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Ministry of Justice
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THE HAGUE, 11 December 2008

Your ref.: 5574459/08/DJJ

Our ref.: 43611(08)JEN/SM

Dear Mr ter Heerdt,

INTERPRETATION OF ARTICLE 22 OF 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION

I refer to your letter of 17 November concerning the question of partial mediation of intercountry adoptions from the United States under the 1993 Hague Convention on Protection of Children and cooperation in respect of Intercountry Adoption (the Convention). You request clarification of Article 22 of the Hague Convention, and the practical consequences for the Netherlands of the United States' declaration concerning Article 22(2) on the possibilities for partial mediation.

Background and Interpretation of Article 22

The Convention, in Articles 14-21, sets out the mandatory obligations of Central Authorities during the adoption procedure. Article 22(1) allows the functions of Central Authorities in Articles 14-21 to be performed by accredited bodies or other public bodies. Accredited bodies are adoption agencies which are licensed or accredited according to the standards in Articles 10 and 11. Accredited bodies must be non-profit organizations (Art.11 a)).

On the other hand, a Contracting State may declare that bodies or persons may be approved to perform the Central Authority functions in Articles 15-21 (note: not Art.14) if they meet the criteria in Article 22 a) and b), that is, they

- a) *meet the requirements of integrity, professional competence, experience and accountability of that State; and*
- b) *are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.*

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Such persons or bodies are therefore not “accredited” as are “accredited bodies” and they may perform adoption functions for profit. The United States has declared that such persons will be approved as part of their adoption system under the Convention. Contracting states which do not want approved (non-accredited) persons involved in their adoptions must make a declaration under Article 22(4) which states as follows:

Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1. [that is, by Central Authorities or accredited bodies]

The Netherland did not make this declaration. Therefore, approved (non-accredited) persons in the United States may arrange intercountry adoptions with the Netherlands.

The Explanatory Report for the Convention refers to “the sensitivity of the compromise” reached in relation to Article 22 (paragraph 395). The sensitivity arose from the need of certain States, in particular the US, to make some provision for adoption services by private persons. Hence, “private” or “independent” adoptions were fully discussed (Explanatory Report, paragraph 373) and the Convention text admitted “a limited possibility of “independent” or “private” adoptions and entitles any Contracting State to declare that the procedural functions assigned to the Central Authority under Articles 15 to 21 may also be performed, but only in that State, by persons or bodies other than the public authorities or bodies” (paragraph 378).

Relevance of Article 14

Although an American approved (non-accredited) person may mediate an intercountry adoption for a Dutch couple, the couple must still apply to adopt through the Dutch Central Authority or accredited body, in accordance with Article 14. An approved (non-accredited) person is not permitted to perform the functions in Article 14 (see Art. 22(2)).

Implications for the Netherlands

If I understand the Dutch system of partial mediation correctly, the effect on Dutch adoptive parents of the US declaration under Article 22(2) is as follows: the adoptive parents must still apply to the Dutch Central Authority and obtain a positive evaluation that they are eligible and suited to adopt. The prospective adoptive parents must then locate an American accredited body or approved (non-accredited) person to mediate the adoption of an American child. The Dutch couple must inform the Dutch Central Authority/accredited body of their choice of mediator and the choice must be investigated and approved by Dutch authorities. A report on the child must be prepared. If prepared by the approved (non-accredited person), it must be done “under the responsibility of the Central Authority” (Art. 22(5)). When a child has been matched with the Dutch adoptive parents, the report on the child, the proof of consents and the reasons for the placement must be sent to the Dutch Central Authority/accredited body. The Dutch Central Authority/accredited body must give its approval to the placement before the child is physically entrusted to the adoptive parents. This step is required by Article 17 of the Convention.

Other issues relevant to Convention adoptions

In the Convention there are a number of principles, prohibitions and obligations which must be observed in any adoption completed in accordance with the Convention. First, there must be a decision of a competent authority that a child is adoptable (Art. 4). The principle of subsidiarity

requires that a permanent family be sought in the Country of origin before intercountry adoption is considered (Art. 4). How will the Dutch authorities be satisfied that an American family has been sought for an American child? I understand that American birth mothers may state their preference for their child to be adopted internationally rather than nationally. The birth mother's preference for intercountry adoption cannot override the subsidiarity principle.

The principle of the child's best interests must guide the decision to allow intercountry adoption for the child, as well as adoption decision itself (Arts.1, 4 b), 16(1)). There is a prohibition on improper financial gain from the adoption (Art. 32), even though approved (non-accredited) persons may do adoptions for profit. There is also a prohibition on contact between the prospective adoptive parents and the child's legal carers before the proposed adoption is quite advanced (Art. 29). Finally, there must be a certificate issued under Article 23 to state that the adoption was completed in accordance with the Convention. If the adoption is completed in the USA, only the US Central Authority can issue the Article 23 certificate.

Partial mediation

I am concerned that a partial mediation could sometimes mean an "independent adoption". For example, if the prospective adoptive parents, once approved as eligible and suited to adopt, travel independently to the US to find an adoption service provider (whether or not accredited or approved under the convention) who will find them a child. The adoption might then be completed in the US.

If the Dutch Central Authority/accredited body are not involved in the procedure (except for the initial evaluation of the parents) at the relevant stages, as described above, then the "independent adoption" is not consistent with the Convention. In addition, the other issues mentioned, namely subsidiarity, best interests, no contact between the prospective adoptive parents and birth parents, and improper financial gain, must also be addressed in the Convention adoption procedure. Otherwise it cannot be in conformity with the Convention.

Conclusion

As the US and the Netherlands are both Convention countries, any intercountry adoptions between the 2 countries must be done in accordance with the Convention. In my opinion, there is no reason that intercountry adoptions by Dutch couples of American children could not continue under the Convention, provided that the Convention requirements referred to above are consistent with your definition of "partial mediation." The partial mediation must not be an independent adoption.

I hope that this information will assist you.

Yours sincerely,



Jennifer Degeling
Secretary at the Permanent Bureau