

Adoption Law in Romania-In the Best Interests of the Children?

It is CAP's view that the current Romanian law on adoptions does not comply with the international standards governing intercountry adoptions and that it is in violation of Romania's obligations under the United Nations' International Convention on the Rights of the Child (the "UNCRC") and under the HCIA.

Specifically, the new Romanian law on adoptions - by effectively eliminating international adoptions – fails to comply with the hierarchy of solutions for the care of abandoned and unparented children that results from the UN Convention on the Rights of the Child ("UNCRC") and is equally established by the HCIA.

The UNCRC

The provisions of the UNCRC relevant to adoptions include:

Article 20(3)

"Such [alternative] care [to be ensured by the state] [for a child temporarily or permanently deprived of his or her family environment] shall include, *inter alia*, foster placement, kafalah of Islamic law, adoption, or if necessary, placement in suitable institutions for the care of children. When considering 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."

Article 21

"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) ensure that the adoption of a child is authorized only by competent authorities [...];
- (b) recognize that inter-country adoption may be considered as an alternative means of the child's care, 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;
- (c) ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it; [...]".

The ambiguous wording of Article 21, combined with the focus placed in Article 20 on the continuity of a child's upbringing in his or her domestic environment, had led some to argue that the UNCRC gave preference to *any* domestic solutions, including long term care in domestic institutions, over inter-country adoptions. However, UNICEF in an

official statement released on January 15, 2004 unequivocally stated that it is not so and provided its interpretation of Articles 20 and 21.¹

UNICEF states that the first priority, in implementation of the right of every child to know and be cared for by his or her family, is to enable families needing support to care for their own children and to assist them to that effect. However, for "children who cannot be raised by their own families, an appropriate *family environment* should be sought in preference to institutional care, which should be used only as a last resort and as a temporary measure. Inter-country adoption is one of a range of care options which may be open to children and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution. In each case, the best interests of the individual child must be the guiding principle in making a decision regarding adoption."

This Statement removes any ambiguity as to the hierarchy of care solutions for children under the UNCRC. Among the possible solutions of care for unparented children, institutions come last, after any form of alternative appropriate and permanent family care has been considered. This interpretation by UNICEF is also consistent with the views of the Committee on the Rights of the Child (CRC Committee). In its Concluding Observations following its review of the second report submitted by Romania under Article 44 of the Convention,² the CRC Committee recommended that Romania "place children in institutions only as a measure of last resort and as a temporary measure; [...]; expedite the adoption of the revised law on adoption and ensure that this new legislation is in full conformity with the Convention and other international standards, in particular, the Hague Convention on [Inter-country Adoptions]; [...]; ensure that the cases of intercountry adoption still under consideration are dealt with in full accordance with the principles and provisions of the Convention in particular Article 21 and the Hague Convention of 1993; explore ways to encourage national adoptions so that recourse to inter-country adoptions becomes a measure of last resort."

The January 2004 statement of UNICEF reflects its prior position on intercountry adoptions. In a February 2003 Guidance Note on Intercountry adoption in the CEE/CIS/Baltic Region, UNICEF states that "it is widely agreed that three principles should guide decisions, regarding long term substitute care for children, once the need for such care has been demonstrated: (i) family-based solutions are generally preferable to institutional placements, (ii) permanent solutions are generally preferable to inherently temporary ones; and (iii) national (domestic) solutions are generally preferable to those involving another country. Intercountry adoptions fulfill the first two but not the third. It is therefore invariably to be considered "subsidiary" to any foreseeable solution that corresponds to all three and must be weighed carefully against any others that also meet two of these basic principles. Naturally the solution chosen and the manner in which it is effected must always fully respect the rights and best interests of the child. In this regards, it should be borne in mind that adoption is the only sphere covered by the CRC where the best interests of the child are to be *the* primary consideration, as opposed to

¹ Statement available at www.unicef.org/media/media_15011.html

² CRC/C/15/Add.199 (March 18, 2003).

