INTERCOUNTRY ADOPTION AND THE SUBSIDIARITY PRINCIPLE: A PROPOSAL FOR A *VIA MEDIA*

Meda Couzens
LLB MA MChPr
Lecturer, Faculty of Law
University of KwaZulu-Natal, Durban

Noel Zaal
BA LLB LLM LLM PhD
Professor, Faculty of Law
University of KwaZulu-Natal, Durban

SUMMARY

This article discusses implementation of the principle of subsidiarity in intercountry adoption cases. The authors demonstrate that, whilst this principle has become well established in international law, the precise nature of its application remains uncertain. The adverse effects of this uncertainty on the reception of the principle of subsidiarity in South African Law are analysed. It is shown that neither our courts nor the legislature have been able to provide the degree of clarity required by professionals and parties involved in intercountry adoption cases. A proposal for improved guidance is put forward.

1 INTRODUCTION

The subsidiarity principle is relevant for children in need of permanent alternative care. It directs that domestically available care solutions – meaning those within children's present national states – must first be sought for them. Only once it has become apparent that a suitable local placement is not available should it be lawful to send a child to a foreign state in terms of an intercountry adoption. Thus intercountry adoption must be treated as subsidiary to appropriate local care options. The subsidiary principle usefully assists in enabling as many children as possible to grow up in their original cultural and national environments. It is rooted in the premise that continuity in ethnic, religious, cultural and linguistic aspects of children's upbringing will generally be in their best interests.[1]

[1] Van Bueren *The International Law of the Rights of the Child* (1998) 102.

Although the subsidiarity principle is based on impeccable logic and has been widely recognized internationally, there has been uncertainty concerning how precisely it should be applied. And this uncertainty has been mirrored in South African Law. This article explores the gradual reception of the principle in our system. In part 1, as a necessary precursor to an understanding of developments in South Africa, the international standing and differing interpretations of the principle are briefly reviewed. Thereafter, approaches of the South African courts and the status of the subsidiarity principle as affected by new legislation in the form of the Children's Act 38 of 2005[2] (hereinafter "CA"), Children's Amendment Act 41 of 2007 (hereinafter "CAA") and pending draft regulations[3] are analysed. The authors suggest that both the case law and legislation fail to provide sufficient clarity for those involved in alternative care cases. The authors propose that what is required is an illumination of subsidiarity through an express ranking of care categories – but one which is merely presumptive rather than mandatory in every case.

2 INTERNATIONAL RECOGNITION OF THE SUBSIDIARITY PRINCIPLE

The principle of subsidiarity is enshrined in three international conventions to which South Africa is a party. These are the 1989 United Nations Convention on the Rights of the Child (hereinafter "CRC"),[4] the 1990 African Convention on the Rights and Welfare of the Child (hereinafter "AC")[5] and the 1993 Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoptions (hereinafter "the Hague Convention").[6] As Skelton has stated:

> "The importance of the principle of subsidiarity is reflected in the fact that it forms an integral part of the concept of intercountry adoption. In fact, nowhere in the international instruments does one find a description of intercountry adoption which is not intrinsically qualified by the principle of subsidiarity."[7]

Despite such endorsement, the precise application of the principle of subsidiarity remains controversial. As will be shown, this is particularly because of differences in the wording of the three conventions.

Article 20 of the CRC states that when a child is deprived of parental care the state should provide alternative care which may include foster care, kafalah,[8] adoption or placement in a suitable institution. Article 21(b) of the

---

2 The CA entered partially into force on 1 July 2007: see Proc R13 GG 30030 of 2007-06-29.

3 Consolidated Draft Regulations Pertaining to Children's Act Including Regulations Pertaining to Bill 19 of 2006 (June 2008) (hereinafter "draft regulations").

4 Ratified by South Africa in 1995.

5 Ratified by South Africa in 2000.

6 Ratified by South Africa in 2003.

7 *AD v DW (Department of Social Development Intervening; Centre for Child Law as Amicus Curiae)* 2008 3 SA 183 (CC): written submission of the *amicus curiae* par 96.

8 Kafalah is a form of substitute care developed in the Islamic world for children who cannot be cared for by their biological parents. See Van Bueren 95.

CRC specifies when intercountry adoption may be used. It directs that countries shall "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 an adoptive family or cannot in any suitable manner be cared for in the child's country of origin".

It is clear that article 21(b) accords first priority to national adoption or foster care, or any other suitable form of national care, and rates intercountry adoptions as a second-best solution.[9] Although the key phrase "in any suitable manner" is not defined, a reading of article 20(3) together with article 21(b) of the CRC suggests that all appropriate forms of national care have priority over intercountry adoption.[10] Article 20(3) requires that in selecting care "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background".

Similarly to the CRC, article 24(b) of the AC characterises intercountry adoption as a last resort, less preferable than national adoption, foster care, or other domestic alternatives.[11] However, in one important respect it is more restrictive than the CRC. It directs state parties to place children in intercountry adoptions only in destination countries which have signed the CRC or the AC.[12]

In contrast to the CRC and AC, the Hague Convention seems to prioritise all permanent family solutions equally, regardless of their national or international character. Its Preamble at paragraph 1 recognizes that "for the full and harmonious development of his or her personality" every child "should grow up in a family environment, in an atmosphere of happiness, love and understanding". And paragraph 2 gives unqualified support to intercountry adoptions, stating that they "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". Article 4(b) of the Convention permits intercountry adoptions when competent authorities "have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests".

Since the Hague Convention prioritizes all permanent family solutions it can be interpreted[13] as preferring intercountry adoption over national foster

---

9 See further Maravel "The UN Convention on the Rights of the Child and the Hague Conference on Private International Law: The Dynamics of Children's Rights Through Legal Strata" 1996 6 *Transnational Law & Contemporary Problems* 309 314.

10 *Ibid*; and Cantwell "Guidance Note on Intercountry Adoption in the CEE/CIS/Baltics Region" 2003 http://www.unicef.org/ceecis/Guidance_note_Intercountry_adoption.pdf (accessed 2008-06-14).

11 Article 24(b) of the AC.

12 See further Stark "Lost Boys and Forgotten Girls: Intercountry Adoption, Human Rights, and African Children" 2003 22 *Saint Louis University Public LR* 275 281.

