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Refugee Documentation Centre

Country Adoption Pack

Afghanistan

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Information on the legal requirements/procedures regarding adoption in Afghanistan.

An article by Alice Richards published in the *Journal of the American Academy of Matrimonial Lawyers*, in a section headed “Adoption in Islamic Family Law”, states:

“Adoption under Islamic Shari’a is different from the American concept. Under Shari’a law adoption does not end the blood relationship between the child and his or her biological parents. The relationship that is created to the adoptive parent is similar to a guardianship. Since both Afghanistan’s and Iraq’s legal systems draw on Islamic Shari’a law, adoption is technically prohibited in both countries.” (Richards, Alice (1 May 2013) *Bombs and Babies: The Intercountry Adoption of Afghanistan’s and Iraq’s War Orphans*, *Journal of the American Academy of Matrimonial Lawyers*, pp.409-410)

This author also states:

“People can, of course, welcome Muslim orphans into their home and treat them as their children in every respect; however, orphans will not gain the rights which Shari’a law provides for biological children. Instead, Shari’a law countries allow for guardianship of orphaned children. The U.S. Citizenship and Immigration Services in the Department of Homeland Security and the Board of Immigration Appeals has declared that this guardianship status is ‘insufficient for the purposes of immigration under the Immigration and Nationality Act (“INA”).’ As a result, traditional intercountry adoption is essentially impossible between the United States and Afghanistan or Iraq.” (ibid, pp.410-411)

A 2006 document published on the *Passports USA* website states:

“The Department of State has occasionally received inquiries from American citizens concerned about the plight of the children of Afghanistan and wondering about the possibility of adopting them. At this time, it is not possible to adopt Afghan children, for several reasons. In general, intercountry adoptions are private civil legal matters governed by the laws of the children's home country, which has the primary responsibility and jurisdiction for deciding what would be in the children's best interests. The U.S. Embassy in Kabul has confirmed that Afghan law, which is based on Islamic Shari'a law, does not currently permit full adoptions as they are generally understood in the United States. Afghanistan does grant a more limited arrangement akin to guardianship; however, even if an Afghan court or other Afghan authority were to grant a U.S. citizen guardianship rights for an Afghan child, the child would likely be unable to immigrate to the United States, unless the citizen could establish both that the child qualifies as an ‘orphan’ as defined in section 101(b)(1)(F) of the Immigration and Nationality Act and, under Afghan law, the ‘guardianship’ order gave the citizen authority not only to care for the child but to bring the United States for the specific purpose of the child's adoption in the United States. Since Afghan law does not permit adoption, it is not clear that an Afghan guardianship order could give this authority.” (Passports USA (June 2006) *Intercountry Adoption*)

A 2013 document published by the *US Department of State*, in a section headed “Hague Convention Information”, states:

“The Afghan Civil Code governs the rights and interests of minors in Afghanistan. Islamic Shari'a law, upon which Afghanistan family law is largely based, does not allow for adoption of Afghan children in Afghanistan. Therefore, U.S. citizens considering adoption of an Afghan child must obtain guardianship for the purpose of emigration and adoption in the United States from the Afghan Family Court that has jurisdiction over the prospective adoptive child's place of residence. It is important to note that according to Afghan laws, prospective adoptive parents who are non-Muslim may not be appointed guardians of Muslim children. Strong cultural ties to Afghanistan (dual Afghan-American nationality, for example) may favorably influence the court's decision, but are not required.” (United States Department of State (Bureau of Consular Affairs) (1 July 2013) *Intercountry Adoption – Afghanistan*)

In a section headed “Who Can Adopt” this document states:

“In addition to U.S. immigration requirements, you must also meet the following requirements in order to adopt a child from Afghanistan:

Residency: Afghan law does not clearly state any residency requirements for prospective guardians.

Age of Adopting Parents: Afghan law does not clearly state any age requirements for prospective guardians.

Marriage: Afghan law does not clearly state any marriage requirements for prospective guardians.

Income: Prospective guardians must demonstrate to the Family Court that they have sufficient resources to educate and raise the child.

Other: Per Afghan laws, prospective parents who are non-Muslims may not be appointed as guardians of Muslim children. Prospective parents must demonstrate to the satisfaction of the Afghan Family Court judge that they

intend to raise the child in accordance with Islamic tradition and norms. In order to be eligible as a guardian, Afghan Civil Code states that the guardian must be righteous, meet all eligibility requirements, and be able to support the child. A person who has been convicted of crimes against public morality or chastity, has a bad reputation, does not have legitimate income, previously lost guardianship of the child by order of the court, has been denied guardianship in writing by the father or paternal grandfather of the child, or has any judicial dispute with the child's family, may not be appointed guardian." (ibid)

A section headed "Who Can Be Adopted" states:

"In addition to U.S. immigration requirements, Afghanistan has specific requirements that a child must meet in order to be eligible for adoption:

Relinquishment: The child's biological father, if living, may relinquish the child, or the Afghan Family Court can designate a legal guardian to do so.

