



30th March 2009

REDEFINING THE BOUNDARIES BETWEEN CHILD ADOPTION AND CHILD KIDNAPPING

HRCC CAUTIONS MALAWI GOVERNMENT ON LAXITY TO PROTECT THE RIGHTS OF CHILDREN: ADOPTION OF SECOND CHILD BY MADONNA

The Human Rights Consultative Committee (HRCC) is a network of 85 local civil society and non-governmental organisations that work to promote good governance, protect human and people's rights, and contribute to national development through the entrenchment of a culture of transparency and accountability. HRCC does not promote personalities for political or other interests, but promotes systems and principles that are incidental to development and to the entrenchment of a culture of respect for human dignity at all levels. HRCC prioritize the rights of children, among other fundamental rights. HRCC would like to put across its concerns regarding the adoption of another child, Mercy James by American Pop Music Star Madonna. HRCC considers the promotion and protection of the rights of children as a fundamental role to be played by all development partners and that government must take a leading role in that respect. The state must be seen to be protecting children and not relegating its responsibilities to child adoption agencies and individuals.

The Convention on the Rights of the Child

Malawi is a signatory to the Child Rights Convention (CRC). Article 20 of the Convention on the Rights of the Child concerns children who are temporarily or permanently unable to live with their families, either because of circumstances such as

death, abandonment or displacement, or because the State has determined that they must be removed for their best interests.

Such children are entitled to «special protection and assistance». Paragraph 3 of article 20 determines that «Such care should include, *inter alia*, foster placement, adoption or, if necessary, placement in suitable institutions for the care of children».

It is important to note that during the negotiations of article 20, there was a proposal that States should have to «facilitate permanent adoption» of children in care. The proposal was rejected on the grounds that adoption is not the «only solution» when children cannot be cared for by their families.

Paragraph 3 of Article 20 also determines that when considering child protection solutions, due regard be paid to «**the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background**». This provision relates to article 7 (right to know and be cared for by parents) and article 8 (preservation of the child's identity) of the CRC.

The UN CRC and adoption

The Convention on the Rights of the Child remains neutral about the desirability of adoption even within the child's country of origin, though article 20 mentions it as one of the possible options for the care of children without families. It is clear that children's psychological need for permanency and individual attachments can be met without the formality of adoption, but where it is used it should be properly regulated by the State to safeguard children's rights¹.

Intercountry adoption is a very last resort and should only be considered if any suitable means of foster, adoptive or residential care cannot be found in the country of origin of the child and only if it is manifestly in the best interests of the child. It must be clear that residential care comes also before (intercountry) adoption – see article 21(b) of the UN Convention on the Rights of the Child.

Intercountry adoption is often presented as a child special protection measure. However, it is not. Adoption is a civil order, which creates new relationships with the adoptive family and severs the relationship between the child and his or her birth family. **Adoption is one of the available options if a child cannot be returned to his or her family (and attempts to rehabilitate the child with his or her family must be thorough and not token), but there are other options which first need to be considered such as long term placement with the wider family or foster parents and placement in residential facilities.** Especially with intercountry adoption, there is a risk that the institutions responsible for children may impose adoption in cases, which are unsuitable, so as to compensate for their own lack of resources.

¹ Implementation Handbook UNCRC

Intercountry adoption

Article 21 of the Convention on the Rights of the Child, stipulates that the system of adoption «shall ensure that the best interests of the child shall be **the** paramount consideration» and in this context it asks States to «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**».

The rising number of intercountry adoptions has been the cause of much concern. Children are a highly desirable commodity in countries where low birth rates and relaxed attitudes towards illegitimacy have restricted the supply of babies for adoption. This has led an apparently increasing number of adoptions to be arranged on a commercial basis or by illicit means. Without very stringent regulation and supervision children can be trafficked for adoption or can be adopted without regard for their best interests.² This appears to be a real risk for children in Malawi where currently the laws are weak and policies are inadequate.

Children are not isolated individuals but are born in and belong to a particular environment. Only if this native environment cannot, in one way or another, provide for a minimum of care and education should adoption be contemplated. The possibility of providing a better material future is certainly not, of itself, a sufficient reason for resorting to adoption³.

