

Child Adoption Without Parental Consent in the Russian Federation in the Light of UN Convention on the Rights of the Child and the European Convention on Human Rights Requirements

Elena Aleksandrovna Tatarintseva

The Svetlogradsky Filial Office of “The Institute of Friendship of Peoples of the Caucasus”,
Ploschad Vistavochnaya, 30, 356537, Svetlograd, Russian Federation

Abstract: The article comprises analysis of the basis for child adoption designed by the Family Code of the Russian Federation for cases where consent of the child’s parents for adoption is not given. This basis is compared to the requirements of the UN Convention on the Rights of the Child and the European Convention on Human Rights. A conclusion is drawn regarding the necessity of introducing changes and adding to the existing regulations of the legal framework of the Russian Federation, to ensure compliance with the current international law standards relating to child’s rights protection and to the protection of parental rights.

Key words: Child right of care • Parents • Missing persons • Legal incapacitation • Deprivation of parental rights

INTRODUCTION

The requirement for parental consent prior to a child’s adoption is seen as a necessity, not only by most Russian authors [1], but also by experts internationally [2]. At the basis of this law is the fundamental right of the parent to bring up their own child [3], as well as the corresponding law on the right of the child to know who their parents are and the right to be cared by them. However, the right of the child to be brought up by their parents, as dictated by section 7(1) of the UN Convention on the Rights of the Child 1989 and by section 8 of the European Convention on Human Rights (ETS #5), is often breached by the parents of the child themselves. Such situations lead to the necessity for governmental interference into the child-parents relationship, with a view to protecting the rights and interests of the child [4]. For example, according to the legal statistics data, the courts of the Russian Federation examined 67 245 cases ending in the deprivation of paternal rights in 2010 alone; out of these, in only 56 117 cases (83%) legal regulation requirements were met. In 2011, 57 514 such cases were examined, where the legal requirements were met in 51 874 of cases (90%), while in 2012 53 101 cases were examined,

whereby legal requirements were met in 47 663 of cases (89,7%) [5]. At the same time, cases of excessive governmental interference into familial life, which often leads to the removal of the child from their parents illegally and thus the breaching of parental rights, are not infrequent. Although it is possible to say that today this negative trend has somewhat weakened, the situation still remains rather complex. The main reason for this is that social institutes designed to support families display an incapability to adequately address the vital needs of a family, thus leading to a misbalance between the interests of a family unit and those of the government. There is a good reason for why one of the main strategies for preventing social parentlessness and the need to remove a child from their parents, as designed by the National Strategy of Action in the Interests of Children for the period 2012-2017, is the introduction of a ban on the removal of a child from their families prior to the carrying out of a socio-rehabilitative investigation. On the one hand, this regulation prevents the infringement on the right of the child to be brought up by their parents and the right of the parents to be able to care for their child. However, on the other hand, this regulation makes current the need for the establishment of clear criteria on the

Corresponding Author: Elena Aleksandrovna Tatarintseva, the Svetlogradsky Filial Office of “The Institute of Friendship of Peoples of the Caucasus”, Ploschad Vistavochnaya, 30, 356537, Svetlograd, Russian Federation.

adoption of children without the prior agreement for this by their parents within the Family Code (FC) of the Russian Federation (RF). It also makes it important to ensure that the criteria are in complete agreement with those of the UN Convention on the Rights of the Child and the European Convention on Human Rights.

MATERIALS AND METHODS

In the Russian Federation, the removal of the rights of the parents to give permission for their child's adoption is only permissible under special circumstances that are strictly defined by law. According to section 130 of the Family Code of the Russian Federation, parental consent for the adoption of a child is not necessary, if: the parents of the child are unknown or have been named to be absent through obscure circumstances by court (missing); the parents of the child have been named to be legally incompetent and therefore incapable of looking after the child; parental rights have been removed by court; the court has decided that the parents of the child have not been behaving in a respect-worthy fashion, such as when they have lived for under six months with the child and when they refuse to care for or bring up the child.

The legal basis for these regulations will now be examined against international rights standards.

Parents of the Child Are Unknown: The adoption of an abandoned child, where the parents are unknown and no trace of who the parents may be has been found, may be carried out according to the rules of the Russian Federation (chapter 19 of the Family Code of the Russian Federation), under the condition that an act has been issued by the body of care and custodianship. In this case, the registration of the birth of a child is carried out on the basis of section 19 of the Federal law 'On the acts concerning citizens' ('Governmental registration upon the finding of an (abandoned) child'). Under the circumstances that the mother of a child has abandoned them in the maternity home (section of) or another medical organisation, adoption may take place in the case of the presence of an appropriate act, which has been prepared by the administration of the organisation, where the child has been abandoned [6]. At present, cases of mothers leaving their child immediately after birth are, unfortunately, wide-spread. In most such cases, the mother arrives at a medical organisation specialising in aiding childbearing, without appropriate documents that would disclose her identity and does not give any information about herself, or deliberately gives wrong

information. This is especially wide-spread amongst migrant women [7]. This means that the section on child adoption without the consent of the parents in cases where the parents of the child are unknown of the Family Code of the Russian Federation completely complies with the requirements of section 8(2) of the UN Convention on the Rights of the Child whereby the governments involved must maximise the chances of the survival and healthy development of a child. This also completely agrees with section 7(1) of the UN Convention stating that the child must be registered immediately after birth and with section 20(1) of the UN Convention on the Rights of the Child of access to governmental protection and help of a child who has been deprived of their family.

