

Work of the Council of Europe Parliamentary Assembly and Relevant Case-Law of the European Court of Human Rights Concerning Intercountry Adoption

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Abstract: *The paper points out particularly to the Resolution of the Parliamentary Assembly of the Council of Europe No. 1909 (2012) on Intercountry Adoption: Ensuring that the Best Interests of the Child Are Upheld, emphasising the necessity to prevent and to fight criminal activities that may be linked with intercountry adoption and to respect the best interests of the child. As transpires from the case-law of the European Court of Human Rights relating to intercountry adoption, the determination of the best interests of the child must be based on particular circumstances of the case.*

Key Words: *Intercountry Adoption; Rights of the Child; Best Interests of the Child; Resolution 1909 (2012); the Council of Europe; the European Convention on Human Rights; the European Court of Human Rights; Case-Law of the European Court of Human Rights.*

Introduction

Adoption creates, between the adopter and the adoptee, a legal relationship that is identical to that existing between parent and child.¹ Although adoption has a long history, intercountry adoption of a child from the country of his or her origin to another country is relatively new practice. It developed after the Second World War as a humanitarian response to the number of children left orphaned by war. The number of intercountry adoptions started to increase in the early 1990s, culminated in 2004 and in recent years it has been in decline as a result of a change in attitudes and more restrictive government policies in this field.²

¹ *Case of Harroudj v. France* [2012-10-04]. Judgement of the European Court of Human Rights, 2012, Application No. 43631/09.

² *Report on Intercountry Adoption: Ensuring that the Best Interests of the Child Are Upheld Doc. 13059* [2012-10-19] [online]. Parliamentary Assembly of the Council of Europe, 2012 [cit. 2015-11-13]. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19175&lang=en>.

Intercountry adoption may be a long-term solution for children who risk remaining in institutional care in their country of origin. The United Nations Convention on the Rights of the Child of 1989 in its Preamble recognises that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding. Article 21 provides that the best interests of the child shall be the paramount consideration.³ Intercountry adoption may be considered only if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. States are obliged to ensure that the placement does not result in improper financial gain for those involved.

The framework for international co-operation and “safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights”⁴ are set out in the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption of 1993 (hereinafter as “the Hague Convention”). In the line with the “best interests” principle, the Hague Convention recognises the principle of subsidiarity. One part of that principle is that the child should remain in the care of his or her family and if this is not possible, then adoption may be a solution.⁵ This principle further includes priority of national care options. Intercountry adoption should take place only if a suitable family cannot be found in a child's State of origin. Reference should be made also to the European Convention on Adoption of 1967 (ETS No. 58) and the Revised Convention of 2008 (CETS No. 202). Articles 12 and 15 of the Revised Convention apply directly to intercountry adoption.

The Hague Convention contains safeguards in order to prevent abuses connected with intercountry adoption. However, due to improper implementation of the Hague Convention by some Signatory Countries and

³ DOBROVODSKÝ, R. Europeizácia a internacionalizácia rodinného práva [Europeanisation and Internationalisation of Family Law]. In: J. LAZAR, et al. *Občianske právo hmotné: Zväzok 1* [Civil Substantial Law: Part 1]. 1. vyd. Bratislava: Iuris Libri, 2014, p. 247. ISBN 978-80-89635-08-5.

⁴ *The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption* [1993-05-29], Article 1 (a).

⁵ DEGELING, J. How the 1993 Hague Convention Helps to Protect the Best Interests of Children in Inter-Country Adoption. In: *Challenges in Adoption Procedures in Europe: Ensuring the Best Interests of the Child* [online]. 1st ed. Strasbourg: European Commission, 2010, pp. 48-50 [cit. 2015-11-13]. ISBN 978-92-79-19274-6. Available at: http://ec.europa.eu/justice/civil/files/brochure_conference_adoption_en.pdf.

the fact that many States have not signed and ratified it yet, there are still cases where the best interests of the children have not been the primary consideration – cases of illicit practices such as abduction, sale or trafficking of children, coercion or manipulation of the biological parents, “child laundering” through adoption systems by way of falsification of documents and bribery, or other fraudulent methods to facilitate an adoption.⁶ Majority of abuses related to private adoptions where the prospective adopters travelled to a non-Hague convention country independently, without using an authorised agency.⁷

Recommendations of the Parliamentary Assembly of the Council of Europe

In the Recommendation 1443 (2000) “International Adoption: Respecting Children’s Rights” the Parliamentary Assembly emphasised that *“the purpose of international adoption must be to provide children with a mother and a father in a way that respects their rights, not to enable foreign parents to satisfy their wish for a child at any price, there can be no right to a child”*. It condemned all crimes committed in order to facilitate adoption and all commercial practices transforming the international adoption into nothing more than *“market regulated by the capitalist laws of supply and demand”*.⁸