13 Under the Vienna Convention on the Law of the Treaties, 1969 the preamble of an international treaty may be taken into account: see art 31(1)-(2); and see also Carlson "The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption" 1994 30 *Tulsa LJ* 243 264.

care and institutionalization.[14] This has been supported by the Permanent Bureau of the Hague Conference.[15] It declared:

> "It is sometimes said that the correct interpretation of 'subsidiarity' is that intercountry adoption should be seen as 'a last resort'. This is not the aim of the Convention. National solutions for children such as remaining permanently in an institution, or having many temporary foster homes, cannot, in the majority of cases, be considered as preferred solutions ahead of intercountry adoption. In this context, institutionalisation is considered as "a last resort".[16]

A difficulty with this is that it does not fit with the wording of the CRC and the AC. As shown above these prioritise national forms of care, including foster care and institutionalization, over intercountry adoptions.

Commentators have noted the different approaches in the conventions. Bhabha, for example, mentioned that in the Hague Convention "the CRC's emphasis on the primacy of domestic placement is replaced by a weaker reference to the unavailability of a 'suitable family' in the home country and the obligation to merely give 'due consideration' to adoption within the state of origin".[17] Maravel went so far as to argue that the Hague Convention "rejected the UN Convention's preference for nonpermanent foster care or institutional care in the State of origin".[18]

The differing provisions of the AC, CRC and the Hague Convention have become a battleground for proponents and critics of intercountry adoptions. No clear solution to the tensions in wording has been agreed upon internationally. And unfortunately the guidance from international bodies remains inconsistent.[19] This complicates the situation, especially for

---

[14] Bartholet "International Adoption: Propriety, Prospects and Pragmatics" 1996 13 *Journal of American Academy of Matrimonial Lawyers* 181 193. See also Pfund "The Developing Jurisprudence of the Rights of the Child – the Contributions of the Hague Conference on Private International Law" 1997 3 *ILSA Journal of International and Comparative Law* 665 670; and Wallace "International Adoption: The Most Logical Solution to the Disparity Between the Number of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?" 2003 20 *Arizona Journal of International and Comparative Law* 689 702.

[15] Hague Conference on Private International Law (hereinafter "the Hague Conference"), Permanent Bureau (2008) *Guide to Good Practices (Draft)* par 47 http://www.hcch.net/index_en.php?act=text.display&tid=45#expl (accessed 2008-08-01).

[16] See fn 15 above, par 53.

[17] Bhabha "Moving Babies: Globalization, Markets and Transnational Adoption" 2004 *Fletcher Forum of World Affairs* 181 192-193.

[18] Maravel 1996 6 *Transnational Law & Contemporary Problems* 317-318.

[19] In 2003 UNICEF described foster care as a "preferred alternative" to intercountry adoption (UNICEF "Social Monitor 2003. Innocenti Social Monitor" http://www.unicef-icdc.org/publications/pdf/monitor03/monitor2003.pdf (accessed 2008-06-09)) 21. However, in 2004 it issued a position paper stating that "for individual children who cannot be placed in a permanent family setting in their countries of origin, it (*ie*, intercountry adoption) may indeed be the best solution" (UNICEF "Inter-country Adoption" http://www.unicef.org/media/media_15011.html (accessed 2008-06-09)). During the 2005 Day of General Discussion on Children without Parental Care, the Committee on the Rights of the Child did not even include intercountry adoptions as an alternative service for children (CRC Committee "General Discussion Day 2005 Children Without Parental Care" 2006 http://www2.ohchr.org/english/bodies/crc/discussion2008.htm (accessed 2008-06-09). At a regional level, European institutions generally discourage intercountry adoption. See, *eg*,

countries like South Africa which are parties to the Hague Convention, the CRC and the AC. As a way forward Duncan proposes that it is unnecessary to interpret the Hague Convention as prioritising intercountry adoption over domestic foster care or institutionalisation in all cases. Referring to article 4(b), he argues that its wording leaves some flexibility in deciding on possibilities for placing a child nationally and on how to give "due consideration" to alternatives.[20] This elastic interpretation can be used to produce a realm of discretion for state parties.

Despite arguments and uncertainty about what approach should be adopted to bridge the differences between the conventions, there is consensus on the basic purpose of the subsidiarity principle. It is generally agreed that the placement of a child in an intercountry adoption should only occur after the possibilities for a domestic placement have been investigated.[21] If suitable national care has not been found, the child can be placed in intercountry adoption if this is in his or her best interests.[22] The obligation to consider national options first implies that an active search must occur. And the aim must be to assess the availability and appropriateness of domestic care possibilities and establish to what extent they could serve the child's best interests.

However, compliance with subsidiarity entails more than attempting to identify national solutions for specific children. It requires fundamental systemic modifications of child care and protection systems. As stated by the Permanent Bureau:

> "[t]his principle … suggests the need for the service to be in some way connected to or integrated within the broader national child protection system, including the system of national adoption. It may be that the principle of subsidiarity … imposes certain positive obligations with regard to the development of domestic family support and child care services within countries of origin, and that receiving countries also have an obligation to support the development of such services".[23]

Council of Europe, Parliamentary Assembly "Recommendation 1443 of 2000 of the Council of Europe, International Adoption: Respecting Children's Rights" 2000 http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta00/EREC1443.htm (accessed 2008-06-09).

[20] Duncan "The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993. Some Issues of Special Relevance to Sending Countries" in Jaffe (ed) *Intercountry Adoptions: Laws and Perspectives of "Sending" Countries* (1995) 217 221.

[21] See Parra-Aranguren (1994) "Explanatory Report on the Convention on Protection of Children and C-operation in Respect of Intercountry Adoption" 1994 http://www.hcch.net/index_en.php?act=publications.listing&sub=2 (accessed 2008-06-14) par 123; and Lammerant (2004) "Ethics and International Adoptions" 2004 (Opening address: Conference on International Adoption: Montreal, May 4 2004) http://www.adoption.gouv.qc.ca/site/101.161.0.0.1.0.phtml (accessed 2008-08-01) 5.

[22] See Bartholet 1996 13 *Journal of American Academy of Matrimonial Lawyers* 193; and Pfund 1997 3 *ILSA Journal of International and Comparative Law* 670; and see also Wallace 2003 20 *Arizona Journal of International and Comparative Law* 702.

[23] Hague Conference, Permanent Bureau (2001) *Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children in Respect of Intercountry Adoption 28 November – 1 December*

Three important points emerge. First, the subsidiarity principle entails that national care and protection systems in countries of origin be oriented towards continually making comparisons of available local and intercountry options. For this, it is essential that intercountry adoption agencies be fully integrated. They must not be maintained as a separate component in national child care systems. Secondly, for subsidiarity to be implemented properly suitable national options must exist for the majority of care cases. This implies that states have a positive duty to develop national care resources which can in each case be explored before considering an international placement. Thirdly, it appears that implementation of the subsidiarity principle is not only an obligation of sending states, but extends to receiving states. In order to avoid exploitative acquisitiveness of a neocolonial kind, the latter must actively support the development of child care services in under-resourced sending countries.