At the same time, the Russian law contains regulations, which should perhaps be considered to be controversial. For example, chapter 10 of the Regulations of the Plenum of the Supreme Court of the Russian Federation 8, active from 20.04.2006, 'On the use of legislation during the examination of child adoption cases by courts' [8] states that children that have been found following a natural disaster can be adopted without the consent of the parents, as well as after other emergency events. These regulations apply if an appropriate act has been issued by the body of domestic affairs and custody and where the parents of the child are unknown. It should be noted, that the issue of children that have been found during a natural disaster has been looked into by the Parliamentary Assembly of the Council of Europe, where Russia was one of the participants. A special Resolution [9] has been made for such cases, which states that 'the question of the protection of children that have been orphaned as a result of a natural disaster should be prioritised' (chapter 11 of the Resolution). In connection with this, in chapter 13 of the aforementioned Resolution it is proposed to 'encourage and develop the institute for the custody of children in order to prevent the imposing of additional traumas onto them in other areas of their lives'. Although the Resolution highlights the impermissibility of international adoption of children who have been affected by a natural disaster, where this is only permitted as a last resort, the author of this article suggests that this attitude should also apply to cases of national adoption as well. The situation of a child, who is under psychological trauma after having been exposed to a natural disaster and who has lost their parents, must not be worsened by adoption, which can mean the end of the child's connection with any remaining genetic family. This is especially important in situations where it may be possible to hand the child into the care of their close and distant genetic relatives. The importance of doing this

where possible has been highlighted in the Resolution of PACE (Parliamentary Assembly of the Council of Europe). The authors of this article feel that the care for children that have been found following a natural disaster or another emergency situation within the Russian Federation should primarily be handed over to a care home. Adoption should only be considered after a certain amount of time has elapsed to make it evident that the child has been left without the care of their parents and has no relatives. This means that from the point of view of the protection of a child's right of being brought up by their parents, as stated in the Plenum of the Supreme Court of the Russian Federation 8 of 2006, does not completely agree with section 20 of the UN Convention on the Rights of the Child.

The Child's Parents Have Been Considered to Be Missing by Court, with Their Location Being Unknown:

A child can be adopted without the agreement of the parents when their parents are declared to be missing. According to section 42 of the Citizen Code (CC) of the Russian Federation, the declaring of a citizen to be missing is carried out by court after the issue has been raised by persons interested in the matter and if there is no information on the citizen's current location at the place of their residency during the course of a year. However, the Family Code of the RF does not view this absence of the parents in relation to child adoption in the same way that it views the death of the parents (section 121 of the FC of RF) and cases where the parents have been declared to be dead by court (section 45 of the CC of RF). Nevertheless, as far as the matter of rights goes, the declaring of the parents missing should be considered equal to their death, as would be logical in such a situation. Additionally, in section 2 of the 'Regulations on child adoption and on monitoring of the conditions of their quality of life and care in their adoptive families within the territory of the Russian Federation', which are set by the Order of the Government of the RF as of 29.03.00 275 (amended in 22.08.2013)[10], states that adoption may only be carried out in the case of minors, whose only parent or both of the parents have died. The absence of the necessary basis in the law of the RF that would state that adoption in such cases may be allowed without the consent of the parent, means a theoretical inability of a child, whose parents have died or have been found to be dead, to be adopted without the consent of their parents. This does not completely comply with section 20 of the UN Convention on the Rights of the Child which states the duty of the government to ensure

the replacement of care for a child, who has been permanently deprived of their family, including through the means of adoption.

The Parents Are Considered to Be Legally Incompetent by Court:

Legal incompetency of a child's parents is another separate basis for the lack for a requirement of parental consent during adoption. However, this is only possible in access where the parents have been named to be completely legally incompetent by court. According to the Order of the Plenum of the Supreme Court of the Russian Federation 8 of April 2006, the declaring of a parent partially legally incompetent is not sufficient enough reason for adoption of the child without the consent of the parent, as in accordance with section 30 of the CC of the RF, such a parent can only be limited in terms of their ownership rights. At the same time, section 11(5) of the Order of the Plenum of the Supreme Court of the Russian Federation 10 of 27.05. 1998 (amended in 06.02.2007) 'On the use of legislation in court for the resolution of arguments related to child upbringing' [11], it is noted that in the case that a person suffers from chronic alcoholism or drug-abuse problems and that this has been confirmed by a relevant medical organisation, they may be subject to the loss of parental rights, regardless of whether they have only been found to be partially legally incompetent. This means that if a partially legally incompetent person has been diagnosed with the aforementioned disorders, their consent is not required to allow adoption of their child. Since the legal incompetency of the parents means that they are unable to care for the child, the child's remaining in such a family would not be optimal for the child, meaning that the child's placement into another family that is able to account for the basic development needs of the child is required. In relation to this, the regulations of the CC of the RF, stating that the agreement of the parents to adoption is not required in the case that the parents have been found by court to be legally incompetent, is in accordance with section 9 of the UN Convention on the Rights of the Child.