All forms of trafficking of children have been condemned in the Recommendation 1828 (2008) on Disappearance of Newborn Babies for Illegal Adoption in Europe. The Recommendation pointed out particularly to the absence in some countries of strict rules on registration of the birth of children and events of disappearing of newborn babies who had been sold and taken abroad. On the other side, the Assembly expressed

⁶ *Information Document No. 6 for the Attention of the Special Commission of June 2010 on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption: The Grey Zones of Intercountry Adoption* [2010-06-17] [online]. International Social Service, 2010. 11 p. [cit. 2015-11-13]. Available at: https://assets.hcch.net/upload/wop/adop2010_info6e.pdf.

⁷ HOFSTETTER, M. Preventing Abuses in Adoption Procedures: Suggestions and Best Practices. In: *Challenges in Adoption Procedures in Europe: Ensuring the Best Interests of the Child* [online]. 1st ed. Strasbourg: European Commission, 2010, pp. 59-61 [cit. 2015-11-13]. ISBN 978-92-79-19274-6. Available at: http://ec.europa.eu/justice/civil/files/brochure_conference_adoption_en.pdf.

⁸ *Recommendation on International Adoption: Respecting Children’s Rights No. 1443 (2000)* [2000-01-26] [online]. Parliamentary Assembly of the Council of Europe, 2000 [cit. 2015-11-13]. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16775&lang=en>.

regret over large number of children living in institutions in some countries and called for rules bearing in mind children's interests, including a monitoring procedure involving regular post-adoption reports.⁹ In this connection, it is worth mentioning the judgment of the European Court of Human Rights (hereinafter as "the Court") in case of *Zorica Jovanović v. Serbia* (judgment of March 26th, 2013) concerning missing newborn babies from the Serbian hospitals. The Court observed that a failure to provide parents with credible information as to the fate of their missing children constitutes a violation of the right to respect for their family life and held that there had been a violation of the Article 8 of the European Convention on Human Rights (hereinafter as "the Convention").¹⁰

Resolution 1909 (2012) "Intercountry Adoption: Ensuring that the Best Interests of the Child Are Upheld"

Concerns about persisting reports of cases where human rights of children have been severely violated were expressed also in the Resolution 1909 (2012) on Intercountry Adoption: Ensuring that the Best Interests of the Child Are Upheld (hereinafter as "the Resolution").¹¹

The Explanatory Memorandum to the Resolution mentions declining number of intercountry adoptions in recent years. On the other side, it points out to the trend in Europe to postpone starting a family and to become a parent in older age than in previous generations. As a result, there are lower fertility rates and increasing number of childless couples for whom a possibility of intercountry adoption becomes attractive. According to this report, long waiting lists for prospective adopters and amounts of money they are prepared to spend to secure adoption give rise to a risk of fraud, malpractice, and child laundering. Such illicit practices inflict profound harm on the families concerned, especially on chil-

⁹ *Recommendation on Disappearance of Newborn Babies for Illegal Adoption in Europe No. 1828 (2008)* [2008-01-24] [online]. Parliamentary Assembly of the Council of Europe, 2008 [cit. 2015-11-13]. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17627&lang=en>.

¹⁰ *Case of Zorica Jovanović v. Serbia* [2013-03-26]. Judgement of the European Court of Human Rights, 2013, Application No. 21794/08.

¹¹ *Resolution on Intercountry Adoption: Ensuring that the Best Interests of the Child Are Upheld No. 1909 (2012)* [2012-11-30] [online]. Parliamentary Assembly of the Council of Europe, 2012 [cit. 2015-11-13]. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19221&lang=en>.

dren.¹² The Resolution therefore calls on the Council of Europe Member States to prevent and to fight against criminal practices that may be linked with intercountry adoption.

The Explanatory Memorandum also draws attention to the countries affected by humanitarian disasters, such as war, earthquake, etc., where a large number of children become separated from their families. When efforts to trace families of such children are not sufficient and the process of adoption is fast-tracked, there is a strong risk that children are declared adoptable despite of the fact that members of their families survived.¹³ The Resolution therefore calls on the countries receiving adoptive children to declare moratoria when safe adoption procedures can no longer be ensured, but also to maintain open communication between central authorities involved to avoid legal vacuums and traumatising uncertainties for the children.

