

Department of Human Rights and Communities

Legal System Monitoring Section

Child Adoption Procedure in Kosovo

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Executive Summary

The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) is concerned that the current child adoption practice in Kosovo violates both international human rights law and the legal framework in Kosovo. International human rights instruments contemplate a regime whereby adoptions are adjudicated by competent authorities. The legal framework in Kosovo provides that the adjudication of adoptions is a matter within the exclusive competence of the courts. Despite such provisions, many adoptions in Kosovo are currently being adjudicated by administrative bodies rather than by the courts. These administrative bodies maintain complete control over the adoption proceedings from initiation to final disposition, acting with neither legal basis nor judicial oversight. The OSCE is particularly concerned that the case-by-case application of the two different adoption procedures currently in use in Kosovo constitutes discrimination without justification. Cases involving abandoned children are invariably adjudicated by the administrative bodies operating under the auspices of the Ministry of Labour and Social Welfare (the ministry),¹ whereas cases involving children whose parents are known are adjudicated by the courts.²

This report is based on OSCE monitoring of adoption cases throughout Kosovo, as well as interviews conducted with municipal court judges and officials with the Centres for Social Work (CSWs) from all five regions of Kosovo, and with ministry officials. The first and second parts of the report canvass the international human rights standards applicable to the issue of child adoption and the legal framework in Kosovo as it regulates the practice of child adoption. The third part analyses the current child adoption practice, both as it involves adoptions within Kosovo, and as it involves adoptions by applicants residing outside Kosovo. This part examines the practice of administrative bodies in adjudicating adoptions of abandoned children, as well the practice of the courts in adjudicating adoptions of children whose parents are known. The report concludes that the continued adjudication of child adoptions by administrative bodies in Kosovo operating under the auspices of the executive branch severely weakens the rule of law, calls into question the independence of the judiciary and compromises Kosovo's commitment to human rights.

Statistics provided by the department of social welfare, a department within the ministry, indicate that in 2008 the ministry approved the adoptions of 39 abandoned children, of whom 17 were girls and 22 were boys. In 2009, the ministry approved the adoptions of another 35 abandoned children, of whom 19 were girls and 16 were boys. In the first five months of 2010, the adoptions of 15 more abandoned children have been approved, of whom five were girls and ten were boys. Some municipal courts keep statistics concerning the number of adoptions they adjudicate,³ however, there are no comprehensive, Kosovo-wide statistics as to how many adoptions are adjudicated by the courts altogether.

¹ The great majority of these children are adopted by families residing within Kosovo.

² A large majority of these adoptions involve applicants residing outside of Kosovo.

³ For instance, a municipal court in Prishtinë/Priština region informed OSCE monitors that it adjudicated a total of 15 child adoptions between 2006 and 2009; a municipal court in Prizren a total of 17 child adoption cases between 2007 and 2009. However, it is not known whether these numbers are typical of other municipal courts for each of these two regions, or whether they are typical of the number of adoptions adjudicated by municipal courts in the other three regions in Kosovo.

International Human Rights Standards

The Convention on the Rights of the Child (CRC) provides that “the best interests of the child shall be the paramount consideration” in adoption proceedings,⁴ and that child adoptions shall be “authorized only by competent authorities” who shall make their determinations “in accordance with applicable law and procedures”.⁵ The CRC recognises that “inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”⁶ Adoption institutions must “ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption”⁷ and must “take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it.” Institutions responsible for regulating adoptions must “ensure that the placement of the child in another country is carried out by competent authorities or organs.”⁸ The CRC also obliges adoption institutions to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”⁹

The European Convention on the Adoption of Children provides that “the best interests of the child shall be of paramount consideration”,¹⁰ that “an adoption shall only be valid if it is granted by a court or an administrative authority”,¹¹ and that “in each case the competent authority shall pay particular attention to the importance of the adoption providing the child with a stable and harmonious home.”¹² The Hague Adoption

⁴ Article 21, Convention on the Rights of the Child, UN General Assembly Resolution 44/25, 20 November 1989, entered into force 2 September 1990 (CRC). See also Article 5, Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally (Adoption Declaration), UN General Assembly Resolution 41/85, 3 December 1986.

⁵ Article 21(a), CRC.

⁶ Article 21(b), CRC.

⁷ Article 21(c), CRC.

⁸ Article 21(d) and (e), CRC.

⁹ Article 35, CRC. Other provisions in the CRC applicable to the issue of adoptions include Articles 2, 9, 11, 12, 21, and 35. Article 2(1) creates a positive obligation to ensure the enjoyment of the rights set forth in the CRC to every child, “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” Article 9(1) provides that “a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.” Article 11(1) obliges institutions involved in child adoptions to take measures to “combat the illicit transfer and non-return of children abroad.” Article 12(1) and (2) create a positive obligation to “assure to the child capable of forming his or her own views the right to express those views freely in all matters affecting the child” and, in particular, to assure that such a child “be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child.”

¹⁰ Preamble, European Convention on the Adoption of Children (Revised), Council of Europe, Strasbourg, 7 November 2008.

¹¹ *Ibid*, Article 4(1).

