

Office of the Commissioner of the President
of the Russian Federation on the Rights of the Child
Mr. Pavel Astakhov
Moscow

Brussels, 15 April 2010

Subject: intercountry adoption

Dear Mr. Astakhov,

We would first of all transmit to you our deepest sympathy for the difficult situation that has now arisen in the intercountry adoption of Artem Saveliev. We understand as not other the pressure that will now be put on the Russian authorities to continue to allow the intercountry adoption of its children.

Let me briefly explain my background. As civil servant of the European Commission in Brussels, I worked from 1999 until 2005 on the reform of the Romanian child protection. The EU supported Romania in this reform, which meant that large children's homes were closed and replaced by alternative child protection services, such as foster care, small family-type homes and support for families. During this work it became clear that the adoption system that Romania developed in the framework of the Hague Adoption Convention was in fact a legalized market in children. The EU put as condition for Romania's EU accession that this export of children needed to be stopped, which Romania did. In 2004 Romania adopted new laws on children's rights that no longer allowed adoption by non related foreigners.

Huge pressure was put on Romania and the EU to re-open Romanian adoptions. High level politicians from the US, Italy, Spain, France and Israel were involved, pleading on behalf of their countries' adoption agencies and their clients. As a result of these pressures I could no longer remain working in the European Commission, although I am still a civil servant. Since then the European Commission has seconded me to a new NGO Against Child Trafficking (ACT) that works to stop the trafficking/trade of children for intercountry adoption.

Back in 2003, when also within the EU institutions opinions were mixed, the European Commission appointed an Independent Panel of EU Experts in Family Law. They accompanied Romania in the drafting of its new legislation.

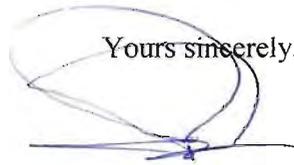
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I hereby take the liberty to send you the Opinion on Intercountry Adoption of this Independent Panel. I hope it may be of use for the difficult discussions and decisions ahead.

In case you would wish further information, please feel free to contact us.

Yours sincerely,

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal line and a small flourish.

Ms. Roelie Post, MSc

Encl. Opinion of the Independent Panel of EU Expert on Family Law

**INDEPENDENT PANEL OF FAMILY LAW EXPERTS
OF EU MEMBER STATES**

Summary of opinion on the matter of adoptions

Brussels, 19 May 2004

The Independent Panel was set up by the European Commission in December 2002 and consists of experts on family law and children's rights from Member States (civil servants). The Panel reports to the Commission on whether the Romanian draft legislative package complies with international standards laid down in the UN Convention on the Right of the Child and the European Convention on Human Rights. In making its assessments, the Panel considers inter-alia whether the proposed legal framework would ensure respect of children's rights at a level comparable to that provided by legislation in the present EU Member States.

In Romania adoption was seen as a child special protection measure (Law 25/1997). However, it is not the case and it is important it should not be seen as such. Adoption is rather a civil order, which creates new relationships with the adoptive family and severs the relationship between the child and his or her birth family. It is one of the available options if a child cannot be returned to his or her family (and attempts to rehabilitate the child with his or her family must be thorough and not token), but there are other options which also need to be considered viz long term placement with the wider family or foster parents. The assessment process will need to determine the child's best interests and how these can best be met. Even if it is decided a child should be placed for adoption, reviews must be continuous both while the child is not yet placed and during the placement. Especially with intercountry adoption, there is a risk that the institutions responsible for children may impose adoption in cases, which are unsuitable, so as to compensate for their own lack of resources.

In this context it is important to recall that according to Article 20 of the UN Convention on the Rights of the Child, States Parties shall ensure alternative care to children who are deprived of their family environment. This provision goes further giving examples of different types of alternative care, like for example foster placement, placement in institutions suitable for the care of children or adoption. This enumeration does not imply that adoption is to be regarded as a “special protection measure” of a similar nature to the other ones. It does neither favour one option to the others. The aim of Article 20 is to give States Parties the spectrum of some possible solutions for children deprived of their family environment – and one of these possibilities is adoption, which is regulated in more depth under Article 21 of the UN Convention.

Intercountry adoption is a very last resort and should only be considered if any suitable means of foster, adoptive or residential care cannot be found in the country of origin of the child and only if it is manifestly in the best interests of the child. It must be clear that residential care comes also before (intercountry) adoption – see article 21(b) of the UN Convention on the Rights of the Child.

The reasons and motivation for intercountry adoption should be clearly stated in the law. In this respect it is also of importance that there should not be other ways to avoid the new regime on intercountry adoptions. Examples of how the new law and system can be prevented from working properly are: recognition of a child by a foreign (married) man of a Romanian child of which he clearly is not the father. Another example would be to consider a poor and/or minor Romanian mother not able to raise her child with as a consequence that the child will be available for adoption in Romania or even for intercountry adoption.

There is also concern about the 5.400 children who the Romanian Adoption Committee apparently has on the list of children approved for adoption. Clarification is required on what is happening to those children now and whether their cases are being reviewed. It would be unacceptable for these children to be “available for” inter-country adoption.