The AC, CRC and Hague Convention unfortunately provide no specific guidance on compliance with the subsidiarity principle. However, there are some recommendations in documents of Hague Conference and other bodies. It is apparent from these that states must employ adequate measures for maintaining children in families of origin and preventing family dissolution.[24] These must include measures to reduce child abandonment. The Permanent Bureau thus recommended that sending states focus on provision of "services for families in crisis, including family preservation services; arrangements for temporary care; counselling services to families of origin, and where a family cannot remain intact, counselling on the effects of giving consent to an adoption".[25] Generally, child care systems must be effectively maintained so that there is only a need for international adoptions in a small minority of cases.[26]

Concerning which agencies should be licensed to facilitate intercountry adoptions, in order to prevent profiteering some commentators have recommended restrictions on eligibility. Only organizations with ready access to means for supporting care of children by families of origin in suitable cases and adequately equipped to facilitate in-country arrangements should be authorized to assist with intercountry adoptions.[27] It has also been proposed that commitment to the subsidiarity principle must

2000 par 24 http://www.hcch.net/index_en.php?act=conventions.publications&dtid=2&cid=69 (accessed 2008-06-10).

[24] See Hague Conference, Permanent Bureau (2001) par 26; and Hague Conference, Permanent Bureau (2008) par 257; see also European Parliament, Resolution A 4-0392/1996 pars C & G as referred to by Masson "Intercountry adoption: A Global Problem or a Global Solution?" 2001 55(1) *Journal of International Affairs* 141 158.

[25] Hague Conference, Permanent Bureau (2008) par 267.

[26] Masson 2001 55(1) *Journal of International Affairs* 159.

[27] Masson 2001 55(1) *Journal of International Affairs* 159 argues that organisations which focus mainly on intercountry adoption "are poorly placed to find and promote alternatives". They are therefore unlikely to comply sufficiently with the subsidiarity principle. See also Duncan 222.

be a condition for accreditation.[28] And compliance with the principle by accredited agencies should be regularly assessed.[29]

The Permanent Bureau has issued recommendations for countries where significant internal barriers and constraints reduce national adoptions. They must investigate and analyse the causes, engage in awareness raising campaigns and design measures to encourage national adoptions.[30] The latter should include effective incentives such as material support for adoptive families. States should also allow for the option of community care.[31] On the side of receiving states, they must provide technical and, where possible, financial assistance to sending states for the purpose of improving child care systems.

In conclusion, the fundamental idea that at least some national child care solutions should take priority over intercountry adoptions is well established in current international law. Valuable guidance on how states should promote national care is also available. What is problematic, however, is the differences in wording in the CRC, AC and Hague Convention. It is also unfortunate that these instruments fail to give specific direction on how exactly to comply with the principle of subsidiarity. Against this background of a degree of uncertainty, the reception of the principle in South African law will now be explored.

3 THE PRINCIPLE OF SUBSIDIARITY IN SOUTH AFRICAN LAW

Intercountry adoption has a short history in South Africa. It received legitimacy only in 2000. This occurred because of a constitutional challenge in *Fitzpatrick v Minister of Social Development*.[32] In 2003, South Africa ratified the Hague Convention. The Convention has since been incorporated in South African law by the CA. Although South African jurisprudence on intercountry adoptions is not yet well developed, the principle of subsidiarity has been addressed by our courts in two important series of reported decisions. For convenience these will be referred to, respectively, as those

---

[28] Hague Conference, Permanent Bureau (2006) *Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children in Respect of Intercountry Adoption* (17-23 September 2005) par 62 http://www.hcch.net/index_en.php?act=conventions.publications&dtid=2&cid=69 (accessed 2008-06-10). Masson 2001 55(1) *Journal of International Affairs* 162 states that in India, the Central Adoption Resource Centre requires, as a condition for accreditation, that at least 50% of the children placed by the applicant organisation be placed nationally.

[29] Masson 2001 55(1) *Journal of International Affairs* 162.

[30] Hague Conference, Permanent Bureau (2001) par 27. Hague Conference, Permanent Bureau (2008) par 297-298. See also Mosikatsana "Intercountry Adoptions: Is There a Need for New Provisions in the Child Care Act?" 2000 117 *SALJ* 46 64.

[31] Hague Conference, Permanent Bureau (2008) par 296.

[32] 2000 3 SA 139 (C). Also reported as *Minister for Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC) (hereinafter "*Fitzpatrick*").

in the *Fitzpatrick* and *Baby R*[33] litigation. The approach of the South African courts is discussed in parts 3 1 and 3 2 below, and the impact of the CA and subsequent legislation is analysed in part 3 3.

3 1 The Fitzpatrick litigation

Before 2000, section 18(4)(f) of the Child Care Act 74/1983 (hereinafter "CCA") prohibited non-South African citizens from adopting any child born to a South African. This applied unless the child was of the other spouse, or the prospective adoptive parent was in the process of becoming a South African citizen.[34] The CCA therefore confined alternative care to national solutions. The constitutionality of this was challenged in *Fitzpatrick*. Mr and Mrs Fitzpatrick, two British citizens resident in South Africa, wished to adopt a child whom they had fostered for more than two years. But they were prevented by section 18(4)(f). The High Court held that this provision was inconsistent with the Constitution of South Africa Act, 1996 (hereinafter "the Constitution"). It ruled that section 18(4)(f) was invalid to the extent it constituted an "absolute proscription" on adoption by a non-South African citizen or person who had not applied for citizenship.[35] However, it suspended its order of invalidity and ordered Parliament to revise section 18(4)(f) within two years.[36] It further granted the applicants immediate joint custody and guardianship of the child.

Confirming the invalidity order made by the High Court in *Fitzpatrick*,[37] the CC discussed the legal issues raised with particular reference to section 28(2) of the constitution.[38] It found that section 18(4)(f) of the CCA was in conflict with section 28(2)[39] because its "blunt and all-embracing" prohibition of adoptions by foreign nationals prevented application of the best interests principle.[40] It deprived courts of the flexibility needed to assess what was in the best interests of individual children because it prejudged that adoptions by foreigners can never satisfy those interests.[41]

---

33 In this series of cases the courts referred to the child as "Baby R". At different stages, the following reports appeared: *De Gree v Webb (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 6 SA 51 (W); *De Gree v Webb (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2007 5 SA 184 (SCA) (hereinafter "the *De Gree* case"); *AD v DW (Department of Social Development Intervening; Centre for Child Law as Amicus Curiae)* 2008 3 SA 183 (CC) (hereinafter "the *AD* case").