¹² *Ibid*, Article 4(2). See also Article 14 of the Adoption Declaration, which provides that “in considering possible adoption placements, [the adoption authority] should select the most appropriate environment for the child.” Article 6, which provides that a child who is the subject of adoption proceedings must, “as far as possible” be consulted, and his or her “views and wishes shall be taken into account having regard to his or her degree of maturity. See also the European Convention on the

Convention recognises that “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.” However, it mandates adoption institutions to take measures “to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.”¹³ As is the case with other international human rights standards, this Convention contemplates that such “intercountry adoptions” be finalised only by “competent authorities” within the child’s “State of origin.”¹⁴

Children who are the subject of adoption proceedings in Kosovo are also entitled to benefit from the fair trial rights enshrined in the European Convention on Human Rights (ECHR). Article 6(1) of the ECHR provides that everyone, in the determination of his or her civil rights and obligations, “is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹⁵ Such children also enjoy the right to respect for private and family life, as enshrined in Article 8(2). That Article provides that a public authority shall not interfere with the exercise of the right to a person’s private and family life except “in accordance with the law”.¹⁶ Article 14 provides that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”¹⁷

The fair trial and non-discrimination provisions of the International Covenant on Civil and Political Rights (ICCPR)¹⁸ also apply to the issue of child adoption proceedings in Kosovo. Article 14 provides that “[a]ll persons shall be equal before the courts and tribunals” and that, in the determination of his or her rights and obligations in any civil proceeding, “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁹ Article 26 provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” Prohibited grounds of discrimination include, but are not limited to, “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁰

Exercise of Children’s Rights, Council of Europe 25 January 1996, ETS 160. Chapter II.A of this Convention guarantees to children involved in judicial proceedings a number of procedural rights, including the rights to be receive all relevant information, to be consulted and to express his or her views, to be informed of the possible consequences of compliance with these views and the possible consequences of any decision, and the right to apply for appointment of a special representative.

¹³ Hague Conference on Private International Law, Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention on Intercountry Adoption), 29 May 1993, entry into force 1 May 1995, preambular paragraphs.

¹⁴ Article 4, Hague Convention on Inter-country Adoption.

¹⁵ Article 6(1), ECHR.

¹⁶ Article 8(2), ECHR.

¹⁷ Article 14, ECHR.

¹⁸ International Covenant on Civil and Political Rights (ICCPR), U.N.T.S. No. 14468, vol 999 (1976), p. 171.

¹⁹ Article 14(1), ICCPR.

²⁰ Article 26, ICCPR.

Legal Framework in Kosovo

The Assembly of Kosovo Law No. 2004/32 on Family (Family Law), as promulgated by UNMIK Regulation No. 2006/7 of 16 February 2006 gives the courts of Kosovo exclusive competence to adjudicate adoptions.²¹ This law is the most recent piece of legislation in Kosovo to regulate the adoption procedure, and is also the most specific. It constitutes a complete code with respect to adoption, setting out the legal principles upon which adoption is based and the conditions precedent for an adoption to occur, and regulates all aspects of the adoption procedure. As such, under the doctrines of both *lex posteriori*²² and *lex specialis*,²³ this law clearly overrides earlier and more general legislation regulating adoption in Kosovo.

The Family Law provides for court oversight of all aspects of an adoption, beginning with the initial request to adopt. The request may be made by the prospective adoptive parent²⁴ or, in the case of children who are “determined to be without parental care”, by “the appropriate authority.”²⁵ It gives the court exclusive competence over the procedures required to establish the consent of the child, as well as the consent of the birth parents or their substitutes.²⁶ It also assigns to the court the responsibility of assisting “the parties in all stages of procedures”, informing both “the adoptee and adopters about the legal, educational and moral purposes and consequences of the adoption”, and informing the adoptee “of the legal nature of future rights and obligations.”²⁷

The court is responsible, *inter alia*, for making all necessary inquiries, and taking into account “all reasonable opinions of sociologists, psychologists, doctors, therapists and other experts” concerning “the adequacy of the adopting party.”²⁸ It may, at its discretion, “seek advice from the custodian body in making a determination on adoption.”²⁹ It may also “collect further data and proof from the custodian body, social services and other experts in the field of child care on conditions of adoption.”³⁰ During the period of data collection, the custodian body has the obligation of providing both

²¹ Article 161(1), Assembly of Kosovo Law No. 2004/32 on Family, promulgated by UNMIK Regulation No. 2006/7 of 16 February 2006 (Family Law). Part One of the Family Law contains the Law’s “General Provisions” and provides, at Article 1, that the Law “regulates engagement, marriage, relations between parents and children, adoption, custody, protection of children without parental care, family property relations and special court procedures for disputes of family relations.” Part Five of the Family Law is entitled “Specific Forms of Protection of Children Without Parental Care”; Chapter II of Part Five, comprising Articles 160-202, deals specifically with child adoption.

²² *Leges posteriores priores contrarias abrogant* (Subsequent laws prevail over prior conflicting ones, also known as the “last in time” rule).

²³ *Lex specialis derogat legi generali* (A specialised law will prevail over a general one).

²⁴ Article 180, Family Law.

