



To the Minister for Legal Protection
Mr F.M. Weerwind
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Email advies@rsj.nl Our reference 3949954
Subject Advice on the future of intercountry adoption (for the purposes of country selection)

Dear Mr Weerwind,

On 11 April 2022, you informed the House of Representatives of the government's position with regard to the future of intercountry adoption. The government had decided that intercountry adoption would remain a possibility for children for whom no suitable care is available in their country of origin. The government's ultimate goal is for countries of origin to eventually provide suitable care themselves, given that intercountry adoption is no longer considered the best solution in the long term to protect the interests of these children.

In the coming months, you will be working to provide more specific details of the steps involved in creating a new adoption system. A number of steps will be required to achieve better regulation of the system and to attach stricter conditions to intercountry adoption than is currently the case. For example, higher demands will be set on the selection of countries of origin. The countries with which cooperation is still permitted will be selected on the basis of a stricter assessment. To this end, the Dutch Central Authority (CA) has drawn up a country analysis.

The CA developed this country analysis using a number of criteria: the application of the principle of subsidiarity, areas of societal concern, the youth protection system (prevention, quality and development), how procedures are followed (relinquishment, assessment and parentage information), the risk of corruption, and costs. Before these criteria are applied to the selection of countries, the Advisory Division of the RSJ was requested to provide advice on the suitability and completeness of these criteria, and of the sources that the CA had used in drawing up the country analysis.

Based on your request for advice, the RSJ considers the following to be the key question:

What considerations must play a role in establishing a procedure for selecting countries for intercountry adoption?

To provide this advice, the RSJ consulted experts and people with experience-based expertise. An extensive literature review was also carried out. Before examining the central question in greater depth, it would be worthwhile to look at the key principles in international law that the RSJ considers relevant in this context.

1. Key principles

The most important principles for regulations and decision-making relating to procedures that concern children – and with regard to intercountry adoption in particular – are set out in the International Convention on the Rights of the Child (CRC) and in The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (“The Hague Convention”). There is a *shared responsibility* between the country of origin and the Netherlands as the receiving country to ensure that every intercountry adoption occurs in the best interests of the child and in accordance with international children’s rights standards.

1.1 Adoption in the best interests of the child

The key principle in adoption decisions is that the interests of the child are the determining factor: *the best interests of the child shall be the paramount consideration*. States Parties that recognize and/or permit the system of adoption shall ensure that the best interest of the child shall be the paramount consideration (see Art. 21 CRC). This means that when decisions are made about adoption, the best interests of the child are the determining factor, to the exclusion of any other interests.

1.2 The principles of subsidiarity and non-discrimination

The best interests of the child are reflected in the principles of subsidiarity and non-discrimination. In essence, the principle of subsidiarity means that, where possible, a child should grow up in their biological family or with members of their extended family in their country of origin. If this is not possible or desirable in practice, other forms of permanent placement with a family in the country of origin should be considered. Domestic solutions must be investigated first, before intercountry adoption can be considered. And, again, intercountry adoption should only be considered if it is in the best interests of the specific child.

In the context of intercountry adoption, the principle of non-discrimination ensures that all adopted children, regardless of whether the adoption is international or domestic, enjoy the same rights and protection. It also ensures that even the most vulnerable and disadvantaged children enjoy protection and have the same opportunities to grow up in a family environment as other children.



The best interests of the child in the principles of subsidiarity and non-discrimination form an important framework, and the selection of countries for intercountry adoption must be considered within that framework.

2. Four considerations relating to country selection

2.1 Only cooperate with countries based on a reversed-flow approach

The RSJ believes that the demand for adoptive children is one of the biggest risks for the emergence and continuation of abuses in adoption. In addition, the question arises as to the extent to which the best interests of the child can actually be the focus in a demand-driven adoption system. In line with the principles of the Hague Convention, the RSJ recommends only responding to a request from the government of the country of origin for the possible reception of a child in the Netherlands. This means that, in the future, the Netherlands will not go looking for children in countries of origin, and will be continuously alert for incentives in the system that undermine this approach. It is obviously essential to discuss this reversed-flow approach with the countries of origin that emerge from the country selection process. Such a discussion should also include whether and how the Netherlands can help to strengthen the youth protection and foster care system in the country of origin concerned. For potential adoptive parents in the Netherlands, this means that they will make themselves available to receive a child from abroad without any guarantee that they will actually be able to adopt a child.

2.2 Only cooperate with countries that have ratified the Hague Convention, the CRC and the Optional Protocol on the sale of children

The country of origin, and the Netherlands as the receiving country, are jointly responsible for ensuring that intercountry adoptions take place in the best interests of the child and in accordance with international children's rights standards. The Hague Convention is based on this shared responsibility and does not operate in relation to states that are not parties. Accordingly, the RSJ believes that the Netherlands should only cooperate with countries that have ratified the Hague Convention. By extension, the RSJ believes that these countries must also have ratified the CRC and the *Optional Protocol to the CRC concerning the sale of children, child prostitution and child pornography* (hereafter: *Optional Protocol on the sale of children*), since this would demonstrate their intention to make children's rights and the best interests of children paramount. It should be noted that there is a dilemma at a micro level: the decision to only cooperate with countries that have ratified these conventions may mean that not all children who need protection and care can be reached. It would be good to be able to help these children through development cooperation.