34 S 18(4)(f) of the CCA 74 of 1983. For discussion see South African Law Commission (hereinafter "SALC") (2002) *Discussion paper 103 (Project 110) Review of the Child Care Act* http://www.doj.gov.za/salrc/dpapers.htm (accessed 2008-06-11) 1013; and also Mosikatsana 2000 117 *SALJ* 47-49.

35 *Fitzpatrick* 2000 3 SA 139 (C) 144F.

36 An effect of suspension was that the applicants could not adopt the child.

37 In terms of s 167(5) of the Constitution an order of invalidity becomes effective only after it has been confirmed by the CC.

38 *Fitzpatrick* 2000 7 BCLR 713 (CC) 719 par 15.

39 *Fitzpatrick* 2000 7 BCLR 713 (CC) 719 par 16. S 28(2) directs that "a child's best interests are of paramount importance in every matter concerning the child".

40 *Fitzpatrick* 2000 7 BCLR 713 (CC) 721 par 20.

41 *Fitzpatrick* 2000 7 BCLR 713 (CC) 721 par 21.

At the CC hearing of *Fitzpatrick* the Minister of Social Development requested a suspension of the invalidity order. It was argued on behalf of the Minister that, pending a legislative replacement for section 18(4)(f), this order created a situation of "inadequate provision to give effect to the principle of subsidiarity".[42] The CC rejected this. It importantly conceded that, although the principle of subsidiarity is not expressly provided for in South African law, it is applicable because of the obligation to consider international law (especially in the instant case the provisions of article 21(b) of the CRC) in interpreting the Bill of Rights.[43] However, as defined by the CC "subsidiarity refers to the principle that intercountry adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth".[44] Further, the CC noted that section 40 of the CCA guaranteed consideration of the religious and cultural background of an adoptee and adopters.[45] It concluded that the principle of subsidiarity was sufficiently satisfied by this, and a continuance of section 18(4)(f) was therefore not necessary for maintenance of the principle.

Acceptance of the principle of subsidiarity by the CC in *Fitzpatrick* was undoubtedly a significant step in the development of our law on intercountry adoption. But it can hardly be said to have provided clear guidance for future applications. Somewhat anomalously, it referred to obligations under the CRC, yet expressed a description of subsidiarity closer to that in the Hague Convention, which favours familial placements.[46] It did not acknowledge the differences between these Conventions and the AC. Also, the CC merely referred to intercountry adoption as subsidiary to national adoption. It did not discuss the applicability of intercountry adoptions where foster care and institutionalization are the only available domestic options.

In reaching its conclusion that subsidiarity was sufficiently reflected in the CCA even without section 18(4)(f), the CC in *Fitzpatrick* took only limited cognisance of the implications of the principle. It did not refer to implementation safeguards that have (as noted in part 1 above) been recommended internationally as essential. In particular, it did not address the relevance for South Africa of protective requirements such as birth family support or searches for national adopters. It also bypassed the issue of

---

42 *Fitzpatrick* 2000 7 BCLR 713 (CC) 721 par 23.

43 *Fitzpatrick* 2000 7 BCLR 713 (CC) 724 fn 33.

44 *Fitzpatrick* 2000 7 BCLR 713 (CC) 722 fn 13.

45 *Fitzpatrick* 2000 7 BCLR 713 (CC) 724 par 32.

46 The CC stated "[s]ubsidiarity refers to the principle that intercountry adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth" (*Fitzpatrick* 2000 7 BCLR 713 (CC) 722 fn 13). This formulation aligns with the family placement approach taken by the Hague Convention. Yet, when explaining when the subsidiarity principle becomes applicable, the CC referred to obligations under the CRC, stating that the "courts would nevertheless be obliged to take the principle into account when assessing the 'best interests of the child', as it is enshrined in international law, and specifically article 21(*b*) of the Children's Convention" (*Fitzpatrick* 2000 7 BCLR 713 (CC) 724 fn 33).

whether our child protection system was sufficiently geared and oriented for implementing subsidiarity.

There are further concerns with *Fitzpatrick*. In criticising the CC's reliance on section 40 of the CCA, Louw rightly pointed out that it gives absolutely no indication of the ranking priority of care placements. It therefore does not assist in choosing between national and intercountry adoptions.[47] Also, the CC appeared to accept that if foreign prospective parents of a similar culture and religion to the adoptee compete with national prospective parents courts are not obliged to favour the national adopters. This raises important questions about the nature of "culture" – in particular, whether it includes territorial or social group dimensions. As Moodley has noted, a difficulty in applying section 40 to intercountry adoptions is that South African culture is unique.[48]

In conclusion on *Fitzpatrick*, its positive contribution is twofold. Most importantly, it increased alternative care options by providing for intercountry adoptions in South African law. Secondly, it made clear that the principle of subsidiarity applies to such adoptions. Unfortunately, however, *Fitzpatrick* allowed relatively easy access to intercountry adoptions without creating clarity on requirements for prior assessment of national options. This led to intercountry adoptions from South Africa being governed by national law and a child care system insufficiently equipped to deal with the resultant complexities.[49]

3 2 The *Baby R* litigation

The complex issues raised by *Fitzpatrick* showed clearly that there was an urgent need for clarification of our law. In August 2003 South Africa acceded to the Hague Convention, and it entered into force in the Republic on 1 December 2003. It was incorporated into national law through chapter 16 of the 2005 CA. However, this chapter is not yet in force, and that adds new complexities to the current processing of intercountry adoptions. This is apparent from the *Baby R* litigation.

In November 2004 a newborn African baby girl ("Baby R") was found abandoned in Roodeport. She was placed in the foster care of an African-American couple, resident in South Africa, who were running a home for orphans. Mr and Mrs De Gree, African-Americans from the US and visiting in South Africa, were friends of the couple. They got to know Baby R, grew fond of her, and decided to adopt her. The De Grees applied to the Witwatersrand Local Division for an order declaring their sole guardianship and custody of the child. They further requested the discharge of the foster

---

47 Louw "Intercountry Adoption in South Africa: Have the Fears Become Fact?" 2006 3 *De Jure* 503 517.

48 Moodley "Unravelling the Legal Knots Around Intercountry Adoptions in *De Gree v Webb*" 2007 3 *Potchefstroom Electronic LJ* 2 7.