²⁵ Article 182(4), Family Law.

²⁶ Articles 168-172, Family Law.

²⁷ Article 183, Family Law.

²⁸ Article 184(1), Family Law.

²⁹ Article 161(1), Family Law. The term “custodian body” is defined in Article 6 of the Family Law. The term is used interchangeably in the English version of the law with the term “guardianship authority”. The latter term is defined in Article 1.3(j) of the Assembly of Kosovo Law No. 02/L-17 on Social and Family Services, promulgated by UNMIK Regulation No. 2005/46 of 14 October 2005 (Law on Social and Family Services). Article 1.3(j) defines “custodian body” as “the function within the Centre for Social Work that is responsible for the protection of children.” The role of the CSW is set out in Article 7 of the Law on Social and Family Services.

³⁰ Article 182(3), Family Law.

the child's parents and the prospective adoptive parents with the "necessary preparation."³¹ Upon the request of a child, the consent of the custodian body to the adoption shall in certain circumstances be substituted for that of the child's parent.³²

The court can approve an adoption,³³ refuse to approve it,³⁴ annul it³⁵ or terminate it.³⁶ In cases where it approves the adoption, the court must not make a final pronouncement until after the expiration of a three-month trial period during which the prospective adoptive parent cares for the child. It may, where there are extenuating circumstances, extend this trial period for a further three months.³⁷ All of the foregoing procedures are within the exclusive jurisdiction of the court; there is no provision in the Family Law pursuant to which these procedures may be exercised by any body other than the court.

Furthermore, an adoption "establishes between the adopting party and the adoptee the same rights and obligations that exist between parents and children."³⁸ Only a "minor child" can be adopted,³⁹ and that "[t]he prospective adoptive parent must have reached 21 years of age."⁴⁰ However, "if spouses intend to adopt a child together, one of the spouses must have reached 25 years of age and the other spouse must have reached age 21."⁴¹ The prospective adoptive parent must ordinarily be a Kosovo resident;⁴² only in exceptional circumstances will "a foreign citizen/resident"⁴³ be allowed to adopt. Such circumstances include cases where the child cannot be adopted,⁴⁴ and/or cases where "the child has special needs and requires specialised treatment not available in Kosovo."

The Family Law introduced significant changes to legislation previously in effect in Kosovo governing adoption procedure. Prior to the promulgation of this Law, adoption procedure in Kosovo was governed in part by the Law on Marriage and Family Relations,⁴⁵ and in part by the Law on Social and Family Services.⁴⁶ Under the now superseded Law on Marriage and Family Relations, the CSWs were the primary

³¹ Article 184(2), Family Law.

³² Article 171(1), Family Law. Consent will be substituted in cases where the "parent continuously and gravely violates his obligations toward the child or has demonstrated by his conduct that he is indifferent towards the child", and the child would be considerably disadvantaged were the adoption not to take place because of lack of parental consent.

³³ Article 186, Family Law.

³⁴ Article 185, Family Law.

³⁵ Article 196, Family Law.

³⁶ Article 198, Family Law.

³⁷ Article 166, Family Law.

³⁸ Article 167, Family Law.

³⁹ Article 174, Family Law. The term "minor child" is not defined anywhere in the Family Law; however, Article 3.1 of the Law defines "children" as "persons under age of 18".

⁴⁰ Article 176(1), Family Law.

⁴¹ Article 176(2), Family Law.

⁴² Article 179(1), Family Law. UNMIK Regulation No. 2006/7 provides that "the title of article 179 shall be revised to read "Citizenship/Habitual Residence" and the word "citizen" in article 179(1) shall be revised to read "habitual resident".

⁴³ Article 179(2), Family Law.

⁴⁴ Ibid. Note that the English translation of this section incorrectly translates the word "adopted" as the phrase "adopted or fostered".

⁴⁵ Law on Marriage and Family Relations, Official Gazette Socialist Autonomous Province of Kosovo No.10/84 (the old Law on Marriage and Family Relations).

⁴⁶ Article 11, Law on Social and Family Services.

adjudicative institutions for adoptions.⁴⁷ Under the Law on Social and Family Services, the ministry's department of social welfare also had limited and vague adjudicative competence concerning the adoption of abandoned children who were under the long-term care of the department.⁴⁸

In June 2006, four months after the promulgation of the Family Law, the ministry issued an Administrative Instruction on Establishment of the Panel for Placing Children Without Parental Care in Foster Care and Adoption but within the framework of the superseded Law on Social and Family Services.⁴⁹ This Administrative Instruction created a panel "for placing children without parental care in foster care and adoption" (child placement panel). It dealt only with those children who were without parental care, and defined such children as those "whose parents are not alive, are not known, are disappeared or [who] for any reason do not carry out their parental duties temporarily or permanently."⁵⁰

The Administrative Instruction obliged the CSWs to request in writing the opinion of the child placement panel on the proposed adoption of such a child. The child placement panel then was to give an opinion, canvassing the welfare of the child and the suitability of the prospective adoptive parent(s).⁵¹ As to which body should ultimately adjudicate on the merits of the adoption, the Administrative Instruction provided that the decision was to be made "by Center of Social Work or the Court based on the matter and territorial competences."⁵²

It must be reiterated again at this point that this Administrative Instruction purports to operate pursuant to the Law on Family and Social Services, a Law which, at the time the Administrative Instruction was issued, no longer regulated adoption in Kosovo. As such, the issuance of the Administrative Instruction was entirely without legal basis.

