KIRSTEN MCDONALD

INTERCOUNTRY ADOPTION IN NEW ZEALAND

FAMILY LAW (LAWS 507)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2002

CONTENTS

I INTRODUCTION

II INTRODUCTION TO INTERCOUNTRY ADOPTION IN NEW ZEALAND
- A Adoption in New Zealand
- B Intercountry Adoption

III HAGUE CONVENTION
- A Description of the Convention
- B Necessity for the Convention
- C Some Problems with the Convention

IV ADOPTION OUTSIDE THE CONVENTION
- A Adoption Occurs Overseas
- B Adoption Occurs in New Zealand
- C Recommendations for Change

V THE WELFARE OF THE CHILD: WHAT IS RELEVANT?
- A Where does the "Welfare of the Child" Principle Come From?
- B What does the "Welfare of the Child" Mean?

VI ACCREDITED BODIES
- A Introduction to Accredited Bodies
- B The Merits of having Accredited Bodies
- C How to Become an Accredited Body
- E ICANZ
- G Accredited Bodies Overseas
- H Issues Relating to Accredited Bodies
- I Conclusion on Accredited Bodies

VII IMMIGRATION CONCERNS
- A Adoption and New Zealand Citizenship
- B Policy Developed by the Courts
- C Adoption by Relatives
- D Adoption of a Child by its Own Parents
- E Adoption of 19 year old "Children"
- F Possibility for Reform

VIII CONCLUSION

ABSTRACT

The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, signed at The Hague in May 1993 indicates that intercountry adoption is an area of concern for the international community. New Zealand has acceded to the Convention and implemented it via the Adoption (Intercountry) Act 1997, but this has not solved many of the problems associated with intercountry adoption in New Zealand.

The objectives of the Convention cannot be fulfilled because it does not apply when a country that is not a Contracting State for the purposes of the Convention is involved in the adoption. In this case, totally different rules govern the recognition of the adoption in New Zealand. The New Zealand law should be amended to require New Zealand to comply with the Receiving State's Convention obligations whenever it is involved in an intercountry adoption and to encourage the child's country of origin to comply with the Sending State's Convention obligations as much as possible. Section 11(b) of the Adoption Act 1955 should be amended to make the welfare of the child the paramount consideration in any adoption, whether domestic or international. The welfare of a child in need will often be best served by becoming a member of a family through intercountry adoption.

The merits of having accredited bodies involved in intercountry adoption have often been debated but, if adequately supervised, they can play a valuable role in intercountry adoption. It appears to be very difficult to become an accredited body in New Zealand. More details about exactly what is expected of an accredited body need to be made available by the Central Authority to allow deserving organisations to have a better chance at becoming accredited.

The majority of children adopted into New Zealand come from the Pacific Islands, especially Samoa, and are adopted by family members. Adoption has often been used as a device to circumvent immigration procedures. Deciding who is allowed to reside in New Zealand and be a New Zealand citizen is a matter for the Immigration Service and not the Family Court. Adoption should not be used as a "back-door" for immigration into New Zealand.

Intercountry adoption law in New Zealand is ad hoc and arbitrary. Major reform is needed to make it fair, consistent and certain.

Word Length

The text of this paper comprises 14 945 words.

I INTRODUCTION

Intercountry adoption is a recent phenomenon, but one that we are hearing more and more about. There are two very different schools of thought about its merits. One sees it in a romantic light, as rescuing children in need from overseas orphanages and bringing them to a new country where they can have a better life with a loving family. The other takes a more negative approach, and raises concerns about children being torn away from their birth country and culture to satisfy the adoptive parents' desire to have a family. However, intercountry adoption is a complex matter and cannot be discussed in such black and white terms. In fact, intercountry adoption of children into New Zealand can occur in many different ways and for many different reasons.

The common conception of an intercountry adoption is of adoptive parents who, unable to conceive a child themselves, adopt children from another country whose birth parents have deserted them or do not want them and who are truly in need of a new family. The danger that is often associated with intercountry adoption is that some of the participants may engage in unconscionable practices such as buying and selling babies. It is this type of intercountry adoption that has been recognised by the international community with the signing of the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (the **Convention**) at The Hague, in May 1993.[1]

In fact, the majority of children adopted into New Zealand families from overseas are from the Pacific Islands, Western Samoa in particular, and are adopted not by strangers, but by family members. This sort of intercountry adoption often raises questions relating to immigration practice and the appropriateness of intra-family adoptions.

The New Zealand law relating to intercountry adoption has been built up on an ad hoc basis, by the courts, the legislature and the international community. This means that the law has become inconsistent. For example, the method by which an

[1] Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, signed at The Hague, 29 May 1993.

intercountry adoption is recognised in New Zealand is determined largely by which country the child comes from. There is also uncertainty in the law. All aspects of intercountry adoption, from who can be recognised as an accredited agency under the Convention, to whether the Family Court should have regard to immigration policy when considering intercountry adoption applications, is unclear. These inconsistencies and uncertainties mean that intercountry adoption law is applied in a very arbitrary way, creating unfairness for both the adopted children and their parents. Legislative change is needed to provide consistent rules for intercountry adoption and guidelines for the courts when they are considering intercountry adoption applications.

II INTRODUCTION TO INTERCOUNTRY ADOPTION IN NEW ZEALAND

A Adoption in New Zealand

Adoption is a process by which a child's existing parents are replaced, in law, by new parents. The adoptive parents are deemed to be the child's parents, as if the child had been born to them.[2] The existing parents of the child are deemed to cease to be his or her parents and all legal links between them are extinguished.[3] The child can then be secure in the knowledge that he or she is a "real" and permanent member of his or her new family.[4]

Traditionally, children were placed for adoption by parents who were not able to or did not want to care for them and were adopted by couples who could not have children. The birth parents and adoptive parents were usually strangers to each other. A closed adoption was the norm, and all contact between the birth parents and the child ceased when the adoption was complete.

However, attitudes to adoption have changed since the 1955 Act was passed. Most adoptions are now open and children are often adopted by people known by or

[2] Adoption Act 1955, s 16(2)(a).
[3] Adoption Act 1955, s 16(2)(b).
[4] *Director-General of Social Welfare v L (No 2)* [1990] NZFLR 139 (FC) Judge Inglis.

related to the birth parents.[5] Also, a decreasing number of babies are available for adoption.[6] This is due to better availability of contraception, society's increased acceptance of abortion and the destigmatisation of children born out of wedlock.[7]

As a result it is virtually impossible for an infertile couple to adopt a child, from a stranger, within New Zealand. Not surprisingly, adopting children in need from overseas orphanages has become a popular alternative.

B Intercountry Adoption

Intercountry adoption occurs when a child, who is habitually resident in one country (the **Sending State**), is adopted by parents who are habitually resident in another country (the **Receiving State**).[8] The child is moved to the Receiving State either after an adoption has taken place in the Sending State or in order for it to occur in the Receiving State.[9] New Zealand almost always plays the role of the Receiving State in an intercountry adoption. Statistics are not kept on the number of children of New Zealand nationality who are adopted by foreign parents and removed overseas, but its occurrence is believed to be rare.

There are several different ways in which an intercountry adoption can be recognised in New Zealand. The first is through the Hague Convention on Intercountry Adoption. New Zealand has acceded to the Convention,[10] and is therefore a "Contracting State" for the purposes of the Convention. The Convention applies to adoptions occurring between two Contracting States,[11] so it is only applicable to New Zealand when the child being adopted comes from another Contracting State, for example Romania. If two Contracting States are involved, the

---

[5] Webb, Adams, Atkin, Henaghan & Caldwell *Family Law in New Zealand* (10 ed, Butterworths, Wellington, 2001) 1243.
[6] *Family Law in New Zealand*, above, 1319.
[7] Jorge L Carro "Regulation of Intercountry Adoption: Can the Abuses Come to an End" (1994/95) 18 Hastings International and Comparative Law Review 121.
[8] The terms "Sending State" and "Receiving State" are used in the Convention to describe the countries involved in a Convention adoption. Although the terms do not necessarily apply to adoptions that occur outside the Convention they will be used, in this paper, in relation to all intercountry adoptions for the sake of consistency and clarity.
[9] Convention, art 2.
[10] Via the Adoption (Intercountry) Act 1997.
[11] Convention, art 2.

adoption must conform with the Convention requirements.[12] The actual legal adoption may occur either in the New Zealand Family Court or in a court in the Sending State.

If the child comes from a country that has not yet ratified the Convention, such as Russia, the adoption may either occur in the Sending State and then be recognised under section 17 of the Adoption Act 1955, or the child may be brought to New Zealand on an entry permit and then adopted in the New Zealand Family Court.

Figures released by the Department of Internal Affairs[13] reveal that the most common country of origin for children adopted into New Zealand is Western Samoa. In the year from July 1995 to June 1996, 440 Western Samoan children were adopted by New Zealanders. The rate of adoption has slowed considerably since this peak and, in the last three years, an average of 137 children a year have been adopted into New Zealand from Western Samoa.[14] The next most common source country is Russia. Approximately 50 children are adopted into New Zealand from Russia every year.

III HAGUE CONVENTION

A Description of the Convention

The Hague Convention has been incorporated into New Zealand domestic law by the Adoption (Intercountry) Act 1997 that came into force on 1 January 1999. It sets up minimum standards that must be complied with during an intercountry adoption between two Contracting States.

The Convention also provides for the establishment of Central Authorities and accredited bodies in both Sending and Receiving States to facilitate the adoption

[12] Section 17 of the Adoption Act 1955 does not apply if two Contracting States are involved in the adoption.

[13] Information supplied by Department of Internal Affairs, 24 June 2002. These statistics represent the number of children who were given citizenship by descent through adoption in each particular time period. If a child had been adopted by a New Zealander, but had not applied for citizenship, they would not be represented in these statistics.