The Resolution also emphasises the whole fact that a child is transferred from his or her home country and usual environment to a foreign country and the new family is a traumatising experience and therefore he or she needs to be handled with utmost care and sensitivity for the child's individual situation. Receiving countries should ensure that the adopters are suitable and prepared to adopt. This is even more important in cases of children with "special needs" due to illness or disability.

The measures provided by the Resolution further include international cooperation, setting of rules aimed at fully supervised procedures, documentation of the origins and personal identity of adopted children, their monitoring during and after adoption as well as support for families living in extreme poverty in the sending countries.

The "best interest" principle in the case-law of the Court

Intercountry adoption involves complex situations where interests of the child, the adoptive parents, the birth parents and society do not necessarily converge. The Court has consistently held that particular im-

¹² *Report on Intercountry Adoption: Ensuring that the Best Interests of the Child Are Upheld Doc. 13059* [2012-10-19] [online]. Parliamentary Assembly of the Council of Europe, 2012 [cit. 2015-11-13]. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19175&lang=en>.

¹³ *Report on Intercountry Adoption: Ensuring that the Best Interests of the Child Are Upheld Doc. 13059* [2012-10-19] [online]. Parliamentary Assembly of the Council of Europe, 2012 [cit. 2015-11-13]. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19175&lang=en>.

portance must be attached to the best interests of the child.¹⁴ As to the rights of the child and the birth family, Article 8 cannot authorise parents to take steps which may be damaging to the health or development of the child. On the other hand, a severance of the link between family and child would be in the best interests of the child only in exceptional circumstances.¹⁵

The determination of the best interests of the child has to be done on a case-by-case basis. The interpretation of the “best interest” principle must conform to all rights of the child set out in the relevant international instruments.¹⁶ In the case *Pini and Others v. Romania* (judgment of June 22nd, 2004) the Court held that the right of prospective parents to develop ties with their adopted children had been “circumscribed by the children’s interests, notwithstanding the applicants’ legitimate aspirations to found a family”. The case concerned the applicants, two Italian couples, who had obtained orders for the adoption of two Romanian children. Both girls lived in an institution and were nine years old when the adoption orders were made. The institution refused to transfer custody of the children because they preferred to remain in the social and family environment in which they had been raised than to be transferred to different surroundings abroad and because they had no emotional ties with the adoptive parents. The applicants complained of the failure of the Romanian authorities to execute the adoption orders. As to the applicability of the Article 8 of the Convention, the Court examined whether there were bonds between the applicants and the children amounting to “family life”. It observed that although the right to adopt was not guaranteed by the Convention, the relations between an adoptive parent and an adopted child were of the same nature as the family relations. In its previous case-

¹⁴ See also DOBROVODSKÝ, R. K aktuálnym výzvam slovenskej praxe ochrany práv detí po ratifikácii Opčného protokolu k dohovoru o právach dieťaťa o procedúre oznámení (sťažností) – 1. časť [About Current Challenges for Slovak Authorities in the Field of Protection of Children after the Ratification of Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure – 1st Part]. *Súkromné právo*. 2015, roč. 1, č. 2, pp. 30-35. ISSN 1339-8652.

¹⁵ BERRO-LEFEVRE, I. The Case Law of the European Court of Human Rights Concerning Adoption. In: *Challenges in Adoption Procedures in Europe: Ensuring the Best Interests of the Child* [online]. 1st ed. Strasbourg: European Commission, 2010, pp. 13-15 [cit. 2015-11-13]. ISBN 978-92-79-19274-6. Available at: http://ec.europa.eu/justice/civil/files/brochure_conference_adoption_en.pdf.

¹⁶ *Issue Paper of the Commissioner for Human Rights on Adoption and Children: A Human Rights Perspective CommDH/IssuePaper (2011)2* [2011-04-28] [online]. Council of Europe, 2011 [cit. 2015-11-13]. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1780157>.

law, the Court held that Article 8 may also extend to the potential relationship between child and parent even if family life has not yet been fully established. The Court therefore admitted the applicability of the Article 8, despite the fact that the applicants had not sufficiently close *de facto* ties with their respective adoptive daughters. The Court held that there had been no violation of the Article 8 of the Convention. It observed that in adoption cases, it was even more important that the child's interests should prevail over those of the adoptive parents, since adoption means "*providing a child with a family, not a family with a child*". The Court took into consideration that the adoption orders had been challenged in various sets of proceeding and observed that the Romanian authorities had a duty to dispel any uncertainty concerning the lawfulness of the adoption. It found that the children's opinions should have been taken into account once they had reached the necessary maturity to express them and noted that their oppositions to adoption would make their harmonious integrations into the adoptive families unlikely.¹⁷

