



Intercountry Adoption and the Notary

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Introduction

Intercountry adoption - where a child living in one state is adopted and brought to live in another state – started late in Ireland relative to other countries of Europe. Adoption in Ireland became the subject of regulation pursuant to the Adoption Act 1952. Prior to 1952 there was no statutory adoption process in Ireland although, as was stated officially in the Seanad¹ in debates on the present Adoption Act 2010, ‘there were very many children who were brought up in families other than their birth families’. In the period between the enactment of the Adoption Act 1952 and 1990, the vast majority of children adopted in Ireland were children placed for adoption by their mothers within the State.² During the period 1952 to 1990 almost 2,000 Irish children were placed for adoption outside Ireland, the vast majority of these children being adopted by families in the United States.³

The Minister for Children stated in 2009 that it was a rare event in Ireland by 2009 for an Irish child to be placed for adoption outside his or her own family.⁴ Foreign or intercountry adoption developed. This was influenced partly by the

¹ Seanad Éireann Debates, vol 193, 17 February 2009, Minister of State at the Department of Health and Children, Deputy Barry Andrews.

² See above.

³ See above.

⁴ See above.

Romanian orphanage crisis of the 1990s. Children were subsequently adopted from other countries including frequently Russia and Vietnam.

Hague Convention

The Hague Convention entitled 'Convention on Protection of Children and Co-Operation in respect of Intercountry Adoption' ('the Hague Convention') which was concluded on 29 May 1993 and entered into force on 1 May 1995 was given effect in Ireland by section 9 of the Adoption Act 2010 ('the 2010 Act'): 'The Hague Convention (as defined above) has the force of law in the State.' Further, section 10 of the 2010 Act provided that judicial notice shall be taken of the explanatory report prepared by G.Parra-Aranguren (a judge of the International Court of Justice at The Hague, Netherlands) in relation to the Hague Convention, 'a copy of which has been placed in the Oireachtas Library'. This is a very detailed report which sets out, *inter alia*, the history and the Convention's *travaux preparatoires*.

The principles set out in the Hague Convention permeate the 2010 Act. Accordingly, it is of some relevance to set out some of these principles here. The entire text of the Hague Convention is set out in Schedule 2 of the 2010 Act. Article I sets out the objects of the Convention:

- (a) To establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
- (b) To establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- (c) To secure the recognition in Contracting States of adoptions made in accordance with the Convention.'

In the context of the relevant consents necessary for an intercountry adoption, the principle is set out that 'the consents have not been induced by payment or compensation of any kind and have not been withdrawn'. [Article 4] This principle is again set out in Article 8 of the Convention which obliges central authorities – those designated by the contracting state to discharge the duties imposed by the Convention (and include the Adoption Authority in Ireland) to take all appropriate steps 'to prevent improper financial or other gain in connection with an adoption'. The principles of eligibility and suitability are set

out in the Convention and these criteria are repeated in the 2010 Act and will be considered later in this chapter.

The principle of co-operation between competent authorities in the contracting states is set out. Of interest to lawyers including notaries is the obligation, *inter alia*, on central authorities (including the Adoption Authority in Ireland) to 'facilitate, follow and expedite proceedings with a view to obtaining the adoption' and to 'promote the development of adoption counselling and post-adoption services'. [Article 9]

Accredited bodies or agencies provide adoption-related services to prospective parents. A list of these accredited agencies are set out on the Adoption Authority's website at www.aai.gov.ie. The Convention stipulates certain requirements for these accredited bodies. Accredited bodies must:

- (a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;
- (b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption;
- (c) be subject to supervision by competent authorities of the State as to its composition, operation and financial situation. [Article 11]

The Adoption Authority of Ireland is obliged to communicate details of the names and addresses of the accredited bodies to the Permanent Bureau of the Hague Conference on Private International Law. [Article 13]

The central authority of the state of origin, if satisfied that the child is adoptable, must prepare a report which includes information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family and any special needs of the child and transmit that information to the central authority (the Adoption Authority of Ireland, for example,) together with proofs that the necessary consents have been obtained. [Article 16]

Article 30 of the Convention imposes obligations on the Adoption Authority of Ireland (for example) to ensure that information held by such an authority concerning the child's origin, in particular information concerning the identity of his or her parents, as well as their medical history, is preserved. The Adoption Authority of Ireland, for instance, must also ensure that the child or his or her

representative has access to such information under appropriate guidance in so far as is permitted by the law of that State. [Article 30]

A central and recurring principle in the Convention is the prohibition on improper financial gain or other gain in the context of an intercountry adoption. The Convention stipulates that only costs and expenses including reasonable professional fees of persons involved in the adoption may be charged or paid. Further, the directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to the services rendered. [Article 32 (2) and (3)]

A significant matter is the obligation under the Convention for competent authorities of the contracting states to act expeditiously in the process of adoption' [Article 35]

Among the contracting states to this Convention are Brazil, China, India, Mexico, United States of America and Vietnam.