ADOPTIONS FROM MALAWI

Intercountry adoptions are a demand-driven market that is now shifting to Africa.⁴ However, the offer of children is going down, while the demand increases. It becomes more and more difficult to open new adoption channels as adoption agencies already scammed most of the world.⁵

Western adoption agencies charge between 10.000 and 30.000 dollars for the adoption of an African child. It is also increasingly becoming the trend to combine project aid and intercountry adoptions (requesting project aid as condition for obtaining adoptable children).⁶

² Implementation Handbook UNCRC

³ Explanatory Report Hague Convention, statement made by The Holy See

⁴ Professor Vlaardingerbroek, xxxx, 2008

⁵ Director Kind en Toekomst, Kalsbeek Report, 2008

⁶ For example Ethiopia

Kondanani

The Kondanani children's homes/villages were established in 1998 by the Dutch Annie Chikhwaza-Terpstra and aim to provide care, protection and education for orphaned children. Only babies younger than six months are admitted. Kondanani is sponsored by the Dutch Foundation Kondanani and by several religious organizations throughout the world, as well as private donations.

In March 2007 Kondanani entered into an adoption agreement with the Dutch adoption agency Kind en Toekomst (Child and Future). This Dutch agencies also provides project aid to Kondanani.

Under this agreement a total of 6 Malawian children have since been adopted by Dutch citizens. These families stayed at average five weeks in Malawi. The seventh adoption is currently blocked, and the prospective adopters are since five months in Malawi waiting for the Court's approval.

In February 2008 Annie Chikhwaza-Terpstra stated on Dutch Television⁷ that Madonna had visited Kondanani in 2006, and that Madonna intended to adopt a Malawian child in need. According to Ms. Chikhwaza-Terpstra the children in Kondanani were well cared for and thus not in need to be rescued by adoption. Therefore Madonna turned to another orphanage.

Our Prayer as HRCC

We request the Court to direct the government to set up a proper child protection system, so that Malawi takes care of its own children as obliged under the CRC.

If Malawi's government does not have the money, it should appeal for assistance to international bodies, such as United Nations and European Union.

We request the court to uphold the resident requirement and to fully assess the second Madonna's adoption attempt.

We further request the court to direct law enforcement agents to act on any adoption" that merely amounts to child trafficking. Subsequently the removal of the child out of Malawi has to be considered kidnapping in the event that no procedures have been followed.

⁷ Broadcast Evangelische Omroep - February 2008

The Judge in David Banda's case, referred to the 1984 Indian Supreme Court Judgement which attempted to regulate Intercountry Adoption and protect the children from trafficking. Subsequently multiple checks and balances, and a central authority were established. However, by now there is sufficient evidence available that India's attempt to regulate Intercountry Adoption failed totally. This was conveniently overlooked when the Judge referred to the Indian Supreme Court Judgment in order to justify the adoption of David Banda.

It is already clear that the Malawi laws prohibit international or inter-country adoption, if conducts like Madonna's are left unchecked, this could culminate into a bigger legal problem when more people especially adoption agencies and institutions use the same channel to adopt the Malawi babies.

HRCC has all along, even before the adoption of the first child, David Banda by the same pop star, been urging the government to speed up on its adoption policy so that people like Madonna and others cannot use their financial power to override rules and force the legitimization of child abuse. If this lacuna in policy and law is left unattended for too long, more celebrities and other families will take our children away under the guise of intercountry adoption, a development which may create loopholes and be prone to child trafficking.

It is not only the material needs that matter for a normal upbringing of a child. Children need to be taken care of within their communities. Mercy James is a child who has her extended close family members alive, and we urge Madonna to assist the child from right here and even contribute to existing local capacities so that children are taken care of within Malawi.

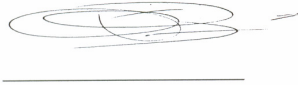
HRCC shares sentiments by the British Charity Save the Children, which is of the view that the best place for a child is in his or her family in their community and just to remind that this is a position held in Guidelines for Orphans and Vulnerable Children (Malawi Government). These guidelines must not be abandoned in pursuit of the commercial interests that may be harboured by some adopting families.

Malawi has over 1 million orphaned children looking for better life and it is the primary responsibility of the State to provide for these children. Malawi government should apportion a share of the tax revenue to care for these children instead of abandoning them to the wishes and devises of celebrities. In addition, it smacks of discrimination for only a few children to be taken away while the rest are being supported in a different way. The most efficient and effective means, this we suggest, if for support to children to be channeled through locally registered institutions and only to those that have capacity to do so. Madonna and other charity foundations can contribute to the building

of such local capacities, and even support the Ministry of women and Child Development which is annually under financed.

HRCC therefore asks the Ministry of Women and Child Development, Ministry of Justice, Malawi Law Commission and relevant non-state actors to expedite the process of reviewing the Child Adoption Laws and policy before the current situation of child trafficking becomes formalized and gets more prone to abuse for commercial and other non-child welfare related interests.

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