Abandonment: As determined by the Afghan Family Court.

Age of Adoptive Child: Guardianship terminates when the child reaches the age of 18.

Sibling Adoptions: None.

Special Needs or Medical Conditions: None.

Waiting Period or Foster Care: None.

Caution: Prospective adoptive parents should be aware that not all children in orphanages or children's homes are adoptable. In many countries, birth parents place their child(ren) temporarily in an orphanage or children's home due to financial or other hardship, intending that the child return home when this becomes possible. In such cases, the birth parent(s) have rarely relinquished their parental rights or consented to their child(ren)'s adoption." (ibid)

A 2010 report published by the *UN Committee on the Rights of the Child*, in a section headed "Adoption" (paragraph 179), states:

"Adoption does not have a Sharia or legal basis in Afghanistan. Therefore, in accordance with article 228 of the Civil Code, when a parentage of an adopted person is known, the legal consequences such as maintenance, custodian fees, inheritance and marriage between close relatives is not enforced on the adopted children. However, if the child is an orphan or their parents are destitute then such children can be put into the care of individuals who have the qualifications and capacity for the custody of the child." (UN Committee on the Rights of the Child (CRC) (13 June 2010) *Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: initial report of State parties due in 1996: Afghanistan*, p.40)

See also paragraph 180 which states:

"The GoA has not ratified the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption but has ratified the Optional

Protocol to the Convention on the sale of Children, child prostitution, and child pornography.” (ibid)

A 2011 report published by the *UN Committee on the Rights of the Child*, in a section headed “Children deprived of a family environment” (paragraph 45), states:

“While noting the information provided in the State party’s report that the State party does not practice adoption or kafalah, the Committee expresses concern that the State party does not have a system that provides special protection and assistance to children deprived of a family environment. The Committee also takes note of the information provided during the interactive dialogue that a system of guardianship exists in the State party to take care of orphaned children, and that legislation to protect those children is being considered. Nevertheless, the Committee is concerned about the absence of a legal framework regulating such guardianship and protecting children deprived of a family environment on a long-term basis.” (UN Committee on the Rights of the Child (CRC) (8 April 2011) Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: concluding observations: Afghanistan, pp.9-10)

A report published by the *Muslim Women’s Shura Council*, in a section headed “Kafala (Guardianship)”, states:

“With the exception of Indonesia, Malaysia, Somalia, Tunisia, and Turkey, the laws of most Muslim-majority states do not currently permit legal adoption. Instead, laws permit a system of guardianship (kafala), which resembles foster-parenting, but is more stable. Kafala is defined as ‘the commitment to voluntarily take care of the maintenance, of the education and of the protection of a minor, in the same way a parent would do for a child.’ According to Jamila Bargach, kafala is seen as ‘primarily a gift of care and not a substitute for lineal descent.’ In other words, kafala involves the obligations of guardianship and maintenance without the creation of legal ties, which would produce specific personal status legal entitlements. This type of guardianship does not sever the biological family bonds of the child or alter the descent lines for the adopting family. Unlike foster-parenting, kafala is intended to be a permanent arrangement for a minor. Like foster-parenting and adoption, kafala is mediated by the state, in contrast to informal or ‘customary’ adoptions which take place within families or through secret agreements.” (Muslim Women’s Shura Council (August 2011) *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, p.6)

The Juvenile Law (Juvenile Code) of Afghanistan, in an article titled “Application for guardianship” (Article 58), states:

1. “A person interested in the welfare of a child may submit a guardianship petition to the relevant court along with the following information:
 - 1- Surname and full address;
 - 2- Name, age, child’s residing place and address
 - 3- Type of relationship to the child;
 - 4- Surname and address of ancestors, descendants and kin relatives of the child;
 - 5- Justifications for competence to be the child’s guardian;
 - 6- Type and scope of guardianship.
1. The juvenile court shall send the petition for guardianship mentioned under paragraph (1) of this article to the social services institutions for necessary

investigations and provision of information. The social services institutions are obliged to report their finding to the court.

1. The Juvenile court shall make decision about the appointment of a child's guardian in presence of the child, his/her parents, the applicant and representative of social services institutions." (Islamic Republic of Afghanistan (23 March 2005) *Juvenile Law (Juvenile Code)* - Official Gazette No. 846)

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