Adoption Act 2010

The *Adoption Act 2010* ('the 2010 Act') is the principal domestic legislative measure regulating adoption in Ireland. The 2010 Act repealed all previous legislative measures encapsulated in the Adoption Acts 1952 to 1998. The 2010 Act came in force on 1 November 2010 – the same day as the State ratified the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) ('the Hague Convention' or 'the Convention'). The 2010 Act provided for the dissolution of An Bord Uchtála and the establishment of a new body designated as the Adoption Authority of Ireland which was also established on 1 November 2010. The 2010 Act also provided for the making and recognition of intercountry adoptions (an adoption effected outside the State) in accordance with bilateral agreements and other arrangements.

Notaries in Ireland have an essential role in intercountry adoptions by certifying documents and frequently advising on adoption law in Ireland for the benefit of foreign authorities. Accordingly, this chapter will focus on that aspect of the law of adoption.

'Intercountry adoption' is defined in section 3 of the 2010 Act as meaning
'the adoption of a child habitually resident in a state (the "state of origin") whether a contracting state or non-contracting state, who has been, is being or is to be transferred into another state ("the receiving state") –

- (a) after the child's adoption in the state of origin by a person or persons habitually resident in the receiving state, or
- (b) for the purposes of an adoption, in either the receiving state or the state of origin, by a person or persons habitually resident in the receiving state.'

In general terms, section 3 of the 2010 Act defines 'a contracting state' as a state in which the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (1993) has entered into force. 'Convention adoption' means an intercountry adoption effected in accordance with the Hague Convention in a contracting state and for which a relevant certificate relating to recognition of adoptions certified by the competent authority of the state of adoption has been provided. 'Bilateral agreement' means

'any agreement between the Government [of Ireland] and a non-contracting state concerning intercountry adoptions which agreement by virtue of section 73 [of the 2010 Act] has the force of law'.

In any matter or application by the Adoption Authority or a court in relation to the question of the arrangements for the adoption of a child, for the making of an adoption order or for the recognition of an intercountry adoption outside the State, the Authority or the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration. [S.19 of 2010 Act]

Section 73 of the 2010 Act provides, *inter alia*, for the State of Ireland entering into bilateral arrangements with non-contracting Hague states. Where the Government has entered into a bilateral intercountry agreement before or after the commencement of the 2010 Act, the Minister for Health and Children must lay before each House of the Oireachtas a copy of the agreement of which judicial notice shall be taken from the date on which it is laid before each house.

'Bilateral agreement adoption' is defined as meaning an adoption

- (a) effected in accordance with a bilateral agreement in a state that is a party to the agreement, and
- (b) certified, in accordance with the agreement, by the competent authority of the state of the adoption as having been so effected.' [Section 3 of 2010 Act]

'Accredited body' is defined in section 11 of the 2010 Act as including the Health Service Executive and in section 3(1) of the Act as a body of persons whose name is entered in the register of accredited bodies. Accredited bodies such as

adoption agencies and societies are registered with the Adoption Authority and their registrations may be viewed at www.aai.gov.ie.

Eligibility to Adopt

The following categories of persons only are eligible to apply for an intercountry adoption in Ireland: (a) a married couple living together or (b) a married person living alone. In the case of a married person living alone, the spouse's consent to the adoption must be obtained unless the couple are living apart and are separated under (i) a court decree, (ii) a deed of separation, (iii) the spouse has deserted the prospective adopter or (iv) conduct on the part of the spouse resulted in the prospective adopter, with just cause, leaving the spouse and living apart. The other categories of person eligible for intercountry adoption include: (a) a relative of the child – being a mother, father, grandparent, brother, sister, uncle or aunt of the child and/or the spouse of such person, the relationship to the child being traced through the mother or father and (b) a widow/widower or a sole applicant not covered by any of the above categories and the Adoption Board is satisfied, in the particular circumstances of the case, it is desirable to grant the order. [Section 33 of 2010 Act]