[14] In the three years from July 1999 to June 2002.

process and ensure that the minimum standards are met. In New Zealand, the Central Authority is the Department of Child Youth and Family Services (**CYFS**). There are currently no accredited bodies in New Zealand.

According to the Convention, the Sending State authorities must make sure that the child is "adoptable", that possibilities for adoption within the state of origin have been considered and that all necessary consents have been given on a free and informed basis without payment or inducement of any kind.[15]

The authorities in the Receiving State must ensure that the adoptive parents are suitable to adopt and have been given any necessary counselling. They must also determine that the child is authorised to enter and permanently reside in the state.[16]

At present 47 states, including New Zealand, Australia and Canada, have either ratified or acceded to the Convention. There are also 13 countries that have signed the Convention, but are yet to ratify it. Among this number is the United States and the United Kingdom, who both signed the Convention in early 1994; and the Russian Federation, who signed in September 2000 and is expected to ratify in the next few years.[17] These countries, especially the United States* and Russia, are heavily involved in intercountry adoption, as a Receiving State and a Sending State respectively. The fact that an adoption involving either one of them is not covered by the Convention is concerning. The Convention has a reasonable impact as it stands, with 47 Contracting States, but its importance will certainly increase once the United States and Russia become bound by it.

(* U.S.A is now a ratified member - 2008)

B Necessity for the Convention

There are many reasons why the Convention is necessary. Without the Convention, intercountry adoptions take place according to the individual domestic law of the countries involved in the adoption. There is no guarantee that the child's interests are given priority, or even considered, when the adoption order is made.

---

[15] Convention, art 4.
[16] Convention, art 5.
[17] www.hcch.net/e/status/adoshte.html (last accessed 8 July 2002).

Whereas the Convention imposes an obligation on Contracting States to ensure that the best interests of the child is an important factor in the decision to approve an intercountry adoption.

The Convention also requires all Contracting States to recognise adoptions made in accordance with the Convention.[18] An intercountry adoption that occurs outside the Convention does not have to be recognised by another country as a valid adoption, unless their domestic law specifically requires it. This may raise problems for families with children adopted from overseas who travel or migrate to a non-Contracting State. If the adoption was made in accordance with the Convention, at least recognition of the adoption is ensured in other Contracting States. If all countries signed up to the Convention and all adoptions were made in accordance with the Convention, this problem would not exist and all intercountry adoptions would be recognised all over the world.

A further, and very important, reason why the Convention is necessary stems from the fact that a lot of money can be made through intercountry adoption in third world countries that have an oversupply of children in orphanages, available for adoption. For example, figures from the early 1990s estimate that, in South Korea, the adoption business yields 15-20 million dollars annually.[19] This, coupled with wealthy adults who are desperate to adopt children, inevitably leads to a trade in children. Buying and selling children goes against international human rights standards and the ethical values of just about every society. International law protections are necessary to prevent this sort of thing from happening, but are the protections that are in place effective?

---

[18] Convention, art 23.

[19] Holly C Kennard "Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions" (1993/94) 14 U Pa Journal of International Business Law 623, 626.

C *Some Problems with the Convention*

1 The child must be "adoptable"

Article 4 of the Convention says that an adoption shall only take place if the child is "adoptable". It is up to the authorities in the state of origin to establish that the child is "adoptable" and no guidance as to what this means is given in the text of the Convention. This poses potential problems. A child could be considered available for adoption by one state, but not by another. For example in South Korea, which has not yet ratified the Convention but does play a big role in intercountry adoption as a Sending State, social workers were instructed to "cultivate" mothers to give their children up for adoption.[20] South Korea may consider these children "adoptable" but other countries may not.

Nevertheless, it is difficult to imagine an alternative way to ensure a child is "adoptable". This is especially true given the many different cultures of all the countries involved in intercountry adoption and their different attitudes towards adoption. The international community will have to trust that the Central Authorities and accredited bodies in the Sending States declare children to be "adoptable" in good faith. Regular assessments, especially of accredited bodies, may be required to ensure that this happens.

2 Improper financial gain

In article 32 of the Convention it states that "no one shall derive improper financial or other gain from an activity related to an intercountry adoption." It also states that "only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid."

However, the Convention recognises in its preamble that "each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin." This seems to create an obligation on Contracting

[20] Kennard, above, 641.

States to have some form of child protection system. Abandonment is often due to poverty,[21] so the Convention may also create an obligation to have a child welfare system. Some Sending States lack financial resources to establish either of these systems. Should there therefore be an obligation on the Receiving States, or adoptive parents, to make a financial contribution to the Sending State? If this were so, would it breach the provision against improper financial gain?

The Permanent Bureau on Private International Law has considered whether financial contributions can be legitimately required under the Convention, but left the question open. It said that if contributions are required, the amount must be fixed and notified in advance, the intended use of the money should be clear, the contributions must be made by a transaction, that is recorded and accounted for, and detailed accounts should be kept as to the use that the money was put to.[22]

If mandatory financial contributions are allowed it should be the children who benefit. The money should be put towards programmes to help children in need in the Sending State. If this can be ensured, then the contributions would not be improper, and therefore would not breach the "improper financial gain" provisions of the Convention.

3 *Habitual Residence*

The application of the Convention relies heavily on the concept of habitual residence. The Convention will not apply unless the child is habitually resident in a Contracting State and the adoptive parents are habitually resident in a different Contracting State. However "habitual residence" is not defined in either the Convention or the Adoption (Intercountry) Act 1997. The words "habitual residence" have been used in other international treaties, for example the Convention on the Civil Aspects of Child Abduction,[23] where they have also been left undefined. This omission appears to make the application of the Convention uncertain. However, not

---

[21] Hague Conference on Private International Law *Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption* April 2001, para 25.
[22] Hague Conference on Private International Law, above, para 45.
[23] Convention on the Civil Aspects of Child Abduction, signed at the Hague, 25 October 1980.

defining the phrase "habitual residence" was a deliberate policy decision on the part of the international community. It allows the phrase to remain flexible and means that it can be interpreted in individual cases in accordance with the policy, aims and objectives of the Convention.[24] It has been suggested that the habitual residence of a person is the "country where they have their home for the time being."[25] There must also be some sort of intention for that country to be their home. As long as the phrase "habitual residence" continues to be given its ordinary and natural meaning, bearing in mind the objectives of the Convention, then there should not be uncertainty as to the application of the Convention.

IV ADOPTION OUTSIDE THE CONVENTION

One of the main principles of the Convention is the "necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children". However, because adoptions can occur outside the Convention, without the protections and safeguards that the Convention provides, this objective cannot be fulfilled.

A Adoption Occurs Overseas

Section 17 was originally enacted as a conflict of laws provision and was designed to ensure that foreign adoptions of children by foreign parents who later migrated to New Zealand were valid. However, it is now primarily being used by New Zealand citizens or residents to adopt children from countries who are not party to the Convention.[26]

Section 17 provides that a foreign adoption can be recognised in New Zealand once the following conditions are satisfied:[27]

- The adoption is legally valid according to the law of the place it occurs in; and

---

[24] Richard Leith "International Child Abduction: Different Approaches to Habitual Residence" (1999) 3 BFLJ 89.
[25] Leith, above.
[26] New Zealand Law Commission *Adoption and its Alternatives* (NZLC R65, Wellington, 2000) paras 303-314.

- The adoptive parent has a right superior to that of any natural parents of the adopted person in respect of the custody of the person; and
- Either
  (i) The adoption order was made by a court or judicial or public authority of a Commonwealth country, or of the United States of America, or of a country designated by an Order in Council; or
  (ii) The adoptive parent had a right superior to or equal with that of any natural parent in respect of any property of the adopted person which was capable of passing to the parents of the person in the event of the person dying intestate, without other next of kin, while he or she was domiciled in and a national of the place where the adoption order was made.

The section 17 criteria for recognising a foreign adoption in New Zealand are very different from the Convention requirements. Section 17 makes no reference to whether the child was available for adoption, the suitability of the adoptive parents or the welfare of the child. The validity of the adoption is determined solely on rights of custody and inheritance, or on the place where the adoption order was made.

Concerns have been noted over the adoption practices of some countries that conform with the section 17 criteria, but not with international standards as outlined in the Convention. For example, Brazil complies with the custody and succession standards of section 17 but has no system to ensure that a child is available for adoption, or that free and informed consent has been given. Similarly, Samoa, which provides a large proportion of section 17 intercountry adoptions, does not have a procedure to determine if the adoptive parents are suitable to adopt. If countries such as Brazil and Samoa ratified the Convention these adoption practices would not be acceptable, and yet they are currently legally recognised in New Zealand.[28]

Even more concerning is the fact that section 17 gives the court no discretion to refuse to recognise such an adoption. Potentially this allows the court to have a reasonable suspicion that the birth parents had not freely consented to the adoption, or

---

[27] Adoption Act 1955, s17.
[28] New Zealand Law Commission *Adoption and its Alternatives* (NZLC R65, Wellington, 2000) para 306.

even that money had changed hands in exchange for the child, and yet be forced to recognise the adoption because the section 17 requirements had been met. This is obviously unsatisfactory.

It has also been suggested that the fact that New Zealand recognises adoptions under section 17 puts us in breach of our international obligations under the United Nations Convention on the Rights of the Child (**UNCROC**).[29] Article 21 of UNCROC provides:

> State Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall;
>
> a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning the parents, relatives and legal guardians and that, if required, the parents concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
> b) 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;
> c) Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
> d) Take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it;
> e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Section 17 breaches every part of article 21. Firstly, the preamble says that "the best interests of the child shall be the paramount consideration". The Adoption Act 1955 does require that the welfare and interests of the child are promoted by the adoption, but does not go as far as making the child's welfare or best interests the paramount consideration. It could be argued that, when deciding cases in practice,

---

[29] J Couchman "Intercountry Adoption in New Zealand: A Child's Rights Perspective" (1997) 27 VUWLR 421, 447.

judges usually consider the welfare of the child to be very important.[30] However, UNCROC seems to anticipate an obvious and binding rule that the welfare of the child is paramount, like that found in section 6 of the Children, Young Persons and their Families Act 1989, rather than an uncertain principle evolved out of case-law. The omission of such a principle from the Adoption Act 1955 puts New Zealand in breach of UNCROC, not only in respect of intercountry adoptions recognised by the Act under section 17 or granted in the New Zealand Family Court pursuant to section 3, but in respect of all domestic adoptions as well.