Current child adoption practice in Kosovo

The OSCE monitoring of adoption procedures in Kosovo, combined with interviews with the relevant institutions, reveal a confusing multiplicity of practices. Adoptions are not being exclusively adjudicated by the courts, as is contemplated by the Family Law. While the courts do adjudicate some adoption cases, the majority of adoptions in Kosovo today are being adjudicated by administrative bodies, primarily the CSWs, but also, in some instances, by the above-discussed child placement panel, acting under the purported authority of the Administrative Instruction.

⁴⁷ Article 147 of the Law on Marriage and Family Relations provided that adoptions were to be "conducted before the institute of the guardianship [...]". See also Article 153 -156 of the law.

⁴⁸ Article 11 of the Law on Social and Family Services provides that it was "the duty" of the department to "make arrangements for the child to be provided with suitable long-term care", which care, "according to the needs of the individual child", may be "residential care, foster care or adoption". Where the Department determined that the child's needs could best be met by adoption, it was authorized both to approve prospective adoptive parents and to match such parents with children deemed to be candidates for adoption.

⁴⁹ Administrative Instruction No. 05/2006 on Establishment of the Panel For Placing Children Without Parental Care in Foster Care and Adoption, June 2006 (Administrative Instruction).

⁵⁰ Article 4(2), Administrative Instruction No. 05/2006. This definition is also set out in Article 156 of the Family Law.

⁵¹ Article 5(6) and (7), Administrative Instruction No. 05/2006.

⁵² Article 5(8), Administrative Instruction No. 05/2006.

The OSCE is particularly concerned about this latter practice, for three key reasons. Firstly, the Administrative Instruction is an order issued by the executive branch, and as such is clearly a secondary, or subsidiary, form of legislation. It is a serious breach of the rule of law to permit subsidiary legislation to override primary legislation with which it directly conflicts. Secondly, the Administrative Instruction was issued pursuant to the Law on Social and Family Services at a time when the latter had ceased to regulate any category of adoptions, the Family Law having come into force a full four months prior to the issuance of the Administrative Instruction. Thirdly, a central feature of the Administrative Instruction is the distinction it makes between two categories of children, abandoned children and those whose parents are known, a distinction which constitutes discrimination as it provides children with different levels of procedural safeguards and which, as such, violates international human rights law.

Adoptions within Kosovo

The Family Law makes no distinction between the procedure to be followed in the case of an abandoned child and the procedure to be followed in the case of a child whose parents are known (apart from the particulars of how the request to adopt is to be initiated).⁵³ Despite this, the OSCE has learned that there is a de facto two-tier adoption system in place in Kosovo, whereby most cases involving children whose parents are known are adjudicated by the courts, and most cases involving abandoned children are adjudicated by either the CSWs or the child placement panel in contravention of both the Family Law and international human rights standards.⁵⁴

Adoption procedures adjudicated by the Centres for Social Work and/or the child placement panel

OSCE interviews with CSW officials⁵⁵ reveal that the prevalent practice in adoptions involving abandoned children is that the CSW receives or initiates the request, prepares the case, and drafts a professional opinion. At that point, the practice diverges. In some cases, the file is forwarded to the child placement panel for its opinion, before being returned to the referring CSW for final determination; while in other cases, the child placement panel makes the final determination itself.⁵⁶ In either case, after the final decision is issued, the CSW engages in further follow up. There is no court involvement or oversight at any point in this process.

Not all CSWs, however, adjudicate adoptions involving abandoned children, and those which do follow different practices. For example, of the five CSWs in Prizren region, one initiates and prepares adoption cases involving abandoned children and then

⁵³ Article 182, Family Law.

⁵⁴ Interviews with the Centres for Social Work (CSWs) in February and March of 2010 and a review of court files in the Gjilan/Gnjilane region reveal that the CSWs have also adjudicated adoptions with the consent of the child's parents, indicating that these were likely not cases of abandoned children.

⁵⁵ The OSCE conducted interviews in February, March and June 2010 with CSW officials in all five regions of Kosovo and with ministry officials.

⁵⁶ However, in an interview with the OSCE, a member of the child placement panel denied that the panel ever made final decisions in adoption cases. The OSCE was informed that, in accordance with the Administrative Instruction, the panel only provided opinions on adoptions to the CSWs, and that the CSWs always made the final decisions.

forwards them to the child placement panel for opinion, before finally bringing them before the court for decision. Another initiates and prepares the adoption cases, and then forwards them directly to the court for decision, without first obtaining an opinion from the child placement panel. The remaining three CSWs initiate and prepare the cases, forward them to the child placement panel for opinion, and then make the final decision on the adoptions themselves. For these three CSWs, there was no court involvement at any stage of the adoption proceedings.⁵⁷

CSW officials interviewed acknowledged that they were familiar with the provisions of the Family Law. In particular, they acknowledged to the OSCE that they were aware that under this Law, courts and not the CSWs exercised adjudicative competence with respect to all adoptions. Despite their awareness in this regard, however, most CSWs throughout Kosovo continue to adjudicate adoption cases involving abandoned children.

