



**Monthly Review N° 6/2006
June 2006**

The Reviews for July and August 2006 will be sent to you in a double edition at the end of August.

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EDITORIAL

Adoption by nationals residing abroad: a mind-boggler for private international law 

When people living outside their country of origin adopt a child from this same country, it frequently happens that national regulations are inconsistent with those at the international level, particularly the Hague Convention of 1993 (HC-1993). If the responses vary according to the situation, the best interests of the child, here too, should be the primary consideration.

Since numerous communities resulting from immigration are now well-established in their receiving societies, it is increasingly frequent to see their nationals initiate procedures for adopting a child from their country of origin. This situation raises several sensitive issues, as much in the application of international law

as in the safeguard of the child's best interests.

Different situations

When foreign candidates for adoption wish to adopt in their country of origin, it is first of all a matter of determining whether or not this country and the future receiving State have ratified the HC-1993.

If this is not the case, the usual norms of international law in the two countries involved will obviously apply, even though it is worth remembering that the Special Commission on the practical operation of the HC-1993, convened by the Hague Conference on Private International Law from 28 November to 1 December 2000, recommended that Contracting States “as far as practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-Contracting States”.

The HC regulations should be followed if the latter is in force in both countries, but even in this case, exceptions might arise. Indeed, it is not unusual for States of origin to consider that an adoption in favour of their nationals domiciled abroad, must be subjected to the domestic procedure, thus favouring the nationality of the adopters as a determining criterion.

However, the HC, in its article 2, paragraph 1, states that “the Convention shall apply where a child habitually resident in one Contracting State (“the State of origin”) has been, is being or is to be moved to another Contracting State (“the receiving State”), either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin”.

The determining criterion in the HC-1993 is clearly the habitual residence of the parties, as well as the transfer of the child from one country to another, and not the nationality, which therefore has no role to play in the processing of intercountry adoptions. From now on, how can these two antinomic criteria be reconciled?

Domestic or intercountry adoption?

To describe an adoption as domestic or intercountry falls within the sovereignty of each State. It is *per se* understandable that a State would, at the same time, like to offer its adoptable children a family stemming from their own country and to support its nationals abroad by allowing them to proceed down the domestic adoption path, which is often less complicated and faster (if only by avoiding the intercountry adoption waiting lists). Nonetheless, in ratifying international texts, States also commit themselves to applying the principles which they embody, unless an explicit mention of a reservation on this subject

has been made. In fact, the HC-1993 is clear in its definition of the intercountry nature of adoption, and, furthermore, does not authorise reservations (art. 40).

Application of the fundamental principles

Although it is not an easy matter to determine whether the requirements of the HC-1993 must be respected in the above-mentioned situation, several arguments plead in favour of the application of the minimum principles of the HC. These principles are in fact those enshrined in article 21 of the Convention on the Rights of the Child, text whose near universal ratification guarantees each child the respect of his/her rights. On this basis, it is a matter of answering in particular, the following questions:

- is the child adoptable?
- has the principle of subsidiarity been respected?
- does “intercountry” adoption respond to the best interests of the child?
- have the biological parents freely given their consent?
- is the procedure free from all improper financial gain?

When it faces this kind of adoption, the receiving State must be able to request guarantees relating to the respect for these fundamental principles from the State of origin. Even if these steps do not exactly conform to those of the intercountry procedure, it is essential that these elements appear in the file, as much in the interests of the child as for legal safety.

Recognition

The application of the domestic adoption procedure to nationals living abroad also deprives the persons concerned of the effects of article 23 of the HC-1993, which provides for full legal recognition of adoptions made in accordance with the HC. Upon its arrival in the receiving country, the adoptive family will therefore have to take the necessary steps to obtain recognition of the domestic adoption made in the country of origin, without having the benefit of often well-practiced procedures based on the HC.

