Council of Europe Consultation Group on the Children of Ukraine (CGU)

Contextual overview: Responding to adoption initiatives in emergency situations

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Contextual overview: Responding to adoption initiatives in emergency situation

Prepared by Nigel Cantwell

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Overview of experience to date

Ironically, given that international standards now tend to bar adoption in emergency situations, intercountry adoption as a phenomenon essentially has its origins in responses to precisely such situations – particularly though not exclusively to the United States of America from certain post-war European countries and from the Republic of Korea in the 1950s.

A subsequent key initiative in this vein, Operation Babylift from Vietnam in April 1975, was remarkable not only because of the numbers of adoptions involved in such a short operation (estimated at more than 3,000 in just four weeks) but also because it spawned possibly the first significant questioning of how far such actions corresponded to the best interests of the children concerned.[1] The ensuing debate highlighted the main concerns that underlie current policy to prohibit adoption during and in the immediate aftermath of an emergency, such as: insufficient information on the child's identity and status, lack of consents, inadequate family tracing and reunification efforts, and hastily improvised procedures. However, information and opinion relayed to the public via the media have frequently omitted reference to such concerns, focusing instead on "saving" the children in question and thus fuelling pressure in favour of adoptions in such circumstances.

Thus, while the foundations for the policy of prohibiting adoptions in emergency situations have existed and been built on for more than four decades, practice over this period has not mirrored that development in a linear fashion.

In some cases, non-compliance has been due primarily to failure to prevent private initiatives to remove children for adoption abroad – e.g. the transfer of 46 children from a Bosnian "orphanage" to Italy in July 1992.[2] The reaction of receiving states to such initiatives has varied greatly, from organising repatriation to authorising adoption. At the other extreme, the competent authorities of receiving states have themselves sought to "expedite" or "fast-track" adoptions, notably bowing to pressure from prospective adopters and usually securing ad hoc approval from the state of origin to circumvent normal procedures – e.g. the quasi-evacuation of over 2,000 children from post-earthquake Haiti to North America and several European countries in 2010.[3] In between those extremes, Ukrainian and Polish authorities reportedly managed, for example, to foil a move in 2022 by various "individuals, organisations and high-ranking politicians" allegedly to remove scores of Ukrainian children from Poland to various US cities for the purpose of adoption.[4]

Central Authorities may thus find themselves bypassed by or, in contrast, actively implicated in, intercountry adoption initiatives in the context of emergency situations, and courts may be required to adjudicate on resulting cases, including where a prohibition policy in place has been disregarded.

[1] See for example Public Broadcasting Service (nd): "Operation Babylift (1975)" available at: https://www.pbs.org/wgbh/americanexperience/features/daughter-operation-babylift-1975/

[2] https://balkandiskurs.com/en/2015/03/24/lost-or-found-the-story-of-bosnias-forgotten-children/

[3] International Social Service (2010) "'Expediting' intercountry adoptions in the aftermath of a natural disaster – preventing future harm", available at: www.iss-ssi.org/storage/2023/04/Haiti_ISS-ANG.pdf

[4] Patricia Fronek, Karen S Rotabi-Casares Marina Lypovetska (2023): The taken children of Ukraine, International Social Work 1-14, available at: https://bettercarenetwork.org/sites/default/files/2023-12/fronek-et-al-2023-the-taken-children-of-ukraine.pdf

Central Authorities and other competent policy-making bodies in receiving states

Since relevant international law makes no provision for derogation, any policy decision diluting the principle of prohibiting adoptions during or immediately after an emergency situation, or allowing case-by-case exceptions, should take account of a number of factors at a minimum, including in relation to Ukraine despite its situation being exceptional in that the National Social Service and tribunals have continued to function in the pertinent areas of the country:

1) **The reliability of the domestic and intercountry adoption system in the state of origin before the emergency situation began**, including:

- Degree of recourse to suitable in-country alternative care and domestic adoption, and other potential indicators of respect for the principle of the subsidiarity of cross-border placements for children deemed to need alternative care or adoption (e.g. family support and reintegration programmes, and initiatives promoting kinship care, foster care and domestic adoption)
- Whether or not the state in question is a contracting state to the 1993 Hague Adoption Convention – if not, why not, and how valid are the perceived substantive and/or political obstacles to accession from a children's rights standpoint?
- Degree of compliance with key procedural safeguards of the 1993 Hague Adoption Convention, regardless of ratification status
- The overall reputation of the state's intercountry adoption system, e.g. whether any or many receiving states had previously withheld or withdrawn cooperation because of concerns about that state's ability to protect children's best interests and other rights, including potential concerns over financial and other issues that may affect decision-making.

2) **The degree to which, following the onset of the emergency situation, the state of origin has taken all steps within its power to prohibit adoptions**, such as decreeing a moratorium (with or without specific and appropriate measures for pending cases), and/or openness to envisaging other non-definitive responses to ensure children's care, in-country or abroad.