The interviewed CSW officials also expressed different rationales for continuing to adjudicate adoptions. Some believed that the Family Law could be read in such a way as to give the CSWs a continuing adjudicative role. Others informed the OSCE that they continued to derive their adjudicative competence from the Law on Marriage and Family Relations, legislation that is no longer in force. Others cited the Law on Social and Family Services and the Administrative Instruction. Some freely acknowledged that they no longer had adjudicative competence, but justified their continuing role by stating that, due to their expertise in the area of adoptions, they were more competent than judges to make decisions in adoption cases.

The adjudicative role of the CSWs and the child placement panel in child adoptions violates both international human rights law and the legal framework in Kosovo. While the expertise of these administrative bodies is relevant to fulfilling their function of assisting the courts in adoption cases, it cannot justify the continued usurping of adjudicative functions clearly reserved, by operation of the Family Law, to the judiciary. The OSCE has previously reported on the lack of adequate communication and co-operation between the courts and the CSWs, leading to the under-involvement of the CSWs in court proceedings, even in instances where such involvement is mandated by law.⁵⁸ In adoption matters, the role contemplated for the CSWs under the Family Law is a discretionary rather than a mandatory one.⁵⁹ However, given the wealth of CSW expertise in the area of child welfare, the courts should exercise their discretion to take advantage of this expertise wherever possible.

⁵⁷ Information as to the current CSW practice was obtained from interviews with CSW officials conducted in February and March 2010. The practice of CSWs in Prizren region appears to be typical of the systemic problem occurring in all of the regions. In only one other region – Pejë/Peć – was there an instance of a CSW forwarding an adoption file on to the court for final determination. However, most of the CSWs informed the OSCE monitors that they only adjudicate adoptions of a “domestic nature”; in cases of an “international nature”, they always forward the files to the child placement panel for final determination. In neither case, however, can one say that the adoption is being adjudicated according to law.

⁵⁸ See the OSCE report *The Centres for Social Work in Civil Proceedings*, March 2010. Available online at http://www.osce.org/documents/mik/2010/03/43190_en.pdf (last accessed, 21 June 2010).

⁵⁹ It should be noted that there is an exception in cases where the applicant is a “foreign citizen/resident”. In such cases, the “preliminary consent of the administrative bodies who deal with social work policies shall be required”: see Article 179(3), Family Law.

The adjudication of adoption proceedings by administrative bodies violates international human rights law, because when adoption proceedings are carried out by administrative bodies rather than by the courts, they are being carried out neither by “competent authorities” nor “in accordance with applicable law and procedures”, as mandated by the CRC.⁶⁰ The practice also violates international human rights law because when child adoptions are carried out not by the courts but by an administrative body acting without legal competence, the children whose adoptions are so processed are denied, in the determination of their “civil rights and obligations”, a fair hearing “by an independent and impartial tribunal established by law”, as mandated by Article 6 of the ECHR and Article 14 of the ICCPR.

The practice also constitutes differential treatment of two like groups, and as such violates the prohibitions against discrimination contained in international human rights standards, including the ECHR⁶¹ and the ICCPR. It does so by perpetuating a two-tier system in which children in the “upper” tier – those whose parents are known – are entitled to the greater procedural safeguards associated with a court-adjudicated adoption. By contrast, their peers in the “lower” tier – those who are abandoned – are denied the benefits of a court-adjudicated procedure.

Adoptions adjudicated by the courts

Even in those cases where adoptions are being adjudicated by the courts, as contemplated by the Family Law, persisting confusion over procedural law raises additional concerns. These include the issue of which level of court has original jurisdiction over adoption proceedings, and the issue of which procedural code applies in adoption proceedings. Lack of clarity concerning these issues hampers courts’ ability to effectively adjudicate these cases.

The Family Law does not specify whether the municipal or the district court shall be the court of first instance jurisdiction in adoption cases.⁶² This failure to make an explicit provision has created considerable confusion; some municipal courts have dismissed adoption cases brought before them because of a presumed lack of jurisdiction. On 14 October 2008, the Supreme Court of Kosovo issued a judgement holding that the competent court of first instance in adoption matters is the municipal court.⁶³ This ought to have clarified the situation for the lower courts. However, the OSCE learned that some municipal court judges remain unaware of this important decision, and continue to dismiss adoption cases that come before them for lack of jurisdiction.⁶⁴

⁶⁰ Supra, note 5.

⁶¹ Article 14 of the ECHR prohibits discrimination “on any ground”. The Article contains a non-exhaustive list of enumerated grounds including discrimination on the basis of “birth or other status”. While differential treatment may be justified on reasonable grounds, it is extremely doubtful such grounds could be made out in this instance.

⁶² Article 181(1) of the Family Law provides that “legal competence lies with the Court of the territory of where the applicants had their last joint residence as well as with the Court at the place of residence of the adoptee.”