49 See Mosikatsana "www.buyababy.com: Intercountry Adoption" 2004 *SALJ* 103 113. See also generally Mosikatsana 2000 117 *SALJ* 46.

care order and authorization to leave South Africa with Baby R. They made it clear that their ultimate intention was to adopt her in the US.

Although in *Fitzpatrick* the children's court had been designated as the authority for granting intercountry adoptions, the De Grees approached the High Court directly. They did so on the basis of a policy of the Department of Social Development (hereinafter "DSD") which allegedly prevented children's courts from granting adoptions in favour of US residents. The High Court dismissed the application. It decided it was not in a position to establish what was in the child's best interest. Such determination should be made, as established in *Fitzpatrick,* by a children's court which is 'better trained and more experienced' in such matters.[50]

The De Grees appealed.[51] Sharply divided, the Supreme Court of Appeal (hereinafter "SCA") dismissed the appeal. In the majority judgment, Theron AJA, with whom Ponnan JA and Snyders AJA concurred, stated that granting a guardianship order would endorse an alternative route for obtaining the effects of intercountry adoption. This would result in applicants eluding the children's courts and CCA – thus "jumping the queue".[52] The subsidiarity principle featured strongly in the judgment. Theron AJA concluded that a failure by the applicants to establish that suitable care could not be found for Baby R in South Africa was fatal to their case. They had not complied with the principle of subsidiarity.[53] Although this was not yet expressly provided for in South African legislation its enshrinement in article 21(b) of the CRC and article 24(b) of the AC was significant. It was applicable as an effect of section 39(1)(b) of the constitution which requires courts to consider international law.[54] In addition, although the Hague Convention was not yet directly applicable (because chapter 16 of the CA was not operational) "its provisions cannot be disregarded".[55] To ensure compliance with the principle of subsidiarity it must be established that the child cannot be cared for through foster care or adoption or other suitable care in the country of origin.[56]

Theron AJA thus extended the scope of the subsidiarity principle beyond that envisaged in *Fitzpatrick*. As will be remembered, in the latter the CC ranked intercountry adoption as subsidiary merely to national adoption without considering other forms of national care. In contrast, Theron AJA required applicants to prove that no suitable national care of any kind can be provided. She went further and directed that adoption agencies and applicants seeking international adoption must actively attempt to identify

---

50 *De Gree* 2006 6 SA 51 (W) 55G and 66E.
51 *De Gree* 2007 5 SA 184 (SCA).
52 *De Gree* 2007 5 SA 184 (SCA) par 25.
53 *De Gree* 2007 5 SA 184 (SCA) par 24.
54 *De Gree* 2007 5 SA 184 (SCA) par 12.
55 *De Gree* 2007 5 SA 184 (SCA) par 11.
56 *De Gree* 2007 5 SA 184 (SCA) par 22. See also Ferreira "Intercountry Adoptions De Gree v Webb Unreported Case No 05/25316 (W)" 2007 70 *THRHR* 146 152.

national parents.[57] And she placed the onus on applicants to prove that these efforts had failed.[58]

Theron AJA's approach usefully accords with that of commentators who propose an active search for national alternatives as an essential prerequisite for international adoptions.[59] However, her judgment is open to two criticisms. Firstly, it is somewhat extreme to require the applicants themselves to "investigate the possibility of suitable local care".[60] This requires them to act against their own interest. It would be preferable to require that prospective parents must simply prove that a licensed adoption agency has made reasonable attempts to place the child nationally before making him or her available for international adoption. Secondly, Theron AJA did not consider the problematic differences between the CRC, AC, and Hague Convention.[61]

A diverging minority judgment was delivered by Heher JA. He described the majority decision as "an unsatisfactory triumph of form over substance".[62] He conceded applicability of the subsidiarity principle but preferred the *Fitzpatrick* approach of only minimal pre-requisites for intercountry adoptions.[63] He concluded that section 40 of the CCA had been sufficiently complied with. The child had the same cultural background as her prospective parents because she had been brought up by another African-American family.[64] Heher JA rejected any need for proof of a prior search for national care options. In his view "in the absence of appropriate structures" such a requirement as requested by the DSD[65] set "an impossible level of compliance for the private citizen".[66]

Heher JA thus nuanced the active search approach by arguing that the tools for its application must be provided by the state. Since there were currently no statutory provisions compelling welfare to undertake prior searches, it was impracticable to require these. There is, however, a weakness in Heher JA's argument. Despite an absence of statutory provisions already in force, DSD policies and guidelines were in place in South Africa.[67] He also overlooked the potential of adoption agencies. These tend to specialise and form part of a network of similar organizations.

---

57 *De Gree* 2007 5 SA 184 (SCA) par 24. According to Theron AJA the appellants "had omitted to investigate properly the possibility of suitable local care". They therefore failed to prove compliance with principle of subsidiarity.

58 *De Gree* 2007 5 SA 184 (SCA) par 23-24.

59 See part 1 of this article.

60 *De Gree* 2007 5 SA 184 (SCA) par 24.

61 *De Gree* 2007 5 SA 184 (SCA) par 11-12. The differences were also not noted by Ponnan JA: see *De Gree* 2007 5 SA 184 (SCA) par 85.

62 *De Gree* 2007 5 SA 184 (SCA) par 34; and see also *De Gree* 2007 5 SA 184 (SCA) par 77.

63 *De Gree* 2007 5 SA 184 (SCA) par 50.

64 *De Gree* 2007 5 SA 184 (SCA) par 68.

65 *De Gree* 2007 5 SA 184 (SCA) par 66-67.

66 *De Gree* 2007 5 SA 184 (SCA) par 67.

67 The DSD had entered adoption agreements with various states, designated an Interim Central Authority and drafted policies and guidelines to give effect to the Hague Convention: see generally *De Gree* 2006 6 SA 51 (W) 52-59.

Therefore, expecting them to conduct a reasonable search for national parents does not in fact produce "an impossible level of compliance".