In addition, New Zealand is also in breach of article 21(a). Section 17 makes no reference to reliable information, the appropriateness of the adoption concerning the child's status, or obtaining the appropriate consents. It could be argued that article 21(a) only applies to domestic adoptions, however this seems unlikely or impossible given that UNCROC attempts to ensure the rights of the child internationally. If signatories to UNCROC were obliged to abide by UNCROC's rules in relation to their own country, but were allowed to sanction another country's behaviour that was contrary to UNCROC, it would undermine the spirit of the treaty. It is probable that article 21(a) applies to intercountry adoptions and that, by virtue of section 17, New Zealand is in breach of it.

Section 17 also breaches article 21(b) and (c) because it does not consider alternatives for the child to be cared for in its state of origin and provides practically no safeguards or protections for internationally adopted children.

The prohibition in article 21(d) against improper financial gain is dealt with by the Adoption Act 1955 in section 25, which makes it unlawful to receive payment or reward in exchange for an adoption of a child or making arrangements for the adoption of a child. However this only applies when the adoption order is made in New Zealand. Section 17 applies when the adoption takes place overseas and does not include an improper financial gain restriction. This breaches article 21(d).

---

[30] For example, see *Director-General of Social Welfare v L*[1989] 2 NZLR 314, 320 (CA) Richardson J.

Finally, New Zealand's practice of recognising intercountry adoption under section 17 is inconsistent with article 21(e). New Zealand has become a party to the intercountry adoption Convention and has negotiated a bilateral agreement with China in respect of intercountry adoption, but the major players in the New Zealand intercountry adoption market are Western Samoa and Russia. We do not have a relevant agreement with either of these countries.

B Adoption Occurs in New Zealand

Section 3(1) of the Adoption Act 1955 says that "a Court may, upon an application made by any person whether domiciled in New Zealand or not, make an adoption order in respect of any child, whether domiciled in New Zealand or not." This section has often allowed the Family Court to consider an intercountry adoption application where the child concerned is not a New Zealand citizen, and where the child is not currently in New Zealand. However, its operation is potentially broader than this. It also means that the New Zealand Family Court has jurisdiction to make an adoption order where neither the child nor the adoptive parents are resident in New Zealand and do not plan to come to New Zealand to live.

In its recent report, *Adoption and its Alternatives*, the Law Commission noted concern about the width of section 3 and the real possibility that it could be abused. The Report describes four instances where people have attempted to use section 3: [31]

- A woman from the Middle East, who resided in the Middle East but had New Zealand permanent residency status, sought to use section 3 to adopt her nephew from the Middle East. They did not plan to reside in New Zealand.
- A New Zealand citizen resident in India sought to adopt an Indian child.
- An Australian citizen, living in Australia, sought to use New Zealand law to adopt a Russian child because the Australian state she lived in did not accept unmarried applicants.
- A New Zealand citizen, living in Australia, adopted a Brazilian child using New Zealand law. The child became a New Zealand citizen by descent and was

[31] New Zealand Law Commission *Adoption and its Alternatives* (NZLC R65, Wellington, 2000) para 287.

therefore allowed to enter Australia. Australian law would not have permitted this adoption.

In most of these cases the applicants tried to use New Zealand law to adopt because it was more permissive than the law of their country or of the child's state of origin. In New Zealand, an applicant has to prove that he or she is a fit and proper person to have custody of the child and that the welfare and interests of the child will be promoted by the adoption.[32] However, some other countries have more stringent rules relating to adoption which can mean that the New Zealand standards are easier to meet. Nevertheless, an adoption order so made under section 3 does not necessarily have to be recognised by another country. In fact, there is no onus on any country to recognise an adoption made in another country unless their domestic law requires that they do, or they are a party to the Convention and the adoption involves another Contracting State. Lord Denning MR, in *Re Valentine's Settlement*,[33] stated that recognition of an adoption made overseas will generally depend on whether the adoptive parents were domiciled in the country in which the adoption order was made. He also said that the child too must be resident in that country. Taken literally, this could mean that the adoption of a foreign child by New Zealand citizens or residents, although granted in New Zealand under section 3, could potentially not be recognised in another country.[34] This has not proved to be a problem and, given that Lord Denning's decision dates back to 1965, when intercountry adoptions were practically unheard of, it is likely to have little effect.

It is inevitable that different countries will have different laws about many things, adoption included. However, New Zealand domestic law should not provide a vehicle for foreigners to circumvent more restrictive adoption laws in their own country.

Even when the adoption application is legitimate, this area of the law is still filled with problems. A legitimate adoption application may involve adoptive parents who are New Zealand citizens, who want to adopt a child from overseas and bring it

[32] Adoption Act 1955, s 11.
[33] *Re Valentine's Settlement* [1965] 1 Ch 831.
[34] New Zealand Law Commission, above, paras 291-92.

to live with them in New Zealand. In this situation the adoption process is the same as if it was a standard New Zealand adoption. A social worker has to prepare a report for the court to help the court decide if the adoption order should be made.[35] The report will attempt to determine whether the child was free to be adopted, whether informed consent was given and whether the adoption is in the child's interests. However, preparation of the report is complicated by the fact that the child is already living in New Zealand, usually with the prospective adoptive parents. Although, it must be remembered that section 6 of the Adoption Act says that prior approval must be given by a social worker or an interim adoption order must be in force before a child can be kept in the home of any person for the purposes of adoption. The child would already be adapting to life in New Zealand. If the adoption application was turned down, the child would be uprooted for a second time and returned to the country where he or she came from. This may mean the court would be more likely to leave them with the adoptive parents, thus endorsing an adoption which would otherwise have been deemed inappropriate.

C Recommendations for Change

1 Section 3

In relation to the problems with section 3, the Law Commission has submitted that the New Zealand courts' jurisdiction in adoption matters should be limited to cases where the child is either habitually resident in New Zealand or is coming to reside in New Zealand and where the applicants are New Zealand citizens or permanent residents, and have been habitually resident in New Zealand for the three years immediately prior to filing the application to adopt.[36] As noted above, there are major problems with section 3 as it currently stands, but the Law Commission's suggested amendment is unworkable.

One can easily imagine a scenario where a couple has lived overseas for several years, returns to New Zealand and plans to adopt a child. In order to satisfy the Law Commission's proposed test, they must have lived in New Zealand for three

[35] Adoption Act 1955, s 10.
[36] New Zealand Law Commission, above, para 292.

years before they could do so. In this situation it is absurd that New Zealand adoption law would not apply. The applicants involved are New Zealand citizens, they plan to adopt either a child who is already habitually resident in New Zealand or a child who is coming to live in New Zealand, and they plan to be resident in New Zealand for the foreseeable future. New Zealand is the country that would be most affected by the adoption and so is logical that it could take place under New Zealand law.

Another hypothetical scenario that does not sit well with the Law Commission's proposed amendment to section 3 is that of a New Zealand couple working overseas, perhaps in the diplomatic service, who plan to adopt a child but to continue living overseas for the time being. Under the Law Commission's suggested amendment there would be no problem if the child being adopted had been habitually resident in New Zealand prior to the adoption. However, if the child was not from New Zealand the Law Commission's amendment would prevent the adoption being carried out under New Zealand law. Again, it is difficult to see why New Zealand law should not apply in this case. The parents are New Zealanders, the child will probably become eligible for New Zealand citizenship by descent and it is likely that the family will return to live in New Zealand some time in the future.

Section 3, in its present form, makes the jurisdiction of the Adoption Act 1955 too wide. The Act needs to be limited, but not in the way that the Law Commission suggests. Instead, the jurisdiction of the New Zealand Court under section 3 should be limited to cases where either:

- The child is habitually resident in New Zealand or is coming to reside in New Zealand, *or*
- The applicants are New Zealand citizens or permanent residents; and
- The court is satisfied that New Zealand is the most appropriate country in which to make the adoption order.

This amendment would exclude the woman from the Middle East, who resided in the Middle East but had New Zealand permanent residency status, from using New Zealand law to adopt her nephew from the Middle East because it is more appropriate for the adoption order to be made in the Middle Eastern country where they both reside. However, the New Zealand couple in the diplomatic service will be able to

adopt under New Zealand law because it is more appropriate for the adoption order to be made in New Zealand, rather than in the country in which they are temporarily stationed.

2 *Section 11*

Another change to the Adoption Act 1955 that is necessary to bring New Zealand's law into line with UNCROC involves section 11(b). Instead of requiring the court to merely promote the welfare and interests of the child in the adoption, section 11(b) should make the welfare and interests of the child the paramount consideration. This change would make the Adoption Act consistent with both UNCROC and other domestic legislation, including the Guardianship Act 1968[37] and the Children, Young Persons and their Families Act 1989[38].

3 *Section 17*

The most significant problem with adoptions that occur outside the Convention's jurisdiction is that the procedures provided for in the Convention do not need to be followed, and therefore the protections of the Convention do not apply, when the adoption involves a country that is not a Contracting State. To overcome this problem the Law Commission has recommended that any adoption of a child habitually resident in another State, by a person habitually resident in New Zealand, should be classified as an intercountry adoption and that procedures akin to those set out in the Convention be applied to intercountry adoptions involving non-Contracting States.[39] The courts are already prepared to this do this to some extent. In *Jayamohan v Jayamohan*[40] the High Court accepted that, in the context of international child abduction, where New Zealand had ratified a treaty, the principles of the treaty should be applied whether or not the other country involved had also ratified the treaty.