In the context of eligibility there is a minimum age for adoption. The adopter must be at least 21 years of age if the child is not a relative. If the child is to be adopted by the natural father or mother, or a relative of the child, only one such person must be 21 years of age. Further, in general, the adopter must be habitually resident in the State and must have resided in the State for at least one year before the making of the adoption order. However, a married couple (in relation to an intercountry adoption) may be resident in another contracting state or a state that has a bilateral agreement with the State. [See generally section 33 of the 2010 Act]

Suitability Criteria

The criteria in relation to the suitability of persons wishing to adopt a child or in relation to recognition of an intercountry adoption effected outside the state are set out in section 34 of the 2010 Act. The Adoption Authority is to be satisfied that the applicant, or the applicants if the applicants are a married couple living together, each of them-

- (a) is a suitable person to have parental rights and duties in respect of the child, and
- (b) without prejudice to the generality of paragraph (a), is of good moral character, in good health and of an age so that he or she has a reasonable expectation of being capable throughout the child's childhood of –
 - (i) fulfilling his or her parental duties in respect of the child;
 - (ii) promoting and supporting the child's development and well-being,
 - (iii) safeguarding and supporting the child's welfare.
 - (iv) providing the necessary health, social, educational and other interventions for the child, and
 - (v) valuing and supporting the child's needs in relation to his or her
 - (1) identity, and
 - (11) ethnic, religious and cultural background,
- (c) has adequate financial means to support the child, and,
- (d) has been provided with appropriate information, advice and counselling concerning adoption.

The above criteria in relation to suitability have been expressed in the following five standards by the Adoption Authority of Ireland and endorsed by the Child and Family Agency of Ireland (TUSLA) and are set out as follows:

1. The capacity to safeguard the child throughout his or her childhood.
2. The capacity to provide the child with family life that will promote his or her development and well being and have due regard to the physical, emotional social, health, educational, cultural, spiritual and other dimensions. The resources that families can draw on will vary from family to family and may change over time. Whatever circumstances the family find themselves in, the applicant(s) will be able to demonstrate their understanding of the importance of maintaining an on-going and meaningful relationship with their child.
3. The capacity to provide an environment where the child's original nationality, race, culture, language and religion will be valued and appropriately promoted throughout childhood. This will include the capacity of the parent(s) to recognise the differences between themselves and their child within these areas and to recognise and try and combat racism and other institutional and personal oppressive forces within society.

4. The capacity to recognise and understand the impact of being an adopted child from an overseas country on the development of the child's identity throughout their childhood and beyond.
5. The capacity to recognise the need for and to arrange for appropriate support and intervention from health, social services, educational and other services throughout childhood.

The application by prospective adopters for a declaration of eligibility and suitability is regulated by Chapter 5 of the 2010 Act. A person habitually resident in the State, or a married couple married to each other, each of whom is habitually resident in the State may apply to the Health Service Executive or an accredited body for an assessment of eligibility in relation to himself, herself or themselves. [Section 37 of 2010 Act]

Applicants complete an application form incorporating a statutory declaration in which they confirm their identity, marital status, the country from which they intend to adopt (for domestic adoption this will be Ireland) and their residency. This may be the first contact with the notary.

A social worker is assigned to the applicant and carries out the relevant assessment. The assessment concludes with an Intercountry Adoption Assessment Report (also known as a Home Study Report).

Pursuant to section 37 of the 2010 Act, the Health Service Executive must 'as soon as practicable' after an application by a person habitually resident in the State, or a married couple, (each person habitually resident in the State), for an assessment of eligibility and suitability in relation to an application for an adoption or the recognition of an intercountry adoption

- (i) provide information, advice and counselling to the applicants who seek an assessment of eligibility and suitability in relation to adoption,
- (ii) carry out an assessment of eligibility and suitability in relation to the applicants and
- (iii) prepare an assessment report that must conform to the criteria set out in Article 15 of the Hague Adoption Convention.

Article 15 of the Hague Adoption Convention makes it compulsory for the Central Authority of the receiving State to prepare a report containing information on the applicant's 'identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for

adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care'. This report is to be transmitted by the Central Authority of the receiving State to the Central Authority of the State of origin.