Having been unsuccessful before the SCA, the De Grees appealed to the CC. The CC appointed a *curatrix ad litem* to represent the interests of the child and invited the DSD to intervene in proceedings.[68] The *curatrix* submitted a report recommending referral to a children's court. She proposed that the latter could grant an adoption in favour of the applicants because no suitable national adopters had been found. Based on this report, the parties reached an agreement which was made an order of court.[69] It provided for a children's court hearing and stated that it was in the best interests of the child to be adopted by the applicants.[70]

The CC noted that the agreement between the parties did not solve some important legal issues raised. It therefore decided to deliver judgment.[71] It found that two fundamental constitutional matters were the jurisdiction of the High Court to issue guardianship and custody orders to persons wishing to adopt children abroad, and the application of section 28(2) of the constitution to intercountry adoptions.[72] The CC disagreed with Theron AJA's view that guardianship and custody orders are never an appropriate route because they avoid the safeguards of adoption. It decided that guardianship and custody should be available, albeit only in exceptional cases.[73] The CC accepted that the subsidiarity principle was relevant, but characterised it as secondary to the paramountcy of the best interests of the child principle.[74] It concluded that therefore there will be situations in which intercountry adoption will supersede an available national placement.

The subsidiarity principle was extensively dealt with in the CC judgment. It was acknowledged as a "key concept for regulating intercountry adoption".[75] The CC concluded that the drafters of the Hague Convention had attempted to make the application of the subsidiarity principle less stringent. By comparison with the CRC and the AC:

> "[t]he framers appear to have felt it would be permissible to reduce the relatively autonomous effect of the subsidiarity principle as expressed in the CRC and the African Charter on the Rights and Welfare of the Child (the African Charter), and bring it into closer alignment with the best interests of the child principle. Thus, using language notably less peremptory …"[76]

The CC thus both appreciated that there were differences between the conventions and supported its earlier reasoning in *Fitzpatrick*. It stressed the

---

68 *AD* par 11.
69 *AD* par 17.
70 *Ibid*.
71 *Ibid*.
72 *AD* par 18.
73 *AD* par 33.
74 *AD* par 55.
75 *AD* par 20; see also par 49.
76 *AD* par 47 (footnotes omitted).

importance of maintaining flexibility in order to achieve what is in the best interests of a particular child. This is prevented when "circumscribed by mechanical legal formulae or through rigid hierarchical rankings of care options".[77] As a consequence, "in certain circumstances" intercountry adoption is preferable to national placement in institutional or foster care.[78]

The CC further reasoned that each case requires a contextualized enquiry by child protection professionals and judicial officers. This must take into account the emotional needs of the child concerned and the risks involved in each available care solution.[79] It pointed out that the implementation of subsidiarity depends crucially on the ability of adoption agencies to investigate possibilities of placing the child nationally.[80] Given the degree of the sending state's responsibility, cooperation between private adoption agencies and the state is essential, as well as respect for proper procedures.[81]

The CC found "too bald" the statement of the SCA that the principle of subsidiarity was an insurmountable obstacle to granting guardianship and custody in *Baby R*.[82] It conceded that there are strong reasons for children being brought up in their country of birth. However, the subsidiarity principle "must be seen as subsidiary to the paramountcy principle".[83] There is a constitutional requirement in all cases "including intercountry adoption, to ensure that the best interests of the child is paramount".[84] Therefore "each child must be looked at as an individual, not as an abstraction" and "rigid adherence to technical matters" should have diminished importance.[85] The CC thus emphasized that subsidiarity must not be viewed in isolation, but rather assessed together with the best interests of the child.

The CC was against any application of a hierarchy of forms of care established *in abstracto*. No category of care – whether national adoption, foster care, institutionalization or intercountry adoption – can have automatic priority over others. The CC thus appeared to reject the CRC position which (as noted earlier) favours national care over intercountry adoption. And it clearly rejected the position of international commentators who have argued that intercountry adoptions should always have priority over national foster care or institutionalization.

---

77 *AD* par 50. The CC cited *M v The State* [2007] ZACC 18, 26 Sept. 2007, par 24 as holding that "to apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned"; and see also par 51, where the CC supports prioritization of national care without making a distinction between adoption, foster care or institutionalization.

78 *AD* par 48-49.

79 *AD* par 50.

80 *AD* par 41.

81 *AD* par 51.

82 *AD* par 54.

83 AD par 55.

84 *AD* par 49 citing *Fitzpatrick* 2000 7 BCLR 713 (CC) 723 par 19.

85 *Ibid*.

Importantly, the CC agreed that cases should in the first instance go before children's courts.[86] It is also significant that in *Baby R* the CC held that the subsidiarity principle requires adoption agencies to investigate national placement options. To assist such investigations there needs to be cooperation from government.[87] The court thus endorsed the active search requirement. This is a characterisation of subsidiarity closer to the Hague Convention than the CRC or AC. The only explanation given by the CC for following the Hague Convention is that its protections reduce the "relatively autonomous effect" of the subsidiarity principle as described in the CRC and the AC.

Whilst the CC judgment usefully clarified that children's courts must be approached first and active searches for national options must be undertaken, it is problematic in other respects. Its absolute commitment to maintaining flexibility of choice and rejecting pre-determined placement solutions in individual cases is extreme. It can be conceded that *a priori* rankings of care options may be inappropriate if these are rigidly applied in every case. But the whole point of the principle of subsidiarity is to provide at least some presumptive rankings as a counter to the inherent financial bias towards intercountry adoptions. And it is surely also appropriate to assume rebuttably that temporary and institutional placements are generally less beneficial than permanent ones in familial environments. To expect adoption agencies to work without guidelines and yet avoid financial bias and honour subsidiarity is hardly practicable.

Another weakness of the CC judgment in *Baby R* is the failure, once again, to help solve the problem of different wording in the three conventions. Although the CC at least recognised the problem, it did not go further and discuss how the differences should be addressed by agencies facilitating international adoptions. By comparison with the situation under *Fitzpatrick* the case-by-case, *ad hoc* approach required by the CC in *Baby R* leaves these agencies with very little real direction.

It may be concluded that our case law generally has left many problems unsolved. The interpretations of subsidiarity that have been put forward by different courts and judges leave considerable uncertainty about how precisely it should be applied.[88]

3 3 The new children's legislation

Given the lack of clarity in our case law, an important question is whether the 2005 CA and 2007 CAA will fill the gaps and bring sufficient direction when fully implemented. As noted earlier, section 256(1) of the CA incorporates the provisions of the Hague Convention. Therefore, when this provision comes into force the Convention will be directly applicable in our national

---

86 *AD* par 56.
87 *AD* par 51.
88 See in this regard the remarks of the *amicus* in *Fitzpatrick* 2006 6 SA 51 (W) 65A.

law.[89] Unfortunately, the CA does not refer expressly to the principle of subsidiarity. However, as will be shown several sections indirectly reflect it and can thus assist its implementation. Each of these will be assessed in turn.