---

[37] Guardianship Act 1968, s 23.
[38] Children, Young Persons and their Families Act 1989, s 6.
[39] New Zealand Law Commission, above, paras 312-314.
[40] *Jayamohan v Jayamohan* [1995] NZFLR 913, 919.

If the Law Commission's suggestion was to be implemented, significant legislative change would be necessary. As mentioned above, section 17 was originally intended to apply to adoptions that occurred overseas, involving people who were not resident in New Zealand, who later migrated to New Zealand. Section 17 would need to be restricted to this class of adoption. A new provision would need to be inserted, either into the Adoption Act 1955, or the Adoption (Intercountry) Act 1997, with the effect that any adoption where a person who is habitually resident in New Zealand adopts a child from overseas, including from a non-Convention State, must conform with the procedures set out in the Convention.

The Commission's recommendations relating to section 17 are ostensibly sensible. However there are potential problems in applying the Convention criteria to non-Contracting States. This change would mean that the same assessment criteria would be applied whether or not another Contracting State was involved. New Zealand can quite clearly comply with the Receiving State's obligations under the Convention. However another country, which is not a Contracting State, may not have the facilities in place to comply with the Sending State's obligations. Intercountry adoptions between this country and New Zealand may then prove to be impossible. Does this mean that New Zealand law would prohibit adoption from any country not sophisticated enough to comply with the Convention requirements?

This is precisely what The Hague Conference on Private International Law in April 2001 recommended that the international community do in relation to Guatemala. The conference was very concerned about the situation in Guatemala; particularly the fact that only 12% of children adopted out overseas came from orphanages. Its solution was to recommend that all Contracting States suspend adoptions with Guatemala until it ratified the Convention.[41] However, it is interesting to note that the Conference only took this approach in relation to Guatemala, when there are many other countries that have not yet signed and ratified the Convention. They did not say that all Contracting States were to stop adoptions with all non-

[41] Hague Conference on Private International Law, *Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption* April 2001.

Contracting States. The situation in Guatemala was sufficiently serious to require this drastic form of action to be taken.

Given the New Zealand situation, the Law Commission's proposal that Convention procedures be applied to non-Convention States is impractical and almost impossible. The majority of children involved in intercountry adoptions into New Zealand come from Western Samoa. There is much doubt over whether these adoptions would comply with the Convention. It would be a major step, that many would consider unfair, if New Zealand suddenly refused to recognise all adoptions involving children from Samoa. However, it is also clear that the section 17 criteria are inadequate and some sort of change is needed.

The Law Commission's recommendation that section 17 should be limited to what it was intended to be used for, adoptions where foreign parents adopt a foreign child overseas and later migrate or travel to New Zealand, is sensible. This amendment would mean that section 17 could recognise genuine foreign adoptions, but would not provide a vehicle for New Zealanders to adopt foreign children into New Zealand. This change could be implemented into the legislation by the addition of the words: "section 17 applies only to adoptions made outside of New Zealand involving persons who were not New Zealand citizens or persons who were not habitually resident in New Zealand at the date of the adoption."

Another section would need to be added to deal with intercountry adoptions where the adoption order, in favour of New Zealand adoptive parents, is made overseas and the child is then brought into New Zealand. Consistent with the Law Commission's recommendations, New Zealand should be required to comply with the Receiving State's obligations under the Convention. However, for the reasons mentioned above, the child's state of origin cannot be expected to comply with the Sending State's Convention obligations. The new section should therefore provide that a non-Convention intercountry adoption that occurs outside New Zealand will be recognised in New Zealand if competent authorities in New Zealand have:

- determined that the adoptive parents are eligible and suitable to adopt,
- ensured that the adoptive parents have received any necessary counselling, and

- determined that the child is authorised to enter and reside permanently in New Zealand.

The new section should also provide that, in considering whether to recognise the adoption, the New Zealand court should have regard to whether competent authorities in the child's state of origin have:

- established that the child is adoptable,
- determined, after possibilities for placement of the child within the state of origin have been given due consideration, that an intercountry adoption is in the child's best interests, and
- ensured that the consent of the persons, institutions and authorities whose consent is necessary for adoption has been given on a free and informed basis and has not been induced by payment or compensation of any kind.

The section should also state that the welfare of the child is the paramount consideration in deciding whether or not to recognise the adoption in New Zealand. This approach aims to protect the welfare of the child, by requiring the court to ensure appropriate procedures for an intercountry adoption have been followed in New Zealand and, where possible, in the child's state of origin. However, if the Sending State is not able to comply with the requirements listed above, it will not be a barrier to the adoption being recognised.

The Law Commission also suggested that the New Zealand government should negotiate bilateral agreements with non-Convention states that parallel the Convention protections, such as the agreement that already exists between New Zealand and China.[42] This is the most sensible approach for New Zealand to take. Given that the countries most often involved in adoption with New Zealand are Western Samoa and Russia, New Zealand should work to establish agreements of this nature with these countries. New Zealand should also work within the international community to encourage and provide assistance to non-Convention countries to sign the Convention and put in place the procedures to comply with it.

As a Contracting State, New Zealand has accepted the policies behind and necessity for the Convention. It does not make sense to apply the Convention

[42] Law Commission, above, para 313.

principles when dealing with Contracting States, but turn a blind eye to them when a non-Contracting State is involved. However, to enforce a blanket refusal to recognise adoptions from countries where the Convention procedures are not followed is manifestly unfair to countries that are unable to put in place the appropriate procedures. As a signatory to the Convention, New Zealand is under an obligation to act consistently with the Convention if at all possible, and to encourage other countries to do the same, but given the high rate of adoption into New Zealand from the Pacific Islands a mandatory requirement to follow Convention procedures is inappropriate. The amendments suggested above, although not as extreme as the Law Commission's recommendations, mean that New Zealand would be complying with the spirit behind the Convention and fulfilling its UNCROC obligations.

V THE WELFARE OF THE CHILD: WHAT IS RELEVANT?

Judges in adoption applications are often asked to make decisions taking into account the "welfare of the child"; but what does this really mean and should the courts be given any more guidance as to what is relevant?

A Where does the "Welfare of the Child" Principle Come From?

There are many authorities for the fact that the welfare of the child is one of the most important concepts in family law. The first objective of the Convention is "to establish safeguards to ensure that intercountry adoptions take place in the *best interests* of the child ...".[43] This is not quite as strong as in the United Nations Convention on the Rights of the Child[44] (**UNCROC**) and other areas of New Zealand family law,[45] where the welfare or best interests of the child is the paramount consideration. However, recently the High Court indicated that when the two countries that are involved in an intercountry adoption have both ratified UNCROC,[46] even if one of them is not a Contracting State for the purposes of the intercountry

[43] Convention, art 1.
[44] United Nations Convention on the Rights of the Child, art 21.
[45] For example the Children, Young Persons and their Families Act 1989, s 6.
[46] UNCROC, as a whole, has not been implemented into New Zealand domestic legislation, however it was established in *New Zealand Airline Pilot's Association v Attorney-General* [1997] 3 NZLR 269, 289 that New Zealand domestic law should be interpreted consistently with international obligations

adoption Convention, then they are required to adhere to UNCROC's principles.[47] This means that more often than not the welfare or best interests of the child is the paramount consideration in intercountry adoption.

B What does the "Welfare of the Child" Mean?

But what does the "best interests of the child" mean? Determining what is in the best interests of a child can be a very subjective decision, two different judges, looking at identical facts, may come to totally different conclusions. For example, in *J v A*,[48] in the context of a custody dispute, the only relevant factor was the welfare of the child but the High Court and Court of Appeal decided the case in totally opposite ways. Many factors may be relevant to a child's welfare.

A popular argument among academics writing about intercountry adoption is that the child's best interests may be served by them remaining within the country and culture of their birth.[49] This is supported by the UNCROC recognition that a child has a right to know and be cared for by his or her natural parents, if possible.[50] UNCROC also states that a child has a right to preserve his or her identity, including national and family relations.[51] However, these rights are only part of the welfare of the child, which remains the paramount consideration.

In practice, the UNCROC rights to natural parents and cultural identity are not relevant to intercountry adoption under the Hague Convention. An "adoptable" child under the Convention is one who lives in an institution. This child has no contact with its natural parents or the family that it was born into. It could be argued that, in taking the child out of the country, the adoptive parents are taking the child out of its culture. However, living in an institution the child is not experiencing its culture anyway. Many of the families who adopt foreign children into New Zealand have close contact with other families who have adopted children of the same nationality

---

whenever possible. Therefore the Adoption (Intercountry) Act 1997 should be interpreted to make the best interests of the child the paramount consideration.

[47] *P v Department of Child Youth and Family Services* [2001] NZFLR 721, 728.

[48] *J v A* [1994] NZFLR 206 (CA).

[49] See Judith Masson "The 1999 Reform of Intercountry Adoption in the United Kingdom: New Solutions and Old Problems" (2000) 34 Family Law Quarterly 221, 236.

[50] UNROC, art 7.

and make an effort to put the child in touch with the culture of its birth.[52] These children are experiencing more of their country's culture living with a family in New Zealand than they ever would in an institution in their home country.

In addition, research has proven that institutionalisation and the lack of stimulation, consistent caregivers and adequate nutrition that go with it all conspire to delay and sometimes preclude normal development. This results in institutionalised children falling behind non-institutionalised children in large and fine motor skills, speech acquisition and the attainment of social skills.[53] If this is a result of living in an institution then it is surely not in the best interests of the child to do so.

It has also been suggested that intercountry adoption is a way of finding babies for adults rather than families for children, and that this may compromise the welfare of the child.[54] It is true that intercountry adoptive parents are usually older, involuntarily childless and tend to come from higher income brackets.[55] It is probably true that they want to adopt a child to make themselves happy. However, it is also probably true that they care very much for their adopted children and want to do their very best for them. It has been said that in cases where an adoption order means a great deal to the caregiver it can "provide an added incentive to the adoptive parents to give the child the love, care, protection and security which comes from permanent nurturing relationships."[56]

In the preamble to the Convention, it is acknowledged that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding". As long as the safeguards and procedures in the Convention are complied with, intercountry adoption is usually in the best interests of a child that is truly in need of a family.