⁶³ Supreme Court of Kosovo judgement A.C. No. 59/2008, 14 October 2008.

⁶⁴ In the Mitrovicë/Mitrovica region, for example, OSCE monitors were informed that two out of three municipal courts conduct adoption cases brought before them, even though the judges of these courts expressed concerns about the ambiguous provision in the Family Law regarding jurisdiction. The third municipal court had received “three or four” adoptions cases; however, the judge informed the

This issue was further confounded by a second judgement of the Supreme Court, issued on 21 October 2008, a week after the first judgement was issued.⁶⁵ In this second judgement, the Court dismissed on its merits an appeal from a decision of a district court not to allow a proposed adoption. The issue of jurisdiction was not directly before the Supreme Court in this second appeal. Yet by disposing of the appeal on its merits, without having once raised the issue of the district court's lack of jurisdiction to hear adoption cases, the judgement may foster further confusion among the judges of the municipal and district courts of Kosovo on this important question of jurisdiction.

Furthermore, the Family Law fails to specify which procedural code the court should apply in adoption cases. Lacking explicit guidance, some municipal courts apply the Law on Non-Contested Procedure (LNCP)⁶⁶ and others the Law on Contested Procedure (LCP).⁶⁷

The 14 October 2010 Supreme Court judgment suggests that adoption cases should be treated as non-contested procedures. However, this decision has not been widely disseminated, and many judges are therefore unaware of its existence. As such, and despite its obvious relevance, the decision is unlikely to influence judges' determination of the applicable procedural code to apply in adoption cases.⁶⁸ In fact, the judges interviewed informed the OSCE that they based their decision as to which procedural code applies on their own interpretations of the Family Law. This lack of clarity is cause for concern; it means, in effect, that many courts simply determine their own procedure on an *ad hoc* basis, and that no uniform practice can be said to exist across Kosovo as to how adoption cases will be heard.

In an uncontested application before a municipal court in the Prishtinë/Priština region concerning the adoption of a 14 year-old boy, the court acknowledged

OSCE monitors that he did not proceed with adjudicating them, but instead dismissed them due to the lack of clarity as to jurisdiction. Judges interviewed expressed a need for clarification on this question of whether municipal courts had jurisdiction. None were aware of existence of the Supreme Court judgement. Information as to current judicial practice was obtained from interviews with judges in all five regions conducted in February and March 2010.

⁶⁵ Supreme Court of Kosovo judgement A.C. No. 25/2008, 21 October 2008.

⁶⁶ Law No. 03/L-007 on Out Contentious Procedure, Kosovo Official Gazette, 12 January 2009, also referred to as the Law on Non Contested Procedure, (LNCP). This law regulates the procedures to be used in the adjudication and resolution of non-contested cases in the areas of "property, family, and personal interests and other rights": Article 1.1, LNCP

⁶⁷ Law No. 03/L-006 on Contested Procedure, Kosovo Official Gazette, 20 September 2008 (LCP). This law regulates the procedures to be used in adjudicating and resolving "civil justice disputes of physical and legal persons, unless otherwise provided for by a particular law": Article 1, LCP. OSCE monitors were informed that in the Prizren region, out of five municipal courts, two adjudicate adoption proceedings using the LCP and three using the LNCP. In the Mitrovicë/Mitrovica region, the two municipal courts which adjudicate adoptions cases use the LNCP. In the Pejë/Peć region, all of the municipal courts adjudicating adoption proceedings apply the LNCP. In the Gjilan/Gnjilane region, three courts adjudicate adoption cases using the LNCP. One court has yet to hear an adoption case; however, the judge stated that he would use the LNCP.

⁶⁸ The OSCE has previously noted that, while such knowledge transfer would contribute to greater consistency in jurisprudence across court levels, lower courts do not have easy access to the judgments issued by the Supreme Court of Kosovo. See the OSCE Review on the Criminal Justice System 1999-2005 *Reforms and Residual Concerns*, March 2006. More recently, this issue has been canvassed by the OSCE in relation to sentencing; see *Inadequate Assessment of Mitigating and Aggravating Circumstances by the Courts*, June 2010.

that the proceeding was a non-contested one, but nonetheless opted to apply the LCP to its review of the evidence and its assessment of the expenses.⁶⁹

In addition to the issues raised by the practice of administrative bodies, the OSCE also has concerns about the role played by the courts. At a minimum, it would appear that judges have been complacent regarding this serious infringement on their adjudicative competence. Complacency signals to all of the participants in this practice a courts' tacit approval of the current practice of the administrative bodies. All civil judges interviewed for this report acknowledged to the OSCE they were fully aware that the CSWs were adjudicating adoptions of abandoned children. As earlier noted, the adjudication of adoptions by administrative bodies constitutes a serious and egregious infringement of judicial powers by the executive branch. Yet, with one exception,⁷⁰ none of those interviewed had taken any steps to deal with this issue.⁷¹

A case from a municipal court in the Gjilan/Gnjilane region illustrates the deference that the courts of Kosovo show toward the adjudicative role of the CSWs, and toward the decisions resulting therefrom:

In a municipal court in the Gjilan/Gnjilane region, a husband and wife filed an application to adopt a three year-old child, the husband's nephew. The birth-mother and birth-father gave their consent to the adoption. In the course of the proceedings, it emerged that a CSW had in fact already made a decision granting the adoption some three years previously.⁷² In a hearing held on 22 June 2007, the court decided that the subject matter of the adoption case was for that reason *res judicata* and dismissed the application pursuant to Article 228 of the Law on Civil Procedure.⁷³

It appears that the court intended to reference the Law on Contested Procedure. Article 228 of the Law on Contested Procedure does not deal specifically with the doctrine of *res judicata* and provides scant, if any, support for a decision to dismiss the applicants' case for court confirmation of the longstanding de facto adoption of their child.

⁶⁹ It should be noted, however, that this practice is in fact contemplated by the law. Article 3 of the Law on Non-Contested Procedure provides that in non-contested procedures, courts may apply appropriate provisions of the Law on Contested Procedure, unless otherwise provided by law. In this instance, the OSCE's concern is not that the court mis-applied the law, but rather, that of the absence of specific provision in the Family Law as to the applicable procedure left the court little choice but to cobble together a procedure from two separate civil procedure codes.

⁷⁰ One judge interviewed by OSCE monitors informed that she had attempted to deal with this issue of CSW adjudication of adoptions directly, with a phone call to the CSW Director in her municipality.

⁷¹ Options available to a judge who wished to do so include informing the president of his or her court, or alternatively bringing the matter to the attention of the Kosovo Judicial Council (KJC).

⁷² The CSW decision was in fact made during the time that the now superseded Law on Marriage and Family Relations was still in force. However, it is extremely doubtful that the administrative process leading to the CSW decision was a judicial proceeding to which the doctrine of *res judicata* would apply.

⁷³ Subsequent to the dismissal, the applicants made a request to reactivate the case, seeking court confirmation of the CSW decision. On 14 June 2010, the court issued a decision confirming the adoption.

Adoptions where the applicant is a “foreign citizen/resident”

As noted earlier, the Family Law provides that a “foreign citizen/resident” may only adopt a child in Kosovo in exceptional circumstances. Such circumstances include cases where the child cannot be adopted in Kosovo and/or cases where “the child has special needs and requires specialised treatment not available in Kosovo.”⁷⁴ The “preliminary consent of the administrative bodies who deal with social work policy” is required for such adoptions.⁷⁵ The law does not specify what criteria shall be used to determine when a child cannot be adopted in Kosovo. The OSCE monitored a case in which the court granted an application to adopt, despite having neither obtained the consent of the CSW, nor canvassed the issues referred to above.

The case, before a municipal court in Mitrovicë/Mitrovica region, concerned a 14 year-old child whose father had died in 1999. On 12 January 2010, the child’s uncle, who has German citizenship and lives in Germany, applied to the court to adopt him. The applicant brought his application pursuant to Article 179(2) of the Family Law and, among other statements, explicitly stated that he lived and worked in Germany. On 20 January 2010, the judge indicated that the court would request CSW consent before proceeding with the adoption. The case resumed on 25 February 2010 with the applicant, the child’s mother, the child’s custodian and the child himself all present. All of those present provided statements, and the mother, the custodian and the child all provided their consent to the adoption. The applicant again pointed out to the court that he lived and worked in Germany. The minutes from the trial record for 25 February 2010 state that “[t]he court, based on aforementioned and based on the statements of the parties, concluded that applicant fulfils the criteria for adoption [...]”⁷⁶ and that there were no further obstacles to the adoption pursuant to either Article 177 or 178 of the Family Law.⁷⁷ The court approved the adoption.

The court appears to have overlooked the fact that the application was brought pursuant to Article 179 of the Family Law and that the applicant was a “foreign citizen/resident.” This is surprising, since the applicant brought his foreign residence to the attention of the court on multiple occasions over the course of the proceedings. It is more surprising still, since the court at one point indicated that CSW consent was being requested.⁷⁸ The case contains no discussion of the Article 179 criteria, i.e., whether the child could have been adopted within Kosovo, and/or whether he had special needs and required specialised treatment not available in Kosovo.

⁷⁴ Article 179, Family Law.

⁷⁵ Ibid, Article 179(3). The phrase “administrative bodies who deal with social work policy” has been interpreted by the courts as referring to the CSWs.

⁷⁶ As provided for in Articles 164(2), 168, 174 and 175 of the Family Law.

⁷⁷ Article 177 prohibits adoption “of a person along the lines of descendants” and adoption of a sibling, and provides that a legal custodian cannot adopt a person under his or her care “until the competent body discharges the custodian from his legal status.” Article 178 prohibits adoption by a “person who by court order has lost parental custody”, a person for whom there is founded suspicion that he will misuse the rights of an adopter resulting in harm to the adoptee or that he requests adoption for his own pecuniary benefit”, or a “person who suffers from a diagnosed psychiatric illness or is retarded from a mental perspective as well as a person who suffers from an illness as which may endanger the health and life of the adoptee.”