Good cooperation

To the extent that the HC-1993 insists upon close cooperation between Contracting States, Central Authorities must bring everything into play in order to manage these procedures to their best. It is, for example, useful for the

national Central Authorities of the countries involved to establish contact with each other so as to inform themselves of this type of procedure and, possibly, to formalise its use – on the basis of article 39, paragraph 2 of the

HC for example – in the best of interests of the child and in respect of the rights of everyone.

The ISS/IRC team

IRC NEWS

- **Intern at the ISS/IRC** 

Bénédicte Billion, who is currently studying for her Degree in Trilingual Economist Jurists, will undertake an internship within the ISS/IRC during the months of June and July. This internship will enable her to expand her knowledge of the rights of the child at the international level, as she will contribute to the development of the country situation database and assist the team with the preparation of the Monthly Review.

- **Project on distance training and exchange of experiences: New Fact Sheets on the ISS/IRC website**



Two new Thematic Fact Sheets (N° 12 and 13) have been issued. They address the issue of temporary protection measures, including the opening of a lifebook, and institutional placement, which must be provisional other than in exceptional circumstances. All Fact Sheets are available on the ISS/IRC website: http://www.iss-ssi.org/Resource_Centre/Tronc_DI/tronc_di_fic.html.

PROTAGONISTS

The Agence Française pour l'Adoption has been inaugurated

Prospective adoptive parents now benefit from a "third way", namely independent adoption while benefiting from the support of the AFA. The latter's mission is to inform, advise and act as an intermediary in the adoption of foreign minors who are under the age of 15.

The *Agence Française pour l'Adoption* (AFA; French Adoption Agency) was inaugurated on 18 May. A governmental body under public law, the AFA offers a "third way" for French adoption candidates. The latter no longer just have the choice between adoption through an accredited adoption body (AAB) and independent adoption. They are now able to turn towards a midway solution, namely an individual adoption process supported by the AFA. The latter acts as a sort of public AAB, as its functioning fees are borne by the State and the *Conseils Généraux* (Departmental General Councils). The candidates bear themselves the fees inherent to the adoption procedure. However, contrary to a private AAB, the AFA operates no selection and offers its help to all families holding a decision on their suitability and who wish to make use of it as an intermediary.

Commissioned to inform and advise as well as to function as an intermediary

As enshrined in the Law of 4 July 2005 on the adoption reform, the new agency is commissioned to inform, to advise and to act

as an intermediary in the adoption of foreign minors under 15 years of age. Specifically, its charter commissions it, particularly, to develop local information and assistance thanks to the departmental correspondents made available to it via the adoption services of the *Conseils Généraux*. The latter organise information meetings, if they so wish, in partnership with the AABs and Family Associations and provide candidates with a booklet of advice on adopting abroad. The AFA's website¹ also provides updated information.

In addition to its function as information provider, the AFA offers its support, in association with the *Conseils Généraux*, in setting up files for the families who wish to undertake individual adoption proceedings abroad. It also puts a local correspondent to the latter's disposal in certain countries of origin. It, however, does not conduct any matching. When the adopters are back in France, the AFA helps them, in collaboration with the *Conseils Généraux*, to meet their obligations in relation to follow-up reports on the children, for the countries of origin.

The AFA, thus, assumes, amongst other things, the general information functions of the

Mission pour l'adoption internationale (MAI; Mission for Intercountry Adoption) as well as its management role in individual adoption procedures in HC-1993 Contracting countries. In due course, the MAI will, for its part, be replaced by a new structure within the Ministry for Foreign Affairs: the Secrétariat général de l'Autorité centrale pour l'adoption internationale (General Secretariat of the Central Authority for Intercountry Adoption). It will mainly be responsible for bilateral relations between States in matters of adoption, for the supervision of AABs, and for authorising the granting of adoption visas, i.e. everything which falls under the responsibility of the State in the framework, particularly, of the application of the HC-1993.