The Health Service Executive must establish one or more adoption committees. The function of an adoption committee is (a) to advise and assist the Adoption Authority in the performance of its functions and to make recommendation to the Adoption Authority concerning the issuance to applicants of declarations of eligibility and suitability. After the Assessment Report has been prepared by the Health Service Executive or an accredited body, the Health Service Executive must refer the report to an adoption committee for its recommendation under section 39 of the 2010 Act. [Sections 36 and 39 of the 2010 Act.]

The Adoption Authority may hold hearings in relation to an application for an adoption order and a person before the Adoption Authority is entitled to be represented by counsel or a solicitor. [Section 43] The Authority may summon witnesses and examine such persons on oath. [Section 46 of the 2010 Act] The Adoption Authority may refer any question of law arising on an application for an adoption order or the recognition of an intercountry adoption to the High Court for a determination. [Section 49 of 2010 Act.]

The Adoption Authority, with the prior consent of the Minister for Health and having regard to the principles of the Hague Convention, may enter into discussions with any non-contracting state concerning the possibility of the Government entering into a bilateral agreement with that state. [Section 73 of the 2010 Act] The Adoption Authority is also the competent authority for certifying adoptions in accord with any bilateral agreement. [Section 76 of the 2010 Act]

There is an Adopted Children Register maintained by the Registrar of Births, Marriages and Deaths. [Sections 83 and 84 of the 2010 Act] A Register of Intercountry Adoptions is maintained by the Adoption Authority and adoptive parents must no later than three months after the date when the child first enters the State after his or her intercountry adoption furnish relevant particulars to the Adoption Authority. This register is not open to public inspection and no information is to be given to any person except by order of the court or of the Adoption Authority. [Section 90 of 2010 Act]

A certified copy of an entry in the Register of Intercountry Adoptions is evidence of the facts stated. [Section 91 of 2010 Act]

Part 15 of the 2010 Act sets out a list of offences such as prohibitions against certain advertisements relating to adoptions, [section 144 of 2010 Act] and a prohibition against receiving, making or giving certain payments and rewards or agreeing to do so in relation to the adoption of a child. [section 145 of 2010 Act]

The Dossier of Documents

Adopter(s) are obliged to assemble a dossier of documents (sometimes described as an 'Adoption Pack') for the authorities of the state of origin of the child being adopted. The documents should be placed in a bound folder. Sometimes, two original sets of documents are required and one copy but this requirement can vary. The documents are 'notarised' before normally being forwarded to the Department of Foreign Affairs for the apostille which is normally placed on each document. The documents normally include the following:

1. Adoption Authority certificate of eligibility and suitability;
2. Health Service Executive (or accredited body) Home Study Adoption Report;
3. Passport of adopter(s) (copy);
4. Birth Certificates of adopter(s) in long form;
5. Marriage Certificate of adopters (if applicable);
6. Immigration Clearance Certificate from the Department of Justice Equality and Law Reform;
7. Garda Síochána/Police Clearance Certificate of adopter(s);
8. Medical Certificates of good health of adopter(s);
9. Employer's Certificate as to income of adopter(s), if applicable;
10. Certificate of income from Accountant for adopter(s) where relevant;
11. Certificate from accountant or valuer as to value of house of adopter(s) and other assets;
12. Photographs of the adoptive parents and frequently a photograph of the house and room for the proposed adopted child.

The operative part of the notarial certificate is where the notary public certifies

- 1 'That the documents listed in the following schedule of documents, the originals and, where necessary, any copies in lieu of originals and notarised by me, (signed 'AB, Notary Public" and stamped by me) ground in part the application to the Adoption Authorities of (specify country) of CD (holder of Passport No. 123456 of Ireland) and his wife EF (holder of Passport No. 678910 of Ireland) and both of (address), Ireland, for one child.

- 2 That the attached documents as are originals bear all the signs of authenticity required by Irish law and, in my opinion, are true originals as produced to me; and that such of the attached documents as of necessity consist of copies, are true copies of such originals, as produced to me, and bear all the signs of authenticity required by Irish law.

- 3 That (as stated above) for the purpose of identification and verification, I have signed my name and affixed my official seal and stamp on each of the attached documents.'

Most countries require a post-placement report for some years after the adoption. This involves the parents of the adopted child in Ireland obtaining a further (home study) report from the Health Service Executive and furnishing a translation of the report into the local language. Two copies (at least) are notarised before being sent to the local embassy and later to the relevant authority in the country of origin of the adopted child.

End