3) **The degree to which the executive and judicial authorities of the state of origin are functional and would be able to ensure, throughout the territory of their jurisdiction or at least in the pertinent parts thereof, compliance with necessary pre-adoption and adoption procedures and safeguards, including reliable civil status registration and records.**[5]

4) **The imperative of a concerted response on the part of receiving states.** In the wake of the Haiti 2010 emergency, the Hague Conference on Private International Law Secretary General JHA van Loon identified two, related, findings of "particular concern": that "approaches differed widely among the countries involved – and to some extent also over time – despite the agreed standards and common obligations; and that the emergency context gave rise to rushed, 'expedited' actions, whereby the supposed urgency led to principles and procedures being circumvented, which are otherwise rightly viewed as essential and indispensable safeguards."[6] Indeed, lack of consensus among receiving states as to whether adoptions from a given state of origin should be prohibited has long been a major obstacle to upholding international standards, and has been especially visible when it results in vastly different reactions in emergency situations, some of which have violated or jeopardised the rights of the children concerned.

[5] See also: Checklist to assist decision-making by Central Authorities, Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption, HCCH.

[6] Hans van Loon: Foreword to "Expediting" intercountry adoptions in the aftermath of a natural disaster – preventing future harm. [ISS 2010], available at: www.iss-ssi.org/storage/2023/04/Haiti_ISS-ANG.pdf

Judicial proceedings in receiving states

Competent judicial authorities and lawyers in a receiving state may be asked to take up cases requiring care decisions on the proposed adoption of a child during or immediately following an emergency situation, and potentially including cases in which the validity of an adoption order already granted in such circumstances is contested.

If the court establishes that it has jurisdiction in the case, and recognising the differing degrees of (often considerable) discretion afforded to judges in member states, **key issues to be taken into account, *in all cases*, should include the following:**

1) Against the background of a general policy prohibiting adoption in the context of an emergency situation, **are there exceptional prima facie grounds for hearing the case in question**?

2) If such grounds are deemed to exist in principle, **is there trustworthy evidence of: the child's adoptability (including necessary consents); the aptitude of the identified prospective adopters; and a professional matching process?**

3) Have a bona fide assessment and determination of the best interests of the child concerned been carried out demonstrating that alternative (revocable) solutions to the child's care during the emergency would likely fail to serve their best interests in the short and/or longer term?

It cannot be over-emphasised that **the wishes and opinions of the child must be a significant aspect of this assessment** and determination, and of the judicial decision-making process.

For more guidance on ensuring children's right to participate in judicial procedures and that their views are given due weight in the best interests' assessment, please see:

- Council of Europe Guidelines on child-friendly justice
- Council of Europe Handbook on children's participation for professionals working for and with children
- UN Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard
- Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings, Prepared by European Union Agency for Fundamental Rights
- Guidelines On Children in Contact with the Justice System, Prepared by an International Working Group of the International Association of Youth and Family Judges and Magistrates
- Schrama, W. et al. (eds.), International Handbook on Child Participation in Family Law, Intersentia, 2021.

Key issues to be taken into account, *in contested cases*, should *also* include the following:

4) When such cases involve questioning the validity of an existing adoption order and/or the prior commission of alleged or proven illicit or questionable practices in the context of an adoption, additional dilemmas are created for the courts.[7] Generally, the legislative and regulatory (policy) framework – nationally and internationally – reflects above all a concern to respect the best interests of children collectively, whereas it may arguably not serve the best interests of certain individual children. Thus, **in individual cases before the court, the delicate task is to reach a decision in the long-term best interests of the child in question that, in so doing, will not result in the impunity of perpetrators or create a precedent that could incite future attempts to circumvent recognised standards. Each judge necessarily has strong discretion in such cases.**

To date and in general (i.e. not necessarily concerning emergency situations), it seems that many judges have exercised their discretion to validate the status quo on individual best interests grounds, notably due to the child being settled in the new environment and expressing the wish to remain there. That said, the same grounds – and particularly the wishes of the child – have also been invoked alongside evidence of wrongdoing to successfully secure annulments. However, there is ostensibly no decisive body of jurisprudence to refer to at either national or supranational level for guidance on these matters.

Implications for actions in relation to the situation of Ukraine

The scenarios associated with adoptions concerning Ukraine are varied and, in one instance at least, unprecedented: ***Adoption of children displaced/evacuated from the country where the emergency is occurring*** (see Information Note: Responding to Adoption Initiatives During the War in Ukraine). Over and above general directions to follow – and perhaps in particular those to avoid – there are limited lessons to be learned from previous emergency situations that would be relevant to the situation of Ukraine.

Whether for Central and other competent Authorities or for the courts, there would nonetheless seem to be two overriding watchwords for policy and practice:

- **Avoid irrevocable decisions on children's care arrangements during the emergency situation, rather seeking suitable alternatives to adoption that nonetheless provide stability for the necessary time;**
- **Pay particular attention to the opinions and wishes of the children concerned, all the more so in that they are usually of an age at which they can understand the issues on which they are invited to express themselves, while of course bearing in mind the possible confusion that their current situation and status may cause them.**

[7] More detailed recommendations for responding in such cases are contained in the HCCH Model procedure to respond to illicit practices" pp 175 et seq. and especially pp 188 et seq.

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