China: AFA's first field of action

At present, the AFA is only active in assisting with adoptions in China. It envisages to take on responsibility for adoption requests in other countries having ratified the HC-1993 (Brazil, Burkina Faso, Colombia, Madagascar and the Baltic States) from September 2006. For countries which have not ratified the HC-1993 (Russia, Vietnam, Haiti...), their date of opening will depend on the time required for the AFA to obtain accreditation from these countries. Amongst these, one of the first to

open up should be Cambodia, with which France has recently signed a protocol of administrative cooperation on the coordination of adoption application procedures before the Cambodian authorities and the subsequent requests for visas for the children. The aim of the Ministry of Foreign Affairs and the AFA is for this agreement to be operational as soon as possible in order to enable the first children to join their adoptive families early 2007.

Not increasing the pressure on countries of origin

The establishment of the AFA offers support to adoption candidates and thereby wishes to respond to their numerous requests. It should also allow for a reduction in the risks associated with independent adoptions, which, in France, represent more than 60% of intercountry adoptions. It would, however, be desirable that the creation of such an agency does not contribute to increasing the pressure which is already borne by the countries of origin due to the imbalance between "supply" and "demand" of adoptable children (see Monthly Review 5/2006). Once again, it is the best interests of the child which must remain the priority in any adoption process.

¹ www.agence-adoption.fr

PROTAGONISTS IN MATTER OF ADOPTION

Source : Permanent Bureau of The Hague Conference : http://hcch.e-vision.nl/index_en.php?act=conventions.authorities&cid=69.

- **Australia:** This country has amended its accredited body for South Australia.
- **Philippines:** This country has named its Competent Authority: Philippines Inter-Country Adoption Board; # 2 Chicago Corner Ermin Garcia Streets; Barangay Pinagkaisahan Cubao, Quezon City; Tel: +63 (2) 721 9781/2; +63 (2) 721 9790; +63 (2) 726 4568; or +63 (2) 726 4551; Fax: +63 (2) 727 2026; E-mail: icaba@skynet.net; www.skynet.net/~icaba/; Contact: Ms Louna T. R. Laraya, Executive Director.
- **Poland:** This country has updated the particulars of its Central Authority as well as of the contact person: Mrs Aleksandra Kowalczyk.
- **Slovakia:** This country has updated the particulars of its Central and Competent Authorities.
- **Switzerland:** This country has updated the particulars of its Competent Authorities.

ARGENTINA: A new Law on the Integral Protection of Children and Adolescents

Argentina has recently adopted a new law, which allows for the establishment of an integral system of rights, principles and guarantees for children and adolescents and of administrative bodies to implement policies and programmes of protection.*

In October 2005, Law 26.061 on the Integral Protection of the Rights of Children and Adolescents was enacted, and regulated by the recent Decree 415/2006. The previous law, which dated back to 1919, did not consider the child as a subject of rights, and did not grant an adequate protection of its person. The recent law is, without doubt, a response to this criticism, also expressed by the Committee on the Rights of the Child in 2002, and allows for a legal update, which complies with the observations and recommendations of the Committee.

The family's role is strengthened

The new Law 26.061, although not including the guiding principles in all provisions, stipulates the principles, rights and guarantees which should enable children and adolescents to benefit from integral protection, and which respects their best interests, amongst others, in matters of parental responsibility, filiation and adoption (art. 3). According to the Law, public policies will have to be drafted in accordance with the strengthening of the role of the family in implementing the rights of children and adolescent (art. 4). The role of the family is reinforced by various provisions of the Law, which recognise that the family, as a matter of priority, is responsible for ensuring that children and adolescents fully enjoy and exercise their rights and guarantees, and with this in view, State Bodies must secure appropriate policies, programmes and assistance in order for the family to be able to adequately assume this responsibility, and for the parents to assume, in equal conditions, their responsibilities and duties (art. 7). The integral protection of the child or adolescent also includes his/her right to be heard by the competent authority every time he/she requests it, to have his/her opinion taken into account, as an essential matter, when a decision which affects him/her is reached, and to participate in all proceedings, either judicial

or administrative, which affect him/her (art. 27).