The case *Wagner and J.M.W.L. v. Luxembourg* (judgment of June 28th, 2007) concerned an unmarried woman and her child legally adopted in Peru. The Luxembourg courts refused to declare enforceable the Peruvian adoption order relying on the rules on the conflict of laws and on the Luxembourg Civil Code, according to which an application to adopt may be made only by a married couple. The Court held that there had been a violation of the Article 6, Article 8, and Article 14 taken in conjunction with the Article 8 of the Convention. As regards the right to respect for family life, it considered that the refusal to grant enforcement of the foreign adoption order represented an interference with the applicant's right, that the interference was "in accordance with the law" and pursued legitimate aims. It determined whether the measure was "necessary in a democratic society". The Court observed that the decision refusing enforcement of the Peruvian judgment failed to take account of the social reality of the situation, as the applicants encountered obstacles in their daily life. It emphasised that the best interests of the child are paramount and did not find convincing the argument of the Luxembourg Government that the legislature sets limits on full adoption so that such adoption will not be harmful to the adopted child. The Court concluded that the Luxembourg courts "*could not reasonably refuse to recognise the family ties that pre-existed de facto between the applicants*" and that the rea-

¹⁷ *Case of Pini and Others v. Romania* [2004-06-22]. Judgement of the European Court of Human Rights, 2004, Application No. 78028/01 and 78030/01.

sons for strict application of the Civil Code, which permits adoption only by married couples, were not “sufficient” for the purposes of paragraph 2 of the Article 8.¹⁸

The legal context of a case is important in examination whether the existing *de facto* ties amount to “family life”. The Court declared inadmissible an application in the case *Giusto, Bornacin and V. v. Italy* (decision of May 15th, 2007) which concerned an Italian married couple and a child from an orphanage in Belarus who wished to remain with them in Italy. The applicants submitted that they had spent about eighteen months with the child during the period of three years, developing a relationship similar to that between parents and their child. They were unable to adopt the child because in October 2004 Belarus decided to suspend all international adoption procedures. In 2005, Italy and Belarus signed a bilateral protocol relating to pending adoption procedures. However, in the proceedings concerning the child’s repatriation on the initiative of the Belarusian authorities in 2006, the Italian courts observed that the applicant couple had failed to apply to adopt the child in accordance with the procedure set out in the protocol between Italy and Belarus and ordered the repatriation. As regards Article 8 of the Convention, the Court held that the existing *de facto* ties between the applicant couple and the child concerned had not been close enough to qualify as “family life” under the Article 8 of the Convention. The Court attached particular importance to the fact that the regular stays in Italy had been arranged within the scheme which had not been intended to provide orphans with new families, but simply to enable children coming from the area affected by the Chernobyl nuclear disaster to spend several months a year in Italy.¹⁹

In the case *Wagner and J.M.W.L. v. Luxembourg* (cited above) the Luxembourg courts disregarded a legal status created by foreign adoption order. Different situation occurred in two another cases where the applicants unsuccessfully applied for adoption of children whose States of origin prohibit adoption. The children were entrusted to the applicants’ care under the Islamic law which authorises a special form of guardianship called *kafala*. However, *kafala* does not create any legal parent-child relationship. The case *Harroudj v. France* (judgment of October 4th, 2012)

¹⁸ *Case of Wagner and J.M.W.L. v. Luxembourg* [2007-06-28]. Judgement of the European Court of Human Rights, 2007, Application No. 76240/01.

¹⁹ *Case of Giusto, Bornacin and V. v. Italy* [2007-05-15]. Decision of the European Court of Human Rights, 2007, Application No. 38972/06.

concerned the applicant, a French national, and a child born in Algeria and abandoned at birth. The Algerian authorities granted the applicant the right to take the child into her legal care. The applicant applied for full adoption in France. The courts dismissed her application on ground that according to the French law a child could not be adopted if the law of his or her country prohibited adoption. They pointed out that Article 4 (a) of the Hague Convention provides that adoption may take place only if the competent authorities of the State of origin have established that the child is adoptable. They also referred to the Article 20 paragraph 3 of the United Nations Convention on the Rights of the Child which expressly recognises *kafala* as a form of “alternative care”. As regards the right to respect for family life, the Court held that there had been no violation of the Article 8 of the Convention. It observed that the refusal of adoption had been in compliance with domestic law and international conventions. The Court further noted that the judicial grant of *kafala* was fully recognised by the French authorities, had produced effects comparable to those of guardianship, and that there had been various means of circumventing the restrictions that resulted from the inability to adopt the child. The Court therefore concluded that France had made an effort “to encourage the integration of children of foreign origin without cutting them off immediately from the rules of their country of origin” and had struck a fair balance between the public interest and that of the applicant.²⁰ The case *Chbihi Loudoudi and Others v. Belgium* (judgment of December 16th, 2014) concerned a Belgian couple and its niece from Morocco who was entrusted into its care by her parents upon *kafala* arrangement. The Belgian courts dismissed couple’s application for adoption on the ground that the statutory conditions were not met because the child had not been entrusted by the competent Moroccan authorities, but by her parents. The Court held that there had been no violation of the Article 8 of the Convention. It observed that the Belgian courts had taken into account the existence of a legal parent-child relationship between the child and her biological parents in Morocco and that the refusal to grant adoption was in the child’s best interests to have the same personal status in Belgium as in Morocco.²¹