---

[51] UNROC, art 8.
[52] Email from Wendy Hawke, ICANZ, 20 June 2002 and interviews with parents who have adopted children from other countries.
[53] Dr Dana Johnson "Adopting an Institutionalised Child - What are the Risks?", www.icanz.gen.nz/index.html (last accessed 24 July 2002).
[54] See Judith Masson "The 1999 Reform of Intercountry Adoption in the United Kingdom: New Solutions and Old Problems" (2000) 34 Family Law Quarterly 221, 221.
[55] Jennifer Horne-Roberts "Intercountry Adoption" (1992) 142 New Law Journal 286, 288.
[56] *Application for Adoption by RRM and RBM* [1994] NZFLR 231, 235.

VI ACCREDITED BODIES

A Introduction to Accredited Bodies

The Convention provides for accredited bodies to be established in and approved by each Contracting State. An accredited body is a non-profit, private organisation that takes over some of the responsibilities of the State's Central Authority under the Convention. They may do things such as collect information about the situation of the child and the prospective adoptive parents, help with the proceedings with a view to obtaining adoption and provide evaluative reports. In New Zealand, accredited bodies may perform one of two roles, either: [57]

1. Assessment Function: provide services of assessment of adoptive applicants and associated reporting, or
2. Child Placement Function: provide placement and post-placement services to approved prospective adoptive parents.

At present there are no accredited bodies in New Zealand. In fact, accredited bodies do not play a major role in many Receiving States. The merits of accredited bodies have been much debated.

B The Merits of having Accredited Bodies

Critics of accredited bodies argue that, especially in the Receiving States, accredited bodies act in the interests of the adoptive parents rather than the children. The bodies typically advertise their services to couples who cannot have children and, once these couples have decided to proceed with intercountry adoption, the accredited body sets out to find a child or children suitable for the couple to adopt. The focus is on the needs of the adults rather than the needs of the children. The type of child that potential adoptive parents usually wish to adopt is one that is very young, in good health and with no physical or mental disability. The theory often advanced by agencies involved in intercountry adoption is that it is helping a child who is in need.

---

[57] Children Young Persons and their Families Agency *Interim Standards for Approval for Accredited Bodies for the Purpose of Providing Intercountry Adoption Services under delegation under the Adoption (Intercountry) Act 1997* May 1999.

However the type of child that is most in need is not the one that is most in demand. The needs of ill or disabled older children are far greater than those of healthy babies, but accredited bodies in Receiving States rarely facilitate adoptions involving these children who are most in need.

In the Sending States there is concern that having accredited bodies involved in intercountry adoption can lead to corruption. Some countries have a large number of accredited bodies, for example Romania has 98. This can make it difficult to maintain standards and effective systems of control over them.[58] Without proper monitoring, it is difficult to determine whether the accredited bodies are accepting bribes in exchange for children and whether the consent of the biological parents for the children to be adopted is being obtained on a free and informed basis.

However, having accredited bodies can also have positive effects. They allow potential adoptive parents to choose who they want to work with in the adoption process and provide help and support both before, and a long time after, the adoption. Accredited bodies are generally very committed to promoting intercountry adoption. This means that they are probably likely to have more time to give attention to individual children and families than the Central Authority, which operates within the stretched resources of the State. Accredited bodies in the Receiving States may not be proactive in helping sick or disabled children, but at least they do provide opportunities for some children to become part of a family and give them a chance for a better life. As long as high standards are set for accreditation and the bodies are adequately supervised and assessed, accredited bodies can play a valuable role in intercountry adoption.

C How to Become an Accredited Body

The Central Authority for New Zealand, CYFS, has the power to approve an accredited body to operate in New Zealand. In order to become an accredited body, an organisation must meet certain standards. The New Zealand requirements are

---

[58] Hague Conference on Private International Law *Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption* April 2001, para 14.

currently found in the Adoption (Intercountry) Act 1997, the Convention and the Interim Standards for Accreditation (currently under review).[59]

1 The Convention

Accredited bodies are provided for in articles 9 to 13 of the Convention. The Convention states that "accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted."[60] According to Article 11, an accredited body shall:

- pursue only non-profit objectives,
- be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption,
- be subject to supervision by competent authorities of the state as to its composition, operation and financial situation.

2 Adoption (Intercountry) Act 1997

Section 15(1) of the Adoption (Intercountry) Act 1997 incorporates the above criteria for accredited bodies, and adds that a body must also:

- demonstrate its capacity and competence to carry out properly and on a continuing basis the tasks that may be delegated to it under the Convention,
- demonstrate, by its aims, policy and operations, that it will operate in the best interests of the child, and with respect for his or her fundamental rights, when carrying out tasks that may be delegated to it under the Convention.

[59] Information provided by the Department of Child Youth and Family Services, 4 June 2002.
[60] Convention, art 10.

3 *Interim Standards for Approval for Accredited Bodies*

In order to become accredited, an organisation must comply with all of the Interim Standards for Approval of Accredited Bodies. These standards, which have been decided upon and published by CYFS, are set out below:[61]

1. The organisation must have the ability to assess applicants and prepare reports on their eligibility and suitability to adopt, and to provide adoption counselling and education to prospective parents (Assessment Function only).
2. The organisation must maintain appropriate forms of contact with Central Authorities and accredited bodies in the country of origin to ensure the safe transfer of the child from the country of origin to the receiving country. The forms of contact are related to exchanges of information between the agencies, or with other affected agencies, and procedural matters regarding the transfer of the child to the receiving country (Child Placement Function only).
3. The organisation must have procedures and structures in place and provide the appropriate services to ensure the successful placement of the child (Child Placement Function only).
4. The organisation's adoption services are performed in the best interests of the child and with respect for his or her fundamental rights, Adoption (Intercountry) Act 1997, section 15(1)(c).
5. The organisation has a clearly defined management structure.
6. The organisation has a written policy for the recruitment of appropriate, skilled staff. The organisation has procedures to ensure that no person with a criminal conviction for sexual crimes or crimes of violence against a person is employed, in a paid or unpaid capacity.
7. The organisation has a training programme available to ensure all staff are qualified to work in the field of intercountry adoptions, Adoption (Intercountry) Act 1997, section 15(1)(d).
8. The organisation provides all staff with regular supervision.

---

[61] Children Young Persons and their Families Agency *Interim Standards for Approval for Accredited Bodies for the Purpose of Providing Intercountry Adoption Services under delegation under the Adoption (Intercountry) Act 1997* May 1999.

9. The organisation has a written policy for dealing with complaints about staff, paid or unpaid workers, and about the organisation which is given and explained to clients.
10. The organisation must only pursue non-profit objectives and explicitly avoid the financial exploitation of any party to an adoption, Adoption (Intercountry) Act, section 15(1)(a).
11. The organisation has an internal monitoring system.
12. The organisation has a system for reporting on the delegated functions within the stated time frames.

4 The Application Process

Section 16 of the Act sets out the procedure for an application for accreditation, and section 18 says that if the application is declined, the applicant must be given a copy of the information upon which the Chief Executive relied in declining the application, with a reasonable opportunity to make submissions on that information. If the application is still declined, there is a right of appeal to the District Court, whose decision is then final.[62]

5 Possibility for Judicial Review

Even though the Act provides that the District Court's decision is final, it may still be possible for the applicant to apply for judicial review of the decision in the High Court. Judicial review rests on the principle that:[63]

> An administrative decision must take into account all relevant considerations and must not take any irrelevant considerations into account; it must be reasonable; it must not be biased or pre-determined and it must be exercised consistently with the rights of natural justice.

Judicial review is concerned with whether or not the decision was legal, rather than the merits of the decision. A decision may be held to be invalid on the grounds of illegality, unreasonableness or unfairness.

---

[62] Adoption (Intercountry) Act 1997, s 20.

In the case of an application for accreditation under the Convention, the Central Authority will probably have based its decision on the criteria found in the Convention, the Adoption (Intercountry) Act 1997 and the Interim Standards. The law of judicial review says that a decision maker is entitled to be guided by a general policy when exercising a decision making discretion, but that policy cannot be applied so rigidly as to exclude the merits of a particular case.[64] If the decision-maker in an application for accreditation has applied the relevant criteria too strictly or has not paid proper attention to the merits of the applicant's case, judicial review might succeed. The decision-maker would then have to make the decision again, this time with proper regard to all of the relevant criteria.

E ICANZ

Intercountry Adoption New Zealand (**ICANZ**) is an organisation that has operated in New Zealand since 1989, providing assistance to New Zealand adoptive parents who are adopting children from Russia. It is a non-profit organisation and believes in the principle that "every child, regardless of circumstance, has a basic right to shelter, security, and above all, the love of a family."[65] As well as assisting in the placement of legally identified, orphaned, abandoned or homeless children with New Zealand families, ICANZ provides education, guidance and support to the families before and after adoption. It also works to educate the public about the needs of institutionalised children and runs an aid programme for children in need, who remain in institutions, called "ICANZ Helping Hand".[66]

Although ICANZ only assists in the adoption of Russian children, it does play a major role in intercountry adoption in New Zealand. Russia is the second largest source of children adopted into New Zealand, the largest being Western Samoa.[67] Approximately 50 Russian children a year are adopted into New Zealand, and ICANZ

---

[63] Mai Chen & Sir Geoffrey Palmer *Public Law in New Zealand* (Oxford University Press, Auckland, 1993) 928.
[64] Chen & Palmer, above, 932.
[65] www.icanz.gen.nz (last accessed 27 June 2002).
[66] www.icanz.gen.nz (last accessed 27 June 2002).
[67] Information supplied by Department of Internal Affairs, 24 June 2002.

assists with the majority of these adoptions.[68] ICANZ also supplies advice on adoption from other countries.