Protective measures

The system of integral protection includes, as a priority, the application of measures of protection of rights, which are intended to preserve and strengthen family ties in relation to children and adolescents (art. 35). The measures are for children and adolescents to continue living with their family group; to include them in programmes designed to strengthen and support the family; to care for them in their own home, by guiding and supporting the parents, the legal representatives or those responsible, in complying with their duties, together with the temporary monitoring of the family and the child or adolescent, by means of a programme (art. 37). A weak aspect of the application of these measures is that the Law has allocated judicial functions and has given a prominent role to administrative bodies, thus taking away from tribunals matters, traditionally, of their nature, and without this type of decisions being subjected to judicial control.

Exceptional measures

In accordance with arts. 39-41, if children and adolescents were temporarily or permanently deprived of their family environment or if their best interests require that they do not remain in this environment, exceptional measures may be adopted for a limited period of time, whilst the original causes last. These will be applied in accordance with criteria including the temporary placement in family environments considered as alternative; resort to alternative group accommodation different to that of the family group, only as an exceptional and subsidiary measure, for the shortest possible period of time, and favouring the return to the group or family environment by means of rapid and agile mechanisms; the implementation of interventions which do not replace the group of the family of origin, in order to maintain the

family identity; and the protection of life together for siblings.

In this context, it is important to highlight that the lack of economic resources cannot be the ground for protection measures (art. 33). This provision is very important in the protection of children in communities with high levels of poverty and respond to the interpretation of art. 9 of the Convention on the Rights of the Child (CRC) and to Advisory Opinion N° 17 of the Inter-American Court of Human Rights.

Creation of administrative protection bodies

Law 26.061 created the Secretaría Nacional de Niñez, Adolescencia y Familia (National Secretariat for Children, Adolescents and the Family), a body specialised in matters of children and adolescents' rights, and presided over by a Secretary of State. The new law also stipulates the creation of the Consejo Federal de Niñez, Adolescencia y Familia (Federal Council for Children, Adolescents and the Family), with functions of deliberation and consultation, of formulation of proposals and policies for consultation in matters of integral protection of the rights of children and adolescents. Finally, the position of Defensor de los Derechos de las Niñas, Niños y Adolescentes (Ombudsperson for the Rights of Children and Adolescents) has also been created. He/she will be responsible for ensuring the protection and promotion of their rights and for defending these before public and private institutions, as well as for the supervision and monitoring of the application of the system of integral protection at national and provincial levels. This body comes closer to the control and supervisory body required

by art. 4 of the CRC and the Committee's General Comment N° 2.

The new Law has been criticised by national experts for its lack of precision and for not having taken the opportunity to introduce major changes in favour of children. However, the enactment of the new Law on the Integral Protection and of its Decree is a step forward in the promotion and protection of children deprived of a family as subjects of rights, in particular when taking into account the statistics of almost 25,000 institutionalised children (IFCO Informer). The strengthening of the role of the family and the implementation of the provisions relating to the development of alternative family-based policies and programmes are the most urgent objectives, which this new legislation must achieve.

* N.B.: Art. 2 states that the CRC is of obligatory application with respect to persons under the age of 18; whilst Law 26.061 outlines the integral protection of children and adolescents, with an age of majority at 21 years in Argentina.

Sources: Ley 26.061 Protección Integral de los Derechos de Niñas, Niños y Adolescentes (Law 26.061 on the Integral Protection of the Rights of Children and Adolescents), Boletín Oficial 30.767 of 26 October 2005; Decreto 415/2006 Apruébase la reglamentación de la Ley 26.061 – Disposiciones transitorias (Decree 415/2006 Approving the Regulation of Law 26.061 – Transitional Measures); The work of IFCO in Latin America, IFCO Informer, February 2006; Red Latinoamericana de Acogimiento Familiar de IFCO, <http://relaf.ifco.info>; National and international experts.

PROCEDURE

Countries have different legislation and practices concerning the simultaneous adoption of several children who are not siblings

A survey which the ISS/IRC recently conducted shows that some countries are very strict with the prohibition of this kind of adoption whilst others allow it only if the children are siblings, other than in exceptional circumstances. There are also countries which authorise this practice more widely.