2.3 Only cooperate with countries that properly apply the Hague Convention, CRC and Optional Protocol on the sale of children

It is essential that countries with which a potential adoption relationship is maintained have ratified the Hague Convention, the CRC and the aforementioned Optional Protocol. However, that alone is not sufficient. These international standards must also be properly applied. Before it can be established that an adoption relationship can be maintained with



a country, up-to-date information must be available from independent sources on the application of conventions in that country. It is also important that formal quality assurance is satisfied by means of independent, structured evaluative research into the youth protection and foster care systems in the selected countries and the position of intercountry adoption within those systems.

Proceeding with intercountry adoption will be accompanied by the knowledge that the risk of abuse cannot entirely be excluded. It is up to the Dutch government to decide whether to accept this risk. Research shows that the risk of abusive practices is highest in countries with the following characteristics: the majority of the population live in poverty; discrimination towards minority groups and single/unmarried mothers; underdevelopment of local reception facilities and care systems; a lack of birth registration; a lack of familiarity with the concept of 'full adoption'; post-humanitarian disaster; support from biological parents/families is limited or absent. Other indicators that the RSJ considers relevant include a lack of administrative transparency, position in the corruption index, legal protection of the child and their parents, reliability and independence of the courts and the lack of official government intervention in intercountry adoption.

If a decision is made to maintain an adoption relationship with a country, the Dutch CA must exercise constant vigilance with regard to the independent application of the conventions in these countries. This vigilance could take various forms, and existing forms of vigilance could be intensified: through the work of embassies and the provision of information by the Ministry of Foreign Affairs; working visits; information from the Permanent Bureau of the Hague Conference; country information from International Social Services (ISS) or regular questioning of partners in the adoption chain.

When there are suspicions of irregularities in a country, an immediate investigation into the current situation is required. In these circumstances, it is important that an independent investigation be performed on the ground, initiated by the CA. Such an investigation may conclude that adoptions from a State party should be suspended.

The essential thing is to consult with the country of origin to ensure proper application of the principle of subsidiarity. In this context, the availability of a team of independent, experienced and qualified professionals in the country of origin is a prerequisite. They can draft an accurate and detailed report about the child and his or her background, drawing on sources such as legal documents and medical, developmental, educational, psychological and social evaluations. Without such an assessment, there is no guarantee that the best interests of the child will be applied as the determining factor.

2.4 Selections should be based on open and transparent cooperation in which there is scope for critical reflection with regard to the best interests of the child

The RSJ recommends selecting countries based on open and transparent cooperation relationships on an equal footing between the Netherlands and countries of origin. As noted earlier, there is shared responsibility with regard to the care of these children. Having responsibility also requires having an attitude that suggests that responsibility has



been accepted. A critical and enquiring mindset must be adopted on both sides, keeping in mind the best interests of the child. This requires a proactive attitude. Ongoing critical reflection is necessary with regard to the abusive practices that may arise. It is important to enter into dialogue with countries of origin on an equal footing, with the aim of working together to establish the best interests of the child, so that the parties can act accordingly. It is therefore important to take account of and have respect for diversity in cultural and ethnic backgrounds.

3. Conclusion and recommendations

Based on the above considerations, the RSJ has come to the conclusion that the criteria listed in the country analysis reflect key areas of concern, but should not be the only criteria considered in the country selection process if potential abuse is to be prevented in the future. The RSJ therefore doubts whether the proposed criteria constitute an appropriate and complete framework for the country selection process, even though the criteria are consistent with the legal framework resulting from the Hague Convention, the CRC and the Optional Protocol on the sale of children. Accordingly, the RSJ advises the Minister to take a critical look at the proposed country selection criteria through the lens of the above considerations and the recommendations set out below.

The recommendations of the RSJ with regard to creating the right preconditions for the selection of countries, allowing a decision to be made that is in the best interests of the child (in the context of intercountry adoption), are:

1. In future, only cooperate with countries that have signed and ratified the Hague Convention, CRC and Optional Protocol on the sale of children, following a reverse-flow approach;
2. Only cooperate with countries after a critical assessment of whether the Hague Convention, CRC and Optional Protocol on the sale of children are being properly applied;
3. Select countries which allow for open and transparent cooperation on an equal footing, and in which there is scope for critical reflection with regard to the best interests of the child.

Yours faithfully

Advisory Division of the Council for the Administration of Criminal Justice and Protection of Juveniles



Han Moraal
Chair



Annexes:

- Annex I Experts consulted
- Annex II List of sources