²⁰ *Case of Harroudj v. France* [2012-10-04]. Judgement of the European Court of Human Rights, 2012, Application No. 43631/09.

²¹ *Case of Chbihi Loudoudi and Others v. Belgium* [2014-12-16]. Judgement of the European Court of Human Rights, 2014, Application No. 52265/10.

Although the Convention does not guarantee a right to adopt, the Court also dealt with cases of unsuccessful applicants for adoption who complained of discrimination under the Article 14 taken in conjunction with the Article 8 of the Convention. In connection with the already mentioned trend in Europe to start family in later stages of life and with the rising age of prospective adopters who turn to the option of intercountry adoption, the case *Schwizgebel v. Switzerland* (judgment of June 10th, 2010) is worth a mention. In this case the Court dealt with a complaint of discrimination following the refusal to authorise adoption on account of the applicant's age. It concerned an unmarried woman aged forty-seven who wished to adopt a second child no older than five from Vietnam – the country of origin of her first already adopted child. The domestic courts found that there would be an age difference between the applicant and the child of between forty-six and forty-eight years and regarded such an age difference as excessive. The Court held that there had been no violation of the Article 14 taken in conjunction with the Article 8 of the Convention. It found that the applicant might claim to be a victim of a difference in treatment in relation to a younger single woman seeking authorisation to receive a second child for adoption. It determined whether a difference in treatment was justified. It found that the Swiss authorities had a wide margin of appreciation, in so far as there was no consensus among the Council of Europe Member States on the question of the maximum age for prospective adopters or the maximum age difference between adopter and adoptee. It observed that the Swiss courts had taken into account not only the best interests of the child to be adopted, but also those of the child already adopted by the applicant. The Court did not find unreasonable or arbitrary their arguments that a second child would constitute an additional burden for the applicant or that problems are more numerous in families with more than one adopted child. The Court concluded that the difference of treatment had not been discriminatory within the meaning of the Article 14 of the Convention.²²

Conclusion

The intercountry adoption system should correspond to the number of applicants willing to adopt a child and particularly to the needs of children for whom a suitable care option cannot be found in their countries. Both sending countries and receiving countries have to protect all parties

²² *Case of Schwizgebel v. Switzerland* [2010-06-10]. Judgement of the European Court of Human Rights, 2010, Application No. 25762/07.

involved from illegal practices and to ensure that the principle of the best interests of the child and the principle of subsidiarity are fully respected in the process of intercountry adoption.

Although the Hague Convention recognises that the child should grow up in a family environment and that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin, this should not be interpreted as “*a trump card or super right which overrides all other rights of the child*”.²³ The determination of the best interests of the child must be based on particular circumstances of the case. The Court in its case-law repeatedly emphasised that the Convention does not guarantee a right to adopt. As it stated, the purpose of adoption is to provide a child with a family, not a family with a child, and therefore the rights of prospective adopters are circumscribed by the children’s interests. In case of pre-existing *de facto* family links between prospective adopter and a child, the refusal to recognise such family ties constitutes a disproportionate undermining of family life if the best interests of the child stand against such refusal. The best interests of the child should always predominate.²⁴

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²³ *Report on Intercountry Adoption: Ensuring that the Best Interests of the Child Are Upheld Doc. 13059* [2012-10-19] [online]. Parliamentary Assembly of the Council of Europe, 2012 [cit. 2015-11-13]. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19175&lang=en>.

²⁴ BERRO-LEFEVRE, I. The Case Law of the European Court of Human Rights Concerning Adoption. In: *Challenges in Adoption Procedures in Europe: Ensuring the Best Interests of the Child* [online]. 1st ed. Strasbourg: European Commission, 2010, pp. 13-15 [cit. 2015-11-13]. ISBN 978-92-79-19274-6. Available at: http://ec.europa.eu/justice/civil/files/brochure_conference_adoption_en.pdf.

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The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption [1993-05-29].

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