However, the operation of ICANZ may soon change. Russia has signed the Convention and is expected to ratify it within the next few years. Once this happens New Zealand and Russia will both be Contracting States and so the Convention will apply to adoptions between them. ICANZ will not be able to assist with an adoption unless it is an accredited body under the Act. ICANZ has applied to CYFS for accreditation to perform the Child Placement Function, but the application has been declined. They are currently in the process of appealing to the District Court to reconsider the application.[69] ICANZ will not comment on this matter at the moment, on the advice of their lawyers,[70] but parents of adopted Russian children have said that adopting from overseas would be considerably harder if ICANZ was not involved.

Objectively it seems that ICANZ can satisfy many, if not all, of the accreditation criteria. If ICANZ is denied accreditation it is doubtful whether any organisation will ever be accredited in New Zealand. Two questions remain: should we have accredited bodies and, if we do, what standards should we expect them to live up to?

G Accredited Bodies Overseas

To help answer these questions, it is useful to compare the New Zealand situation with that of other Commonwealth countries. The two examples that have been chosen, Australia and Ontario, Canada, demonstrate how states with a similar legal background to New Zealand have dealt with the issues surrounding accredited bodies.

[68] Email from Wendy Hawke, ICANZ, 20 June 2002.
[69] Ross Henderson "From Russia with love - and difficulty" (30 March 2002) *The Dominion* Wellington 3.

1 Australia

The Australians Aiding Children Adoption Agency is the only accredited body in Australia, and is authorised to operate in South Australia and in the Northern Territory. This agency assists with the placement of children in Australian families from China, Croatia, Ethiopia, Fiji, Hong Kong, India, Korea, the Philippines, Poland, Romania,[71] Sri Lanka and Thailand.[72] The number of children that are placed by the Australian agency has grown over the last decade and in 2001 they placed 80 children with Australian families. The majority of these children came from Korea, India, Thailand and Ethiopia.[73]

2 Ontario, Canada

There are many accredited bodies operating in Canada; in Ontario alone there are 14. Most of the Ontario organisations are accredited for only one, two or three Sending States.[74] A closer look at the six that assist with adoptions from Russia reveals that they seem to have special knowledge about and contacts in Russia. For example, the Executive Director of Adoption Horizons is from Russia and has wide experience in intercountry adoption both in Canada and in the Former Soviet Union.[75] Another accredited body, the Global Village Adoption Agency, has a strong bilingual network located in St Petersburg.[76] Tzivos Hashem Canada is an organisation for Jewish children around the world, and it makes use of its ties to the global Jewish community to adopt Jewish children from Russia into Canada.[77]

H Issues Relating to Accredited Bodies

Much in the law on accredited agencies is unclear. In order to become an accredited body in New Zealand, the requirements contained in the Convention, the

[71] However the adoption programme from Romania has been put on hold by the Romanian government until 2003.
[72] www.adoptionagency.com.au (last accessed 19 August 2002).
[73] www.adoptionagency.com.au (last accessed 19 August 2002).
[74] www.hcch.net/e/authorities/caadopt.html (last accessed 11 September 2002).
[75] www.adoptionhorizons.com/about.htm (last accessed 11 September 2002).
[76] www.sympatico.ca/gramatica/village/globalvillage.htm (last accessed 11 September 2002).

Act and the Interim Standards must all be met. The Convention and the Act contain broad statements about the principles that potential accredited bodies should comply with, while the Interim Standards are more focussed on administrative matters. There is no guidance as to the form an approved accredited body would take nor the exact specific functions it would perform.

For example, would an accredited body have to assist with adoption from all countries, or just from countries that it had special knowledge about and contacts in? In Australia, one accredited body assists with adoptions from twelve different countries, while in Ontario accredited bodies are usually restricted to operate with one to three countries. There is nothing in the New Zealand Standards to suggest that an accredited body could not operate in just one country, but the fact that ICANZ's application was declined suggests that the Central Authority may not favour an approach focused on a single country. If an agency was only accredited for the Assessment Function, which involves them evaluating the suitability of potential adoptive parents to adopt, then there is no reason why they could not assess people planning to adopt from any country. However the Child Placement Function is more specialised. It requires the body to have contacts in the Sending State and to assist with the placement of the child in a New Zealand family, which would probably call for the body to have knowledge of the culture that the child had come from. Indeed a body that was diverse enough to perform this task for many different countries would be very hard to find. In fact, it is doubtful whether the New Zealand Central Authority, who at present performs the Child Placement Function when a child from a Contracting State is adopted into New Zealand, has such expert knowledge about all Contracting States that have sent children to New Zealand. It seems that the preferable approach towards accredited bodies for the Child Placement Function should be a body that deals with adoptions from only one or two countries, but has proven expertise in adoptions from those countries and cultures. Guidance to this effect should be included in standards for approval of accredited bodies.

Another question that is not answered by the Convention, the Act or the Interim Standards is how the expertise or qualifications of an applicant for

[77] www.tzivos-hashem.org (last accessed 11 September 2002).

accreditation will be judged. While the Convention remains to be ratified by countries such as Russia, organisations such as ICANZ currently assist with intercountry adoption. This experience indicates that they do have the necessary expertise to fill the role of an accredited body. However in the future, when most countries are bound by the Convention, getting this sort of experience would be very difficult. Would the necessary expertise and qualifications be satisfied by an organisation that has experience and skills in domestic adoption, but no intercountry experience? Likewise, would an agency that has strong links to a particular overseas country, but no adoption experience, be satisfactory? One would think not. It is foreseeable that a group of people with different types of experience could come together and form an organisation with the appropriate skills to become accredited, but what these skills are exactly and how an organisation proves that they have them need to be more clearly defined in the standards for accreditation.

I Conclusion on Accredited Bodies

Although there have been some doubts expressed about the merits of accredited bodies, they also have many positive attributes and, as long as properly supervised, they can play a useful role in intercountry adoption. The guidelines on how to become an accredited body can be found in the Convention, the Adoption (Intercountry) Act 1997 and the Interim Standards, but these are far from clear. Important details, such as whether an accredited body must deal with adoptions from all countries or can specialise in a few and how the experience and skills of the organisation applying for accreditation are to be judged, are not specified at all. If this information is not made clear by the Central Authority, it is difficult for an organisation applying for accreditation to know what they need to show in order to be approved. This is demonstrated by the ICANZ example. If ICANZ is not accredited, the number of intercountry adoptions from Russia is likely to decline sharply. It would make it more difficult for New Zealand families to adopt and may mean that some parentless children will miss out on the opportunity to have a better life in New Zealand as part of a family.

VII IMMIGRATION CONCERNS

The purpose of adoption is to create a new parent-child relationship and provide the child with a secure and permanent family life. Children that are adopted by New Zealand parents are eligible to become New Zealand citizens either by birth or by descent. The only exception to this is if the child was adopted outside of New Zealand after 1992, and was 14 years or older at the time of the adoption, then he or she will not automatically become a New Zealand citizen. The rationale behind automatically granting citizenship to adopted children is that they are deemed to be the child of their adoptive parents as if they had been born to them. If they had been born to them, they would be New Zealand citizens, therefore citizenship is conferred along with the adoption. However, the high instance of children, especially older teenagers, being adopted into New Zealand from the Pacific Islands by their family members raises concerns that adoption is being used to circumvent immigration procedures. In the year from July 2001 to June 2002, the most common age of a child adopted from Samoa was fourteen. In the same period, two years old was the most common age for adopted Russian children.[78] Whatever the benefits to the child of staying in New Zealand, adoption should not be used as a "back-door" for immigration into New Zealand.

A Adoption and New Zealand Citizenship

Section 3 of the Citizenship Act 1977 contains provisions relating to the parentage of an adopted child. It provides that a person shall be deemed to be the child of a New Zealand citizen if:

- he or she has been adopted by that citizen, in New Zealand, by an adoption order within the meaning of and made under the Adoption Act 1955; or
- he or she has been legally adopted by that citizen, in Niue, Tokelau or the Cook Islands, by an adoption order that has the same operation and effect as an adoption order made under the Adoption Act 1955; or

[78] Information supplied by Department of Internal Affairs, 24 June 2002.

- he or she has been adopted by that citizen, outside New Zealand, by an adoption order to which section 17 of the Adoption Act 1955 applies, and either –
    - that adoption took place before the commencement of the Citizenship Amendment Act 1992 (18 November 1992), or
    - at the time that the adoption order was made he or she had not attained the age of 14 years; or
- he or she has been adopted by that citizen, outside New Zealand, by an adoption order which has been certified by the competent authority of the Contracting State in which the adoption was made as being an adoption made in accordance with the Hague Convention.

And in any such case, the person shall be deemed to have been born when and where the adoption order was made.

The implication of this section is that a child who has been adopted in New Zealand is deemed to have been born in New Zealand. Section 6(1) of the Citizenship Act says that every person born in New Zealand on or after 1 January 1949 (when New Zealand citizenship came into existence) is a New Zealand citizen by birth. Therefore, a child who is adopted in the New Zealand Family Court becomes a New Zealand citizen by birth.

Section 7(1) of the Citizenship Act provides that any person, who is the child of a New Zealand citizen otherwise than by descent, who was born outside New Zealand is a New Zealand citizen by descent. Therefore, a child adopted overseas by a New Zealand citizen, being either an adoption under the Convention or an adoption recognised by section 17, is a New Zealand citizen by descent.[79]

B Policy Developed by the Courts

The Adoption Act 1955 provides practically no guidance as to what factors the New Zealand Family Court should take into account when considering an adoption application that would confer New Zealand citizenship on the adopted child.

However, in intercountry adoption cases there are many issues that must be considered. As the Act does not deal with these issues, the courts have had to develop their own policies.