The need for hundreds of international adoptions which persists in Romania is uncommon when we compare the situation with the other States of the European Union. Without strict limitations in the law, it is to be feared that children could be adopted by foreign residents too easily. International adoption besides adoption between relatives is a deliberate choice for a State. Preference should always be given, and in conformity with the UNCRC, to alternatives like foster care and suitable institutional care.

Summary

The Panel's position is a legal and not a political opinion. The reference, guide and basis for its opinion are the UN Convention on the Rights of the Child (CRC) and the European Convention on Human Rights (ECHR). Also the practices in the EU Member States served as reference.

Intercountry adoption **cannot be considered as a protection measure**. Romania's situation is in this regard exceptional, as no EU Member State expatriates its children. Other Member States protect their children and deal with the issues in-country. Out of home placement is available, guidance to parents given and family allocations provided. It is therefore not necessary to abandon children.

The objective of the new legislation is that Romania becomes like other Member States and does not export its children anymore. Intercountry adoptions lead to a vicious circle: too many intercountry adoptions will mean that Romania will not see the need for proper child protection. And as long as the child protection is not at European level, Romania risks continuing to use intercountry adoptions.

To resolve this paradox, intercountry adoptions need to become legally more difficult, exceptional and truly a measure of last resort.

The Convention on the Rights of the Child

The Convention on the Rights of the Child remains neutral about the desirability of adoption even within the child's country of origin, though article 20 mentions it as one of the possible options for the care of children without families. It is clear that children's psychological need for permanency and individual attachments can be met without the formality of adoption, but where it is used it should be properly regulated by the State to safeguard children's rights.

In adoption the best interests of the child must be "the paramount" consideration rather than simply "a primary" consideration. No other interests should take precedence over or be considered equal to the child's **(whether economic, political, state security or those of the adopters)**.

Article 20 of the Convention on the Rights of the Child concerns children who are temporarily or permanently unable to live with their families, either because of circumstances such as death, abandonment or displacement, or because the State has determined that they must be removed for their best interests.

Such children are entitled to «special protection and assistance». Paragraph 3 of article 20 determines that «Such care should include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children».

It is important to note that during the negotiations of article 20, there was a proposal that States should have to «facilitate permanent adoption» of children in care. The proposal was rejected on the grounds that adoption is not the «only solution» when children cannot be cared for by their families. Even the weaker proposal that children should have a right to a «stable family environment» did not survive to reach the final text.

Paragraph 3 of Article 20 also determines that when considering child protection solutions, due regard be paid to «the desirability of continuity in a child's

upbringing and to the child's ethnic, religious, cultural and linguistic background». This provision relates to article 7 (right to know and be cared for by parents) and article 8 (preservation of the child's identity) of the CRC.

According to UNICEF's Handbook on the Implementation of the CRC, «Continuity of upbringing implies continuity of contacts, wherever possible, with parents, family and the wider community – achievable even when the child is adopted». The Panel notes that of course, in cases of intercountry adoption it will be much harder – and in most cases even impossible – to respect this provision of the UN Convention on the Rights of the Child.

On the other hand, article 21 of the Convention on the Rights of the Child, stipulates that the system of adoption «shall ensure that the best interests of the child shall be **the** paramount consideration» and in this context it asks States to «recognise that intercountry adoption may be considered as an alternative means of child's care, **if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin**».

Again according to UNICEF's Handbook, article 21 of the Convention states that «intercountry adoption is only to be considered if the child cannot be suitably placed in his or her country» and «the Convention on the Rights of the Child remains neutral about the desirability of adoption even within the child's country of origin, though article 20 mentions it as one of the possible options for the care of children without families»

On the question of intercountry adoption the Handbook on the Implementation of the CRC says that « the rising number of intercountry adoptions has been the cause of much concern. Children are a highly desirable commodity in countries where low birth rates and relaxed attitudes towards illegitimacy have restricted the supply of babies for adoption. [...] This has led an apparently increasing number of adoptions to be arranged on a commercial basis or by illicit means. Without very stringent regulation and supervision children can be trafficked for adoption or can be adopted without regard for their best interests [...] ».

The United Nations Committee on the Rights of the Child has openly stated that intercountry adoption shall be seen as a solution of last resort. When examining Mexico's Initial Report the Committee stated the following

«intercountry adoption should be considered in the light of article 21, namely as a measure of last resort».

States must therefore take measures to ensure that all possible efforts have been deployed to provide suitable care for the child in his or her country of origin. This «last resort» provision is in conformity with article 20 (3) which refers to the «the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background». This provision relates to article 7 (right to know and be cared for by parents) and article 8 (preservation of the child's identity).

Finally, it is interesting to remember the statement made by the Holy See to the Hague Conference, where a fundamental principle was confirmed, *i.e.*, **that "children are not isolated individuals but are born in and belong to a particular environment. Only if this native environment cannot, in one way or another, provide for a minimum of care and education should adoption be contemplated. The possibility of providing a better material future is certainly not, of itself, a sufficient reason for resorting to adoption".**