à temps complet* (Ties between parent-children in full time foster families) COPES, Paris, 24-25 September, 15-16 October, 12-13 November et 10-11 December 2009; b) *Législation et procédures de l'adoption interne et internationale, en France* (Legislation and procedure : domestic and intercountry adoption), COPES, Paris, 5-9 October 2009. More information: [www.lecopes.org](http://www.lecopes.org); c) *Les séparations en pouponnière: l'arrivée et le départ d'un enfant* (Separation in institutions for toddlers: the arrival and departure of a child), Association Pikler Lóczy, Paris, 5-7 October 2009. Run by a psychologist, this session is aimed at understanding, anticipating and treating the reactions of the child when s/he arrives at the institutions for toddlers and the effects on their development. For more information: <http://www.pikler.fr/activites/ficheformation.php?n=1&fiche=187>
- **Lithuania:** *Keeping the door open – Support to young people leaving care*, organised by the Council of Baltic Sea States and the Lithuanian Ministry of Social Security and Labour, in partnership with the Council of Europe and SOS Children's Villages International, Vilnius, 7-8 October 2009. The conference will focus mainly on the emotional stability, social wellbeing, education, employment and housing for the young people leaving care. Time limit for the submission of proposals for paper presentations: 4 September. A youth workshop will be organised from 4-6 October. For more information: <http://www.crin.org/resources/infoDetail.asp?ID=20517>.
- **United Kingdom:** *Contact Arrangements for children who are fostered & adopted*, Family Future, London, 26 September 2009. This course will look at ways of making contact safe, meaningful and therapeutic for all parties. For further information and application form, contact: Joanne Collett, Training Services Co-ordinator, [joanne@familyfutures.co.uk](mailto:joanne@familyfutures.co.uk).

*As a reminder, this Monthly Review is distributed to a selected network of Authorities and professionals. It is not aimed at being posted on an internet website without the authorisation of ISS/IRC.*

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[www.iss-ssi.org/Resource\\_Centre/Resource\\_Center\\_EN/About\\_ISS-IRC/about\\_iss-irc.html](http://www.iss-ssi.org/Resource_Centre/Resource_Center_EN/About_ISS-IRC/about_iss-irc.html). See Activities.

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