The most significant, and most frequently cited, passage in cases involving immigration issues in adoption applications comes from the case of *Re An Adoption by L and L*,[80] as cited in *L and L v P*:[81]

> Where an application is made to adopt a child not domiciled in this country, the Court must be satisfied that the child's welfare will be promoted by being a member of a family in New Zealand rather than by the advantages that flow merely from residing in New Zealand; an application for adoption involves the creation of a parent/child relationship and is not a substitute for an entry permit into this country.

This passage has strong precedent value, and has been approved by many subsequent courts.

The courts have been forced to develop this policy to deal with immigration issues in adoption cases because the Adoption Act 1955 offers no guidance at all. Section 11(b) says that the court must ensure that "the welfare and interests of the child will be promoted by the adoption". This would appear to mean that the court could only look to the welfare and interests of the child when determining an adoption application. However, the High Court in *L and L v P*[82] decided that, in applications for adoption in respect of children born overseas, consideration of quality of life for the child could not be an overriding factor. The High Court said that courts must look behind the application and endeavour to ascertain whether or not the application is genuine.[83]

The leading British authority in this area is the case of *In re H (a minor)*.[84] This case suggested that the welfare of the child should be balanced against public

---

[79] Provided that the person was under the age of 14 at the time of the adoption or the adoption took place before 1992, Citizenship Act 1977, s 3(2)(b).
[80] *Re An Adoption by L and L* (1984) 1 FRNZ 144.
[81] *L and L v P* (1986) 4 NZFLR 75, 78.
[82] *L and L v P*, above.
[83] *L and L v P*, above, 78.
[84] *In re H (a minor)* [1982] 3 All ER 84.

policy considerations to decide if the adoption application should be granted. The relevant passage says:[85]

> If the Court considers on the evidence and information before it that the true motive of the application is based upon the desire to achieve nationality and the right of abode rather than the general welfare of the minor then an adoption order shall not be made. If on the other hand part of the motive - or it may be at least as much - is to achieve real emotional or psychological, social and legal benefit of adoption, then an adoption order may be proper, notwithstanding that this has the effect of overriding an immigration decision or even an immigration rule. In every case it is a matter of balancing welfare against public policy, and the wider implications of the public policy aspect the less weight may be attached to the aspect of the welfare of the particular individual.

New Zealand has adopted a similar public policy test. Judge Kendall, in *Application by Webster*[86] thought that there were three public policy principles that needed to be considered:[87]

- An adoption order should not be made if there are other methods available to the court to give the child a secure and settled family.
- In relation to adoption by relatives, because adoption extinguishes existing legal family relationships on one side, and distorts relationships on the other family side, then adoptions should not be considered desirable unless the benefits secured by adoption cannot be met by other means.
- If the adoption is purely for immigration purposes, the adoption should be refused.

These public policy considerations then had to be balanced against the welfare of the child.

So it seems that, when considering an intercountry adoption application, the court must decide if the application is genuine and not designed to avoid standard immigration procedures. The court must weigh up the public policy considerations against the welfare and interests of the child and on this basis decide whether to grant the adoption or not. Although the courts have widely accepted this policy, it has been applied in a very inconsistent manner and with erratic results.

---

[85] *In re H (a minor)*, above, 94.
[86] *Application by Webster* [1991] NZFLR 537.

C *Adoption by Relatives*

A major policy concern for the New Zealand Family Court is that an adoption by relatives distorts the existing relationships within a family.[88] This point is addressed by the second policy principle in *Webster*. The rationale behind this concern is that if, for example, a child is adopted by her maternal grandparents she becomes their legal child but is biologically their grandchild. Her biological mother becomes her legal sister, and her siblings become her nephews and nieces. This scenario is particularly problematic if, even though the grandparents may take responsibility for her day to day care, the child still sees her birth mother as her "real" mother and may even continue to call her "mum". If an adoption was approved in this example, the court would be giving legal effect to a situation that is contrary to both practical and biological reality. This is at odds with the purpose of adoption, which is to create a new parent-child relationship.

However, one argument that may convince a court to grant an adoption by a relative is the fact that it is consistent with Maori or Pacific Island culture. In *Re Adoption Application 021 001 91*[89] Judge Inglis commented that cultural factors favouring adoptions diminished the perceived disadvantage of readjusting family relationships.

In standard adoption cases, where all the parties are New Zealand citizens and permanently reside in this country, the court is likely to make a guardianship order in favour of the prospective adoptive parents if an adoption is undesirable. However, in many cases, having a New Zealand guardian does not qualify a child for permanent residency or New Zealand citizenship. Sometimes the court has bent the rules and allowed an adoption to proceed when guardianship seems more appropriate, for example in *Re NB* the adoption application by the 16-year-old child's sister and brother-in-law was successful.[90] On other occasions the court has refused to grant an

---

[87] *Application by Webster*, above, 539.
[88] *MR v Department of Social Welfare* (1986) 4 NZFLR 326.
[89] *Re Adoption Application 021 001 91* [1991] NZFLR 510.
[90] *Re NB* [1998] NZFLR 481.

adoption order and left it to the Immigration Service to decide whether the child can remain in New Zealand.[91]

D Adoption of a Child by its Own Parents

Although the purpose of adoption is to give the child new legal parents, it is not unheard of for a parent to adopt their own biological child. In fact this happens quite regularly in the case of step-parent adoptions, where the child is adopted by either its own mother or father and their new spouse. Section 3(3) of the Adoption Act 1955 provides:

> An adoption order may be made in respect of the adoption of a child by the mother or father of the child, either alone or jointly with his or her spouse.

However, there is no consistency in the courts' approach when a parent applies to adopt their own child who has been residing in a different country.

The case of *Re Adoption A132/85*[92] involved an adoption application by the parents of the child, M, to adopt her. The applicants had five children. They moved from Samoa to New Zealand with their four youngest children, leaving M with her grandparents in Samoa, in accordance with Samoan custom. When the family entered New Zealand they only declared that they had four children, four being the maximum number of children they were allowed to have in order to fit into a New Zealand residency quota at the time. Later, when the grandparents were too old to care for M any longer, the family tried to get residency for her too, but this was declined because of the earlier false declaration. The court was very concerned about M's welfare but refused to allow adoption to be used to circumvent immigration regulations. M was already her parent's legal and biological child, an adoption would not change that. Accordingly, the adoption application was declined.

Although this may seem to be a harsh decision from the child's point of view, there is a strong argument that the court should be commended for making it. It is for

---

[91] For example, *Adoption Application by V* [2001] NZFLR 241, discussed below.
[92] *Re Adoption A132/85* (1987) 3 FRNZ 462.

the immigration authorities to decide who is allowed to live in New Zealand or be a New Zealand citizen. A back-door approach to immigration, via adoption, should not be encouraged.

However, a different result was reached in *Application to Adopt C*.[93] In this case the applicants, Mr and Mrs C, applied to adopt Mrs C's children from a previous relationship, now aged 19 and 16. While Mr C was a New Zealand citizen, Mrs C and the children were from the Philippines. Mr and Mrs C had lived in both the Philippines and in New Zealand. The children had never been to New Zealand, and had mainly been brought up by their Filipino grandparents. In 1998, the applicants adopted the children in the Philippines, but the adoption did not comply with section 17 and therefore was not recognised in New Zealand. The New Zealand Family Court granted the adoption and the children were allowed to come and live in New Zealand.

There are material differences between the two cases described above. In *Re Adoption of A*, both of the child's parents applied to adopt her. Section 3(3) anticipates the scenario where the child's two birth parents are replaced by one birth parent and one step-parent or just one birth parent alone. Upon adoption the status of the child would change in some way. If a child is adopted by both parents there would be no such change of status. *Application to Adopt C* looks more like a typical step-parent adoption that the courts have been happy to grant.

Nevertheless, the purpose of both adoptions is similarly to allow the child of one or both of the applicants to come and live with them in New Zealand. Immigration policy prevented the children, in both cases, from doing this unless they were adopted. Although there are legitimate reasons in both cases why the children should be able to come into New Zealand it is the immigration policy makers who must address these issues; adoption should not be used as a mechanism to achieve immigration.

[93] *Application to Adopt C* [2000] NZFLR 685.

E Adoption of 19 year old "Children"

The Adoption Act provides for the adoption of children under 20 years of age. A significant number of adoption cases that the Family Court is asked to consider involve foreign "children" aged 19, who want an adoption order to be granted so they can stay in New Zealand. The policy that the court has developed to deal with intercountry adoption, discussed above, suggests that the courts should decline to grant the adoption order if the main reason for the application is for the child to get New Zealand citizenship or residency. However, there is a lot of inconsistency in the courts' approach to cases concerning adoption of 19 year olds.

1 Re Adoption of Patel[94]

In this case the applicants, who were New Zealand citizens, applied to adopt their 19-year-old nephew who had been living with them for the past three years. The nephew had been refused permanent residency and therefore was unable to work in New Zealand. This seemed to be the prime motivation for the adoption application.[95] The court was satisfied that a parent-child relationship had developed between the applicants and the child and stated that the fact that normal immigration procedures would be circumvented by the adoption did not justify refusal of the application. The deciding factor for the court seemed to be that the child's economic circumstances would be benefited by the adoption, because he would be able to work in New Zealand. The court said that economic circumstances were often the reason behind adoptions, for example solo mothers who could not afford to support their children and so put them up for adoption. On this basis the court granted the adoption order.

The court's decision in this case must be questioned. It is clear that, had the child's application for permanent residency not been declined, there would not have been an adoption application. Although the applicants and the child had developed a bond, it seems ridiculous to give a child new parents at the age of 19, when he is planning to work and independently support himself anyway. The court's conclusion that economic circumstances were relevant is flawed because a solo mother's

[94] *Re Adoption of Patel* [1992] NZFLR 512.
[95] *Re Adoption of Patel*, above, 514.

economic decision to put a child up for adoption cannot be compared to a 19 year old who wants an adoption in order to remain and work in New Zealand. If the child in question here had been 20 he would have had to make do with standard immigration procedures and the economic benefit that working in New Zealand would give him would not be such an important factor. In this case the court effectively conferred New Zealand citizenship on a person who had been declined permanent residency, simply because he had developed a bond with his aunt and uncle who were New Zealand citizens and he would be economically better off if he was allowed to live and work in New Zealand.