Section 261(5)(a) requires that before making intercountry adoption orders courts must be satisfied that there is compliance with the Hague Convention. The subsidiarity principle as described in article 4(b) of the Convention is thus rendered applicable. This means that consideration must be given to the possibilities for a national placement prior to placing a child in an intercountry adoption. Secondly, section 261(5) read with section 240(1) requires that in making any adoption order a children's court magistrate "must take into account all relevant factors". These expressly include the religious and cultural background of the child, the adoptive parents and the biological parents. Unlike section 40 of the CCA, section 240(1) of the CA does not limit the factors to be taken into account to the religion and culture of the child. It leaves it open for the magistrate to give weight to other factors.[90] Also, the wording is stronger than section 40 of the CCA because relevant factors *must* be taken into account. It is no longer sufficient merely that "regard shall be had" to them.

Section 261(5) of the CA requires that, before any child can be placed in an intercountry adoption, his or her name must have remained on a Register of Adoptable Children and Prospective Adoptive Parents (hereinafter "RACAP") for at least 60 days. The RACAP will provide officials and adoption agencies with ready access to information about children currently available for adoption and prospective national parents. In terms of section 261(5)(g) intercountry adoption processes may not be initiated if a "fit and proper adoptive parent for the child" is found to be "available in the Republic" during the 60 days. This should help to ensure that national adoption options are prioritized over intercountry adoptions. Unfortunately, however, section 261(5)(g) is not specific on the nature or extent of the effort that must be made to identify fit national parents.[91]

Although entering names of adoptable children in the RACAP is compulsory, including those of prospective adoptive parents is not.[92] It has been proposed in the draft regulations that social workers be permitted to request entry of names of prospective national parents whom they have screened.[93] This is surely insufficient. For the RACAP to be an effective tool

---

89 As an effect of s 231(4) of the Constitution. For a comprehensive discussion on the Chapter 16 of the CA, see Human "Intercountry Adoption" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 16-1 to 16-29.

90 Ferreira "Adoption, the Child Care Act and the Children's Act" 2006 2 *Speculum Juris* 129 136.

91 Before a child can be placed internationally from India the agency must certify in writing that sufficient efforts have been made to achieve a national adoption, see Smolin "The Two Faces of Intercountry Adoption: The Significance of the Indian Adoptions Scandals" 2005 35 *Seton Hall LR* 403 444.

92 See the word "may" in s 232(4).

93 Regulation 111(2) of the draft regulations.

for prioritizing national adoptions it is essential that all national prospective parents be listed in it. If this were made compulsory it would be possible for the entire pool of currently available national adopters to be considered in each proposed international adoption case. It would become harder to mislead courts on whether national adopters are available. It would also increase the chances of thorough searches for national adopters becoming a standard South African practice.

In terms of section 257(2) of the CA, the director-general of the DSD is to be the South African Central Authority for intercountry adoptions. This potentially allows for a key role in ensuring compliance with the principle of subsidiarity. Section 261(5)(f) of the CA requires that, before making any international adoption order, a children's court must be satisfied that the Central Authority has given consent. A reasonable interpretation would be that, in the process of deciding whether to consent in each case, the Central Authority must require proof that national solutions have been properly considered. If the principle of subsidiarity has not been complied with in this manner, it could in view of the wording of s 261(5)(f) refuse consent.

The draft regulations of the CA make further recommendations conducive to the director-general having an important role. In terms of draft regulation 111(7) he or she would receive applications for adoptable children to be placed on the RACAP. This could provide an ideal opportunity for checking whether sufficient attempts have been made to maintain the child in or achieve reunification with the family of origin. In draft regulation 128(4) it is further proposed that the Central Authority be able to cancel accreditation of any adoption agency which contravenes the Hague Convention or the CA. This could be interpreted as including a power to cancel accreditation of agencies which do not comply with the subsidiarity principle.

As suggested in part 1 above, for proper compliance with subsidiarity sending countries must be strongly oriented towards supporting national alternatives as a first priority. The CAA assists in this regard. It places considerable emphasis on maintaining children within birth families or local communities – if necessary even by providing services at state expense.[94] And the CA promotes both retention of children within families of origin and national adoptions. Section 231(7)-(8) directs expressly that a child's biological father, other family members in certain circumstances, and foster parents have "the right to be considered as a prospective adoptive parent". Adequate private financial means, previously essential for all national adoptive parents under s 18(4)(a) of the CCA, will be eliminated as a requirement by s 231(4) of the CA. Moreover, subject to a means test, the state will support national adoptive parents.[95]

---

[94] See the discussion of this Act, below. See also Louw 2006 3 *De Jure* 518-520; and generally Matthias and Zaal "Supporting Familial and Community Care for Children: Legislative Reform and Implementation Challenges in South Africa" 2009 18 *International Journal of Social Welfare* – forthcoming.

[95] S 231(5) of the CA. The need for financial support has been recognised for many years: see SALC (1998) *Issue Paper 13 (Project 110) Review of the Child Care Act, First Issue Paper*

The CA also indirectly assists implementation of the subsidiarity principle by attempting to exclude profit-driven businesses. Only genuine child protection organisations can be accredited as private agencies facilitating intercountry adoptions.[96] It has been usefully proposed in draft regulation 128(1) that accreditation applicants must provide information about previous experience in child protection and intercountry adoption. Both the CA and the CAA indicate that child protection organizations must be able to provide a wide range of family services.[97] These include family preservation,[98] prevention of harm[99] and early intervention services,[100] reunification of children with their families[101] and local alternative care.[102] Accredited agencies must therefore have the capacity to provide children with a variety of services that are relevant, prior to any consideration of intercountry adoption. This should help ensure that only agencies which are able and willing to investigate possibilities for appropriate national solutions properly become accredited to provide intercountry adoption services. And that would be fully in line with the accepted international position discussed in paragraph 1 above.

However, there is still a danger that after accreditation, agencies may be tempted to alter their orientation. They may begin to prioritise intercountry adoptions over suitable national options. This is because intercountry adoptions frequently generate considerable sums of money in the form of fees, while thoroughly exploring local options is likely to cost money.[103] This inherent financial bias may over time affect the objectivity of organizations authorised to include intercountry adoption amongst other childcare services. The new legislation does not deal directly with this problem. However, section 259(3)(b) of the CA and draft regulation 128(2), respectively, support periodic audited financial statements and renewals of accreditation. These processes should enable identification by the Central Authority of any undue bias developing.