⁷⁸ The trial record/minutes do not indicate the receipt of any submission from the CSW; it is not possible to ascertain from the record whether a request was in fact ever made to the CSW.

The CSWs and the child placement panel are also involved in adjudicating some adoptions involving “foreign citizen[s]/resident[s].”⁷⁹ As with the adjudication of local adoption cases, there is considerable variation in the practice from region to region, and even within each region. Two CSWs in the Prizren region informed the OSCE monitors that they had each initiated one adoption case involving an applicant from outside of Kosovo. These CSWs each forwarded their case to the child placement panel, which adjudicated and granted both adoptions. In the Pejë/Peć region, one CSW confirmed that they had adjudicated one “intercountry adoption” case. Upon receipt of the opinion from the child placement panel, the CSW made a final decision granting the adoption.

The CRC mandates that child adoptions shall be “authorized only by competent authorities” who must make their determinations “in accordance with applicable law and procedures.”⁸⁰ It also obliges adoption institutions to “ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.”⁸¹ Similarly, the Hague Convention on Intercountry Adoption mandates that such “intercountry adoptions” be finalised only by “competent authorities” within the child’s “State of origin”.⁸² Under the Family Law, only the courts may adjudicate adoptions. Given this, CSWs and the child placement panel cannot be considered “competent authorities” acting “in accordance with applicable laws and procedures.” Nor can they be said to offer the child concerned “safeguards and standards equivalent to those existing in the case of national adoption.” As such, the adjudication by administrative bodies of such adoptions is a clear contravention of the provisions of both the CRC and the Hague Convention on Intercountry Adoption.

Conclusion

The legal framework in Kosovo mandates that adoptions be adjudicated by the courts. When administrative bodies continue to adjudicate adoptions despite the absence of a legal mandate, the rule of law is severely weakened. When they do so on the purported authority of subsidiary legislation which directly conflicts with the primary legislation regulating the field of adoption, the separation of powers – so vital to the functioning of any democratic society – is diminished. When this practice takes place with the tacit approval of the courts, the independence of the judiciary is called into question.

⁷⁹ The Administrative Instruction purports to regulate such adoptions where they involve abandoned children. Article 5(10) provides that, exceptionally, a child may be adopted by a family from outside of Kosovo “if there exist appropriate reasons” indicating that such an adoption is in the child’s best interest. Article 5(20) provides that “in order to protect the rights of children who might be subject to request for adoption” from people living outside of Kosovo, the Child Placement panel must take a number of steps before agreeing to the adoption. It must not issue decisions which are in violation of the adoption legislation applicable in Kosovo, and must ensure that its decisions comply with applicable provisions of the Hague Adoption Convention. It must also develop co-operative relationships with the “organs for adoption” in those states from which it is anticipated prospective adoptive parents will come. Finally, it must oversee the development of procedures and actions by which the CSW can make attempts to have the children adopted in Kosovo before the decision to allow such children to be adopted outside of Kosovo is made.

⁸⁰ *Supra*, note 5.

⁸¹ *Supra*, note 4.

⁸² *Supra*, note 14.

It is telling that the current adoption practice is in violation of both international human rights law and the legal framework in Kosovo. The best measure of the strength of human rights protections in any given society is the extent to which those protections are available to the society's most vulnerable members. Abandoned children are among the most vulnerable members of Kosovo society, and as such must be afforded the maximum protection available under law. When institutions choose to perpetuate what is in effect a discriminatory, two-tier adoption regime, with abandoned children occupying the bottom tier, Kosovo's commitment to human rights is compromised.

Recommendations

To the Kosovo Assembly:

- Consider amending Part Five, Chapter II, of the Family Law to, firstly, expressly repeal all other laws that purport to regulate the field of adoption, and, secondly, provide greater clarity concerning jurisdiction and applicable procedure.

To the Ministry of Labour and Social Welfare:

- Consider withdrawing the Administrative Instruction on Establishment of the Panel for Placing Children Without Parental Care in Foster Care and Adoption;
- Instruct the Centres for Social Work of Kosovo to immediately cease the practice of adjudicating adoptions, and to begin referring all adoption cases to the courts.

To the Supreme Court:

- Ensure that Supreme Court decisions are widely disseminated, and in particular that they are distributed to the presidents of the district and municipal courts.

To the municipal courts:

- Accept jurisdiction in adoption cases, as contemplated in the Family Law and confirmed by the Supreme Court in its judgement of 14 October 2008;
- Take advantage, wherever possible, of the CSW expertise in matters related to child adoptions;
- Report to the relevant institutions any cases you become aware of involving CSWs infringing upon municipal court jurisdiction over adoption procedure.

To the Centres for Social Work:

- Refrain henceforth from adjudicating child adoptions;
- Assist the courts, whenever so requested, by providing expert assessments and opinions in child adoption cases.

To the Kosovo Judicial Institute:

- Continue to provide specific training in the adjudication of adoption cases, with a particular focus on the requirements of the Family Law and on the advisory role of the Centres for Social Work;
- Provide specific training in the distinction between primary and secondary or subsidiary legislation;
- Establish an expert working group to clarify the law with respect to adoptions in Kosovo.