being *a* primary consideration in other fields. This clearly demonstrates the absolute primacy of a “child-driven” approach to adoption issues. The practical procedures and safeguards for ensuring optimal respect for the rights and best interests of children concerned are contained in the 1993 Hague Convention.” The same 2003 UNICEF Guidance Note also clarifies its views on the place of foster care among the solutions for abandoned children. It provides that “formal foster care [...] is essentially designed as a temporary child welfare measure pending either the child’s return to his or her family once the problem provoking the placement has been resolved or a more permanent care measure (notably adoption). [...] The inherent long term insecurity of foster care – including the minimal formal obligations on the part of the foster parents and the fact that it bestows no inheritance rights – means that it is best viewed as a planned time limited response to cover a period prior to stable care provision.”³

In considering the best interests of the child, the UNCRC, as interpreted by UNICEF and the CRC, thus ranks possible care solutions in the following order:

1. Family of origin;
2. Suitable permanent family in the country of origin;
3. Inter-country adoption;
4. Domestic foster-care (non-permanent family environment);
5. Institutional care

The current Romanian legislation by limiting inter-country adoptions to the grandparents of the Romanian child effectively eliminates inter-country adoptions as an option for the care of abandoned children and thereby prefers domestic foster care and institutional care over inter-country adoptions, in violation of Articles 20 and 21 of the UNCRC as interpreted by UNICEF and the CRC.

The HCIA

The HCIA in its Preamble recognizes that a child should grow up in "a family environment" (paragraph 1) and that if the child cannot remain in the care of his or her family of origin (paragraph 2), "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" (paragraph 3).

These provisions are interpreted in the Explanatory Report on the HCIA (hereinafter the Report).⁴ The Report states that "[t]he third paragraph of the Preamble, in referring to permanent or suitable family care, does not deny or ignore other child care alternatives, but highlights the importance of permanent family care as the preferred alternative to care by the child's family of origin" (emphasis added) (paragraph 43). The Report goes on to explain that the final wording of paragraph 3 of the Preamble amended

³ The Note makes an exception when foster care can validly be envisaged as a longer term solution particularly for older children for whom adoption is no longer a realistic proposition.

⁴ This Report drawn up by G. Parra-Aranguren provides an authoritative interpretation of the HCIA as it is based on the very work of the Conference and the members drafting the Convention. The Report is available at www.hcch.net/e/conventions/expl33e.html.

the initial draft wording that read "a child who cannot in any suitable manner be cared for in his or her country of origin". The amendment (and hence the current wording of paragraph 3 of the Preamble) aimed to "ensure that a child should always be placed in a family rather than in an institution or in any kind of environment other than a family" (paragraph 45). This principle is repeated again in the Report at paragraph 46 which reads: "the idea behind [the final wording of paragraph 3 of the Preamble] is that the placement of a child in a family, including in intercountry adoption, is the best option among all forms of alternative care, in particular to be preferred over institutionalization".

The HCIA in Article 4 confirms the principle of the subsidiarity of intercountry adoptions stating that an intercountry adoption shall take place only if the competent authorities of the state of origin "[...] (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests." The Report directly refers to the comments made in explanation of the third paragraph of the Preamble as applying to Article 4 (see paragraph 102). Hence Article 4 of the HCIA does not change the hierarchy of preferred solutions established in the Preamble. The Report further clarifies that, despite the subsidiarity principle, "there was consensus [among the drafters of the Convention] that, in certain circumstances the best interests of the child may require that he or she be placed for adoption abroad, even though there is a family available in the State of origin, for instance in cases of adoption among relatives, or of a child with a special handicap and he or she cannot adequately be taken care of" (paragraph 123).

Thus, the HCIA, as interpreted by the Report, clearly provides that intercountry adoption can only be subsidiary to placement of the child in the birth family and placement in a permanent or suitable domestic family. Because of the Report's statement that the HCIA highlights the "importance of permanent family care as the preferred alternative to care by the child's family of origin" (emphasis added), it is CAP's view that intercountry adoptions are also not meant to be subsidiary to placement in foster families or substitute families that lack the desired permanency. Furthermore, in CAP's view, there is no doubt that under the HCIA as interpreted by the Report, intercountry adoption may not be subsidiary to placement in a domestic institution or any kind of environment other than a family.