4 CONCLUSION AND A PROPOSAL ON THE WAY FORWARD

As shown in part 1 above, different formulations of the principle of subsidiarity in the CRC, AC and Hague Convention underlie its implementation challenges. However, despite the difficulties faced by South Africa as a signatory to all three of these instruments, the principle has

par 7.2.9 http://www.doj.gov.za/salrc/ipapers.htm (accessed 2008-06-11); and Mosikatsana 2000 117 *SALJ* 69.

96 See s 259 of the CA and s 107 of the CAA.

97 CA ss 46 and 156; CAA ss 105-107.

98 CA s 46(1)(g)(ii)-(iii) and s 157(1)(a)(ii).

99 CAA chapter 8.

100 *Ibid*; and CA s 46(1)(g)(i) & (iii).

101 CA s 156(3)(a)(ii); and CAA s 187.

102 CA ss 46(1)(a)-(f) and 156(1)(a)-(g); and CAA chapter 11.

103 Moodley 2007 3 *Potchefstroom Electronic LJ* 8.

clearly been accepted as a core element of our law on intercountry adoption. In terms of process it is now settled that children's courts should be approached as forums of first instance in all intercountry adoption cases, including those where the application of subsidiarity is in dispute.[104] However, several important aspects of the principle's utilisation remain unclear.

In relation to South African case law, it needs to be borne in mind that the *Fitzpatrick* and *Baby R* litigation occurred whilst the 1983 CCA was in force. The relevance of the judgments once the newer legislation comes fully into operation is therefore open to argument. It might be suggested that, at least in so far as they constitute interpretations of the constitution, they must continue to be viewed as authoritative. However, a difficulty is that the approaches of different judges have not all been entirely consistent. Of concern are the disparate positions taken by the SCA and the CC in *Baby R*. It is significant that the majority of the SCA concluded that the subsidiarity principle *must* be followed in order to satisfy the best interests of the child principle. The CC, however, separated the two principles. It agreed that the subsidiarity principle is intended to protect the best interests of the child. But it implied that it is possible to meet the best interests standard without compliance with the subsidiarity principle. Whilst it is of course correct, as per section 28(2) of the Constitution, that "a child's best interests are of paramount importance in every matter concerning the child", the approach of the CC in *Baby R* is confusing. Its complete rejection of all forms of ranking of care options contradicts the very basis of the principle of subsidiarity.[105]

It is true (as the CC held) that the opposite approach of clinging rigidly to a ranking hierarchy of care options is artificial. But the court's entire repudiation of any ranking, however tentative, was an overly extreme response. It left children's courts, the DSD and private child protection agencies confronted with the financial temptations of international adoption work with little real guidance. Aside from not permitting any ordering of available care options, our courts also failed to direct involved organisations on how to deal with the problem of the differing descriptions of the subsidiary principle in the CRC, AC and Hague Convention.

In view of the gaps and unanswered questions left by our case law, the drafting of new children's legislation provided an ideal opportunity for creating better clarity on how the principle of subsidiarity should be applied in South Africa. Unfortunately, as we have shown the approach in the 2005 CA, 2007 CAA and draft regulations is mainly oblique. It is true that in some respects the new legislation appears set to improve our law. The incorporation of article 4(b) of the Hague Convention, the creation of the RACAP and the potentially powerful supervisory role proposed for the

[104] The High Court may be approached as a forum of first instance (for a guardianship and custody orders) only where exceptional circumstances justify this. See supra n 73 and the text accompanying it.

[105] Because this principle ranks at least some local placement options over international adoption.

Central Authority could all assist in creating an enabling environment in which the principle of subsidiarity is more effectively implemented as a counter to profit-driven child care placements.

The numerous supportive services to be made available for children and their families in terms of the new legislation, the integration of intercountry adoption as an alternative care option within the national system of child protection, and the anti-profiteering accreditation requirements for private agencies licensed to facilitate intercountry adoptions are undoubtedly good starting points for applying the subsidiarity principle effectively. These provisions comply with the recommendations of the Permanent Bureau.[106] As we have suggested, however, much will depend on how the new legislation is interpreted and applied in practice.

Despite its potential for improving our law, by mainly taking an oblique approach on intercountry adoption the new legislation has failed to address three core issues on which practitioners urgently need guidance. Firstly, it has not helped solve the differences between the CRC, AC and Hague Convention. For example, it provides no direction on whether the AC's prohibition on intercountry adoptions to non-signatory countries applies in South Africa. Secondly, it fails to provide direction on the nature of the search for local care options to be undertaken before an intercountry placement may be sought lawfully. As the authors have suggested it is quite unrealistic to expect applicants to undertake the search themselves because it is directly against their own interests. And the DSD and private agencies need guidance on what exactly they should be doing during the 60 days of a RACAP listing.

Thirdly, the new legislation fails to provide any direction on a hierarchy of forms of care. As the authors have conceded, an absolutely binding and rigid hierarchy would be so artificial as to fail to meet the best interests of children in many cases. However, in the authors submission, what is urgently required is a *via media* between the extremes of such rigidity and absolutely no ranking at all as favoured by the CC in *Baby R*. This should take the form of legislative guidance containing a *prima facie* or presumptive hierarchy of forms of care. It would provide both a specific starting point for investigations and a uniform set of stages in alternative care cases.

It should be enacted in South Africa that there is a rebuttable presumption that care options for children should normally be explored in sequence and ranked as follows:

- existing family care
- extended family care
- national adoption
- international adoption

[106] As described in part 2, above.

- national foster care
- institutional care

The precise sequence of ranking and options involved could of course be debated.[107] But the important point is that by creating a *prima facie* sequence the legislature would guide children's courts, social workers and others involved on how best to utilise precious and scarce alternative care resources. The DSD, private agencies and applicants for intercountry adoptions would at last have a clear track to follow. And because the proposed ranking is merely presumed, it would always be open to a party in any case to show that the best interests of a particular child indicate moving directly to a low-ranked care option. Given the late, incremental and rather confusing reception of the principle of subsidiarity in our law, it is to be hoped that the legislature will address the core aspects of its application in the near future.

[107] The DSD *Second Draft Guidelines for Intercountry Adoptions* (Nov 2006) par 8 1 1 required that a "list of best placement" always be taken into account. Annexure A lists best placements in order of priority as follows: biological parents; extended family; foster parents; community; province; national; and intercountry. Unlike in the authors' proposal where family care is prioritised, in this more patriotic approach intercountry adoption is ranked as a last resort.