The legislation and practices related to the simultaneous adoption of several children who are not siblings are diverse. The result of the survey which the IRC conducted following a request from the New Zealand Department of

Child, Youth and Family Services (Adoption Central Authority) shows this heterogeneity.

The 23 responses (from 18 different countries) to the questionnaire that IRC circulated indicate that countries like Austria or Denmark are very strict with the prohibition of this kind of adoption. The United Kingdom

allows the simultaneous adoption of several children only if they are siblings, unless in exceptional circumstances, for example when the children have been brought up in the same institution. So does Italy. In Switzerland, there are still cantons (provinces) which authorise such adoption but the situation is likely to change soon, according to the NGO and accredited body Terre des Hommes. In countries or regions where multiple non-related adoptions are not forbidden, these adoptions seem to be seldomly done. This is the case notably in Estonia, Malta, Belgium, Sweden, Maryland (USA) and New Brunswick (Canada).

Most of the adoptions of non-related children are independent or exceptional

It seems that most of these adoptions are either independent or exceptions to a general practice. One of the main reasons mentioned to allow these adoptions is that the children concerned have known each other for a long time and want to be adopted together. However, some of the cases which have been reported to the IRC were not explained at all. In Malta, the principle seems to be more generally accepted. The Department of Social Welfare thinks that it is in the best interests of a child to be brought up with another child in a family because there is less chance of the child being spoiled, the children learn to share everything with each other and they also have each other's support.

It is difficult to find out if these adoptions succeeded or not. The cases mentioned in Estonia, Sweden, Malta and Flanders seemed to have succeeded but the cases mentioned in Italy (before the implementation of the new Adoption Law in 2001) met serious difficulties. We did not obtain further information concerning the other cases.

Several reasons to forbid simultaneous adoption of several children who are not siblings

There are several reasons to forbid such a kind of adoption:

- Adoptive parents need to pay full attention to their adoptive child and this may be more difficult to do when they get siblings. But it becomes even more problematic when children do not have the same background.
- Each child needs his/her integration process in his/her family. Adopting more than one unrelated child at the same time would add difficulties to the parents and to the children for the adjustment to one another. Adjustments are magnified significantly when children from different backgrounds are adopted at the same time.
- The risk exists to treat them as if they were "fraternal twins", to compare them constantly and perhaps to favour the "easier" child.
- Children who are not siblings do not have a common history and may be placed randomly. We can wonder then if it is possible to take care and respond to the need of each child under these conditions.

Simultaneous adoption of non-related children should, in principle, be avoided

The IRC notes that simultaneous adoption of children who are not siblings should, in principle, be avoided for all the reasons mentioned above. However, exceptions may be permitted when the children have grown up together in the same institution or foster family, when they "consider" themselves as siblings and ask not to be separated. However, this does not allow avoiding an individual assessment of the situation for each child. As New Zealand's Best Practice Model mentions, these exceptions should be considered only at the request of the country of origin, and the children should be adopted by a family who has been previously selected to adopt several children (siblings). Specific preparation should also be organised for prospective adoptive parents to inform them about the specific issues raised by this kind of adoption. Close post-adoption support should also be proposed.

FORTHCOMING CONFERENCES, SEMINARS, SYMPOSIA AND COURSES

- **France:** *Les secrets, le secret sur les origines : maintien, révélation, accès au dossier. Quels enjeux ?* (Secrets, the secret of origins : Preservation, disclosure, access to the file. What stakes?), Paris, 25-27 September et 9-11 October 2006 (2 modules). In partnership with DGAS, this course by COPES will be led by Nelly Leblanc, psychologist, with the participation of several specialist contributors. It will address the secret of origins, the feelings of identity and belonging, the curiosity and questioning, as well as the theoretical and clinical approach essentially oriented towards the needs of children and the legal and

psychological aspects of the search for origins. For further information: Copes (Centre d'ouverture psychologique et social), 20 rue de Dantzig, 75015 Paris ; Tel : +33 (0)1 53 68 93 40 ; Fax : +33 (0)1 53 68 93 45 ; E-mail : copes-formation@wanadoo.fr ; www.lecopes.com.

