

Fourth report to the European Commission of the Independent Expert Panel reviewing the Romanian Government's proposals for new legislation on the Rights of the Child and Adoption

Brussels, 19 May 2004

1. This report was drawn up by the Independent Expert Panel on Family Law following their assessment of the draft legislation as received from the Romanian authorities on 31 March 2004.

Consultation at Parliament level

2. The experts are aware that the texts may be amended during their examination by Parliament. They must however point out that any amendments which may be made by the Parliament must assure at least a similar level of protection and of promotion of the rights of children.

Explanatory Memoranda

3. The Explanatory memoranda that were provided do not explain the intended effects of the draft laws.

Secondary Legislation

4. The Independent Panel has in the meantime received the draft secondary legislation. This legislation is essential because not only it needs to be consistent with the principles of the primary legislation, but it has to state and regulate the intended effects of the law. The Panel will need time to carefully analyse this and plans to report before the end of June 2004.

The draft laws

5. The presented texts correspond, essentially, to the formal recommendations of the experts. The observations made concerning the secondary legislation as

well as the legal and administrative capacity needed to ensure the reform need to be maintained, meaning that any secondary legislation must be consistent with the principles of the primary legislation and the UN Convention on the Rights of the Child and the European Convention on Human Rights.

In order to implement legislation fully and effectively and consistently with the UNCRC and the European Convention on Human Rights, the Romanian authorities will need to have put in place not only the primary legislation but also the detailed secondary legislation and have in place the necessary capacity and experience in terms of the judiciary and those working in the child care and adoption fields. It is not possible to comment further without sight of the implementation strategy and the proposed timescale.

Draft law on the promotion of the rights of the child

6. All recommendations made in the 3rd interim report have been taken into account, with the following exceptions.

No transitory provisions have been introduced to ensure that until the respective legal provisions on specialised jurisdiction on family matters can fully be implemented, competencies may be exercised by not specialised courts/judges, might be considered.

7. The Panel has not been able to take into account the draft secondary legislation, which was received only recently. The Panel will report on this before the end of June 2004.

8. Of comment 24 of the 3rd interim report the following observations were not given any follow up:

- a. Article 8 (2): The Panel would suggest that expression “if possible” is removed.

- b. Article 18 (2): The Panel wonders whether the drafting of the provision is not excessive. Does this mean that a child must have the authorisation of both parents? And should such an authorisation be necessary for travelling inside the country?
- c. Article 21: Corresponds to former Article 15. The Panel would be interested in knowing what the compulsory education in Romania is and it thinks that this is an important issue specially, when it is considered in connection with the provision on child labour (see article 24). If compulsory school stops at for example 13 and the child is only allowed to work at 16, what will she or he then do for 3 years?
- d. Article 23: here, and in many other articles (e.g. 29, para (3), 44, para (2) and 94) are fine examples of many new tasks. If these are to come into force immediately, the necessary provision will need to be in place. If not, transitory provisions should be included.
- e. Article 24: The former provision on child labour had a reference to the minimum age for employment – which was, in the panel's opinion, a good thing. Even if there was a problem in the panel's view with Article 18 (3) of the former version, as it enabled children to work below the age of 16 in conflict with the international legal obligations Romania has assumed. So, the panel's suggestion is that Romania goes back to the earlier version of this Article (of course eliminating its former paragraph (3) for the reasons explained) and specify the minimum age for admission to employment or work, which is 16 (according to the Declaration Romania made upon ratification of ILO Convention no. 138).

Moreover, as in the earlier version of the text, there should be a provision explicitly stating that work, which is likely to jeopardise

the health, safety or morals of the child shall not be carried out by persons under the age of 18 years. This is also in conformity with ILO Convention no. 138.

- f. Article 32 (1): The panel wonders if discerning is the same, or is rather a wider expression, than “child who is capable of forming his or her views”. We recall that this last formula is the one contained in the UNCRC.
- g. Article 131: The panel has serious doubts whether this re-evaluation can be accomplished within six months from the date of enforcement of the draft law.

Draft law on the legal status of adoption

9. Article 39, like the whole section of which it is part of, has had a considerable change, in the sense that international adoption is only to be acceptable if between grand parents and grand children. The third report, in its last comment, underlined the necessity to strictly limit international adoptions, which remains a definite and deliberate choice of a state. The new dispositions therefore take the remarks of the Independent Panel into account. But in the absence of any explanations in the Explanatory Memoranda questions remain:

- a. Why point to the situation of grand parents? Could they not naturally become the legal guardians of their descendents? Is such an adoption, which takes out one degree of the natural order of generations, desirable? Should one not imagine such type of adoptions in the framework of other family ties (i.e. between other relatives)?
- b. Having regard to this way of limiting intercountry adoption to rare cases, is it necessary to maintain such a detailed regulation and such important administrative support as mentioned in this law?

- c. The reference in the new article 42 to the dispositions of international private law in the case where the adopted person resides abroad and the adopter in Romania ignores the hypothesis of the adopter residing also abroad. In this case, which law will be applicable?

Conclusions

10. The presented texts correspond, essentially, to the formal recommendations of the experts.

11. The observations made in previous reports concerning the legal and administrative capacity needed to ensure the reform need to be maintained.

12. A fundamental change seems to have been made on the issue of intercountry adoption, meaning that this will be restricted to situations of close relatives. This change of policy will need strong political will to ensure that this rule is respected and upheld and also to prevent that it will be circumvented by practices based on other legal dispositions.

13. The Panel esteems useful to point to the general principles on which it based its opinion. The attached paper sets out the main opinion of the Independent Group based on Member State practice and the basic principles of the UN Convention on the Rights of the Child.

INDEPENDENT PANEL OF FAMILY LAW EXPERTS OF EU MEMBER STATES

Summary of opinion on the matter of adoptions

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".**