The bottom line is that the under the HCIA, a country must act in the best interests of the child by finding him an adequate permanent home.

It had been argued by some that in the process of reforming its laws on adoptions and children protection with a view to meeting the criteria for EU accession, Romania was not required to follow the hierarchy of solutions established by the HCIA because the HCIA is not part of the EU *acquis communautaire*. Rather, it was argued that Romania was required to comply with the provisions of the UNCRC, which is part of the *acquis communautaire*, and this convention was interpreted by the same commentators as making intercountry adoptions subsidiary to any domestic solutions (including domestic foster care and domestic institutions). In CAP's view, the unequivocal statement of UNICEF clarifying Article 21 of the UNCRC changed that picture completely. UNICEF

made it clear that there is no conflict or contradiction between the provisions of the UNCRC or the HCIA with regard to the place of inter-country adoptions among the alternative care solutions for unparented children. Under either Convention, intercountry adoptions is only subsidiary to a permanent family in the child's country of origin (whether his biological family or an adoptive family) and cannot be subsidiary to institutionalized care in the country of origin.

While some could take the view that the hierarchy of solutions for the care of unparented children is an issue subject to debate under the UNCRC and the HCIA, it is at a minimum clear and undebatable (from the discussion above) that both the UNCRC and the HCIA mention inter-country adoptions as a legitimate way of dealing with unparented children and provide that inter-country adoptions must be an option among the available alternative solutions for the care of abandoned children. The current Romanian law on adoptions does not allow inter-country adoptions as an effective option and therefore, is not in compliance with either Convention. Furthermore, CAP notes that, under both the UNCRC and the HCIA, domestic foster care is meant to be only a temporary solution for unparented children. The focus placed in the Romanian child care policy on the objective of caring for their abandoned children domestically at all costs results in lengthy foster care placement and in the use of foster care placements as a permanent solution. This policy is not in compliance with the letter or the spirit of the UNCRC or the HCIA.

The effect of the severe limitations on inter-country adoptions under Romania's law on adoptions – given the limited numbers of domestic adoptions – is to deprive abandoned children of their right to a permanent family and to permanent parents. Clearly this cannot be seen as a solution in the “best interests of the children” – and as discussed above, Romania's obligation under the UNCRC is to devise an adoption law “where the best interests of the child are to be *the* primary consideration” while following the “practical procedures and safeguards for ensuring optimal respect for the rights and best interests of children concerned [as] contained in the 1993 Hague Convention [HCIA].”⁵ The current Romanian law on adoption is far from meeting these requirements.

Finally, it has been brought to our attention that the Romanian law on adoptions is no different than the laws of other European States. Our research indicates that only Greece and Finland do not permit intercountry adoption. that, while not formally banning intercountry adoptions, also limit them to exceptional circumstances - such as adoption by extended family members - subject to strict safeguards. Our information indicates that this is incorrect; intercountry adoption is limited not by law but by insufficient need. While this may technically be correct, it is CAP's view that this is a disingenuous comparison and one that is misguided when considering the best interests of the abandoned children in question. The sheer numbers of abandoned children in Romania (including those that were in institutions before the moratorium was instituted and those that have been abandoned since and continue to be abandoned), the specific demographic situation of these children (the majority of them are of Roma ethnic

⁵ Revised February 2003 UNICEF Guidance Note on Intercountry Adoption in the CEE/CIS/Baltics Region.

background) and the very small percentage of children adopted domestically each year, all indicate that Romania should not be compared with other European countries.

While a Western European state with small numbers of abandoned children each year and large percentages of domestic adoptions may potentially claim that a law that limits intercountry adoptions to adoptions by foreign family members is in the best interests of its children, we argue that this is not the case of Romania. The economic, cultural and demographic reality in Romania is that an abandoned child only has a small chance of being adopted domestically and if he is of Roma origin (as are large numbers of the abandoned children), his chances are even smaller. Therefore inter-country adoption for many of these children may be the only realistic way to a permanent family and a permanent home. Thus a law that eliminates that realistic option is not in the best interests of the Romanian children, even though a similarly worded legislation could be adequate to meet the best interests of abandoned children in another country.