- **Latin America:** *La relación Estado, familia e infancia en América Latina* (The relation between State, family and childhood in Latin America), Campus Virtual (course online), organised by the Consejo Latinoamericano de Ciencias Sociales, in open session. The course's objectives are to understand the main characteristics of childhood representation ; to contextualise these in political, legal and social proceedings as well as their impact on the degree of vulnerability suffered by many children and adolescents. It is also intended to provide updated information on the topic of social and legal accounts of childhood and to critically analyse the characteristics of state intervention. Questions and registration: Consejo Latinoamericano de Ciencias Sociales, Ms Gabriela Amenta, Responsible for the Campus Virtual, Tel: +54 11 4814 2301, E-mail: cff1@campus.clacso.edu.ar; www.clacso.edu.ar.
- **Mexico:** *Ier Congreso Internacional de Familia "Vivir en Familia es un Derecho"* (I International Family Congreso "To live in a family is a right"), Mexico D.F., Mexico, 9-11 August 2006. The aims of this event are to offer a forum of discussion on the family in the 21st century; to allow different positions to be expressed on the topic of the family and its current social and legal situation by national and international speakers, specially in relation to the child's best interests and his right to live with parents; and to collectively unite criteria which would enable the review of the state of existing laws, to promote their reform and to adapt the legislation. For further information: Asociación Mexicana de Padres de Familia Separados, A.C., Tel: +52 55 74 83 47; E-mail: ampfs_mex@hotmail.com; www.ampfsmexico.com; or Centro de Justicia Alternativa del Tribunal Superior de Justicia, Tel: +52 55 14 13 44; Fax: +52 52 07 89 54; E-mail: tsidf_cgpe1@hotmail.com.mx; www.tsidf.gob.mx.
- **United Kingdom:**
 - *XVII World Congress of the International Association of Youth and Family Judges and Magistrates*, Belfast, Northern Ireland, 27 August – 1 September 2006. The central theme of this multidisciplinary event is « The Right Justice ». Throughout the debates, questions relating to the administration of justice as it affects the main influences on children and youth – family, community, society and youth justice – will be considered within the context of a set of themes that reflect the rights enshrined in the United Nations Convention on the Rights of the Child and other relevant international instruments. For further information: Gerry McLaughlin, Head of Secretariat, Northern Ireland Court Service ; Tel : +44 28 9041 2270 ; Fax : +44 28 9023 8506 ; E-mail : wcongress@courtsni.gov.uk ; or The Ovation Group (Professional Congress Organiser) ; Tel : +44 28 9042 4215 ; Fax : +44 28 9042 4216 ; E-mail : youthandfamily2006@ovation-ni.com ; www.youthandfamily2006.com.
 - *Are we making the right plans for children – Adoption, returning home to birth family, education*, London, 28 September 2006. The aims of this BAAF Research Symposium are to explore the evidence on the impact of social worker assessments, actions decision making and plans on the needs of looked after children; to explore the nature of outcomes for looked after children in relation to adoption and returning home; to identify what social workers and other professionals need to do to ensure that early and proactive actions and decisions are in the long term interests of children; and to develop a more 'in-depth' understanding of the reasons why looked after children appear to do poorly in school. For further information: Conference Team; Tel: +44 20 7421 2637; Fax: +44 20 7421 2601; E-mail: conferenceteam@baaf.org.uk ; www.baaf.org.uk.

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www.iss-ssi.org/Resource_Centre/Resource_Center_EN/About_ISS-IRC/about_iss-irc.html. See publications.

The ISS/IRC would like to express its gratitude to the governments (including certain Federated States) of the following countries for their financial support in the realisation of this Monthly review: Australia, Belgium, Canada, Cyprus, Denmark, France, Germany, Iceland, Italy, Luxembourg, Monaco, New Zealand, the Netherlands, Norway, Spain, Sweden and Switzerland. The ISS/IRC also thanks the Canton of Geneva for its specific contribution.