The Parents Have Been Deprived of Parental Rights:

The deprivation of the parents of parental rights is carried out on the basis described in section 69 of the FC of the RF, which accommodates all the potential situations described in section 9(1) of the UN Convention on the Rights of the Child, including child abuse and the lack of care for them. However, the adoption of a child of such parents is only allowed 6 months after the court's order on the deprivation of parental rights of one (or both) of

the parents (section 71(6) of the FC of the RF). The authors of this article feel that when all the erroneous orders often mistakenly made by the courts of the Russian Federation are taken into account, this regulation is justifiable. For example, in the 'Overview court practices' on the resolution of problems related to child upbringing (issued by the Presidium of the Supreme Court of the RF as of 20.07.2011 [12], it is stated that during cases related to the removal of parental rights, the parent that is not living together with the child has often not been informed of the place and time of the court's meeting relating to this case and the parent's right to claim their right of care for their own child has not been explained to them. This means that the 6 month period is not only necessary for the protection of parental rights, but it is also a period that is necessary to make sure that the court's order has not been made illegally. This means that this period is also necessary for the protection of the child's right for the upbringing by their own parents, which completely complies with the requirements of sections 6 and 8 of the European Convention on human rights.

The Parents Haven't Been Living with Their Child for over 6 Months for Reasons That Have Not Been Found to Be 'Respect-worthy' by Court and Are Evading from Fulfilling Their Duty to Bring up and Care for Their Child: This regulatory basis is one of the most controversial due to the absence of a consistent interpretation of it within the sphere of court practice. The authors of this article feel that this regulatory basis being listed as a separate legislative rule is misleading, as in fact, it only echoes one of the other criteria for adoption without parental consent listed under section 69 of the FC of the Russian Federation. This is because both of the conditions refer to the same situation, whereby the parents are evading carrying out their parental duties, including the refusal to pay maintenance fees. This is confirmed by the text of the Order of the Plenum of the Supreme Court of the RF as of 29th April 2006 8. The fact that 'the mechanism of the evaluative process that would allow the court to decide whether the reasons for the parent not having been living with their child for a minimum of 6 months is 'respect-worthy' or not has remained unregulated, means that in practice, the presence of this regulatory point within the legal framework for adoption without the consent of the parent has led to rather sad outcomes in practice', as some Russian authors suggest [13]. This means that the rights of both – the right of the child to live and to be brought up within their own family, as well as the right of the parents, are put under a real threat.

CONCLUSIONS

All this means that the list of criteria, contained within the Family Code of the Russian Federation, detailing the cases in which parental consent is not required for adoption to take place, largely covers the points raised within the UN Convention on child rights and is therefore generally in accordance with international requirements. On the other hand, the list of regulations present within the Russian legal framework does not fully comply with the international legal rights framework, which exposes the rights of the child and the parents to the threat of being breached. In order to ensure the compliance of the Russian legal framework with international standards relating to the possibility of adopting a child without the consent of the parents, the following action plan is required:

- To amend the regulations regarding the possibility of adoption without parental consent of children that have been found during a natural disaster or during another emergency situation, where their parents are unknown. The amendments should take into account PACE 1422(2005)1 on the handing of such children into the care of relatives, as well as section 20 of the UN Convention on the Rights of the Child to be passed into the care of their genetic relatives in order to strive to preserve the child's familial ties.
- To reconsider the basis that exists within the regulatory framework of the RF on the death of a child's parents and of cases where the child's parents have been declared to be dead by court. This is because the absence of such a basis within the list of criteria for adoption without parental consent means the potential breaching of a child's right of being brought up within a family, where this is through the means of adoption without parental consent, as stated under section 20 of the UN Convention on the Rights of the Child.
- To remove the criterion allowing adoption without parental consent in situations where the parents have not been living with the child for at least 6 months and deviate from the duty to bring up and care for their child for reasons considered to not be 'respect-worthy' by court. This is because these regulations are not in agreement with section 8 of the European Convention on human rights due to the high risk of governmental interference with family matters.

To conclude, the criteria under which child adoption without the consent of the child's parents is possible and which comply with the requirements of the UN Convention on the Rights of the Child and with the European Convention on human rights, include only situations in which the parents of the child are: unknown; have been named by court to be missing; have been named by court to be completely legally incompetent; have been deprived of parental rights.

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