2 *Adoption Application by K*[96]

A similar case, with the opposite result, is *Adoption Application by K.* This case concerned the application by the child's maternal uncle to adopt the Sri Lankan child, who would turn 20 within a week of the adoption application hearing. The uncle had already adopted the child's two sisters and wanted to give him greater opportunities and a family life in New Zealand. The court said that immigration was a major factor in the application and refused to grant the adoption. This result seems more consistent with the true purpose of adoption and proper policy regarding adoption and immigration issues.

3 *Adoption Application by T*[97]

This case involved an adoption application by the maternal uncle and his wife to adopt a 19-year-old Tongan child. The child had been living with the applicants for two years, but his wish to be adopted was motivated largely by his desire to stay in New Zealand. There was evidence that a formal adoption, where legal ties with the child' birth parents were cut, was contrary to Tongan custom[98] and that a parent-child relationship was developing, but was not yet fully developed.[99]

---

[96] *Adoption Application by K* [1999] NZFLR 289.
[97] *Adoption Application by T* [1999] NZFLR 300, *Adoption Application by T (No.2)* [2000] NZFLR 481.
[98] *Adoption Application by T*, above, 304.
[99] *Adoption Application by T*, above, 307.

Judge Mather deferred his final decision and ordered that a copy of the judgment should be sent to the immigration service with a view to their accepting the child as a permanent resident. If the child was granted residency, Judge Mather planned to make a guardianship order in favour of the applicants.[100]

The Immigration Service declined the permanent residency application, saying that there were no special circumstances which would allow them to make an exception to government policy. Judge Mather then granted the adoption, nine days before the child turned 20.[101]

The result of this case seems remarkable. Government immigration policy clearly excluded the child from becoming a permanent resident, let alone a citizen. Even if they had wanted to, immigration officials had no discretion to grant the child residency. Nevertheless, a Family Court Judge can accept an adoption application in respect of the child, who was very nearly 20, and confer New Zealand citizenship on him. Judge Mather felt very strongly that the child ought to be able to remain in New Zealand and there may be very good reasons why this should be the case, but this is no excuse for blatantly ignoring immigration policy and circumventing the authority of the immigration officials.

4 *Adoption Application by V*[102]

Another case, with very similar facts to *Adoption Application by T*, was heard by the Family Court in 2001. In this case, the child was 19 and due to turn 20 in five weeks time. The child had lived with the applicants, his aunt and uncle, from birth until age nine in Samoa and even called his aunt "mum". The applicants had then moved to New Zealand, leaving the child behind. The applicants and the child had kept in touch over the years and, on a temporary visit to New Zealand, the child decided he wanted to stay in New Zealand. When the Immigration Service refused to grant him residency, the applicants applied to adopt him.

---

[100] *Adoption Application by T*, above, 310.
[101] *Adoption Application by T (No.2)*, above.
[102] *Adoption Application by V* [2001] NZFLR 241.

The court discussed the difficulties inherent in separating a genuine adoption application from one brought purely for immigration purposes. It was accepted that the provisions of the Adoption Act would all be met by the adoption: the child was under 20, consent had been given, the adoptive parents were fit and proper people and the adoption would promote the child's welfare. However, Judge MacCormick concluded that the child "does not need substitute parents for the remaining five weeks of his minority."[103] He also remarked that "this Court is not given jurisdiction to determine immigration issues."[104] Despite the judge's obvious desire to see the child remain with the applicants in New Zealand, he knew that an adoption order was not appropriate and was not prepared to grant one in order for the proper channels of immigration to be avoided.

F Possibility for Reform

The Family Court seems to have agreed that an adoption order should not be granted if its main purpose is to avoid standard immigration procedures and that the public policy considerations should be weighed against the welfare of the child when determining adoption cases which involve immigration issues. However there is no consistency in the application of this court-devised policy. Determining who is allowed to live in New Zealand or get New Zealand citizenship is not a matter for a Family Court judge who is sympathetic to the plight of an individual, but for the Immigration Service.

The number of cases that have come before the court where permanent residency has been declined but there are compelling reasons why the child should stay in New Zealand, indicates that there may be a problem with immigration policy regarding children in these circumstances. Even if this is the case, it is an issue for the immigration policy makers to deal with and not the Family Court on an ad hoc basis. One way of reforming this area of the law could be to change immigration policy to allow children to permanently reside in New Zealand if they have a court appointed New Zealand guardian. This would remove the need for the court to grant

---

[103] *Adoption Application by V*, above, 246.
[104] *Adoption Application by V*, above, 249.

adoptions in inappropriate cases, but allow the child to be legally in the care of the New Zealand applicant and to live in New Zealand.

This is not the first time that problems associated with adoption and New Zealand citizenship have been recognised. In 1992, section 3(2)(b) of the Citizenship Act 1977 was amended to provide that, in relation to an adoption recognised under section 17, a child would only be deemed to be a child of a New Zealand citizen (and therefore a citizen by descent) if they had been adopted either prior to the 1992 amendment or if they were under the age of 14 at the time of the adoption. The effect of this amendment was that a child who was adopted overseas by a New Zealand citizen and was over the age of 14 would not automatically receive New Zealand citizenship. The rationale behind it was that if a New Zealander adopted a young child overseas and then brought them to New Zealand, it was likely to be a genuine adoption. However, the adoption of an older child may well be a device to circumvent immigration regulations and so New Zealand refused to automatically recognise such a child as a New Zealand citizen.

It would make sense if the law relating to citizenship and adoption in the New Zealand Family Court was amended in the same way. This would mean that the New Zealand court could still consider adoptions of children under 20 years of age, but the grant of an adoption order would only have the effect of making the child a New Zealand citizen if the child was under 14. A child who was older than 14 may be able to stay in New Zealand but would still have to satisfy the Immigration Service that they qualified for permanent residency. This approach puts the citizenship and residency decision in the hands of the Immigration Service, who are better equipped to make these determinations, rather than in the hands of the Family Court.

VIII CONCLUSION

By the creation and signing of the Hague Convention on intercountry adoption, the international community has recognised that worldwide agreement is necessary both for the protection of children involved in intercountry adoption and for the facilitation of adoptions between states. New Zealand has acceded to the Convention, and passed the Adoption (Intercountry) Act 1997 to incorporate the

Convention into New Zealand law. Unfortunately, neither the Convention nor the Act goes far enough. There are still many issues associated with intercountry adoption that have not been addressed by legislation, the courts or government policy. Some parts of the law of intercountry adoption are tarnished by uncertainty; others are inconsistent and unfair; and the rest fly in the face of New Zealand's international obligations and common sense. It is often said that adoption law as a whole is desperately in need of reform. Intercountry adoption is an important and growing aspect of adoption law and the issues associated with it should not be ignored.

The anomaly created by the fact that the Convention only applies when New Zealand and another Contracting State are involved in the adoption could be improved by requiring New Zealand to live up to its Convention obligations in every intercountry adoption and to encourage non-Contracting States to meet the Sending State's Convention obligations as much as possible. Section 11(b) of the Adoption Act 1955 should be amended to make the welfare of the child the paramount consideration in both domestic and international adoptions. The New Zealand Central Authority should be more accepting of the fact that accredited bodies can play a valuable role in intercountry adoption and deserving applicants for accreditation should only be rejected on proper grounds. When the Family Court is asked to make an adoption order in an intercountry adoption case it should refuse to make the order if the adoption is purely to circumvent immigration procedures, in order to prevent "back-door" immigration into New Zealand by way of adoption.

Intercountry adoption in New Zealand involves more than just finding New Zealand homes for orphaned or abandoned children from overseas. It involves broader issues about Convention adoptions and non-Convention adoptions, the welfare of the child, accredited bodies and immigration. Many areas of the law are uncertain or unfair and desperately need attention.

BIBLIOGRAPHY

Information provided by the Department of Child Youth and Family Services, 4 June 2002.

Information supplied by Department of Internal Affairs, 24 June 2002.

Email from Wendy Hawke, ICANZ, 20 June 2002.

www.adoptionagency.com.au

www.adoptionhorizons.com

www.hcch.net

www.icanz.gen.nz

www.sympatico.ca/gramatica/village/globalvillage.htm

www.tzivos-hashem.org

Children Young Persons and their Families Agency *Interim Standards for Approval for Accredited Bodies for the Purpose of Providing Intercountry Adoption Services under delegation under the Adoption (Intercountry) Act 1997* May 1999.

Hague Conference on Private International Law, *Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption* April 2001.

New Zealand Law Commission *Adoption and its Alternatives* (NZLC R65, Wellington, 2000).

Jorge L Carro "Regulation of Intercountry Adoption: Can the Abuses Come to an End" (1994/95) 18 Hastings International and Comparative Law Review" 121.

J Couchman "Intercountry Adoption in New Zealand: A Child's Rights Perspective" (1997) 27 VUWLR 421.

Ross Henderson "From Russia with love - and difficulty" (30 March 2002) *The Dominion* Wellington 3.

Jennifer Horne-Roberts "Intercountry Adoption" (1992) 142 New Law Journal 286.

Holly C Kennard "Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions" (1993/94) 14 U Pa Journal of International Business Law 623.

Judith Masson "The 1999 Reform of Intercountry Adoption in the United Kingdom: New Solutions and Old Problems" (2000) 34 Family Law Quarterly 221.

Mai Chen & Sir Geoffrey Palmer *Public Law in New Zealand* (Oxford University Press, Auckland, 1993) 928.

Webb, Adams, Atkin, Henaghan & Caldwell *Family Law in New Zealand* (10 ed, Butterworths, Wellington, 2001).