

ADOPTION AND CHILDREN (SCOTLAND) ACT 2007

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Chapter 6

Adoptions With a Foreign Element

Section 58 - Restriction on bringing children into the United Kingdom

205. The provisions of this section apply where a person who is habitually resident in the British Islands (“British resident”) either brings, or causes another to bring, a child habitually resident outwith the British Islands into the United Kingdom for the purposes of adoption; or, brings, or causes another to bring, a child adopted by the British resident under an external adoption effected within a period of 12 months from that adoption.
206. Subsection (2) extends the reference to adoption by the British resident to include the British resident and another person. Subsection (3) excludes this section from applying if the child is intended to be adopted under a Convention adoption order. “Convention adoption order” is defined at section 119(1) of the Act and means an adoption made under the law of a country that has acceded to or ratified the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993.
207. Subsection (4) defines an external adoption as an adoption, other than a Convention adoption, effected under the law of any country or territory outside of the British Islands.
208. Subsection (5) allows regulations to be made which require a person to apply to an adoption agency for an assessment of his or her suitability to adopt and provide the agency with any information it may require for the purpose of the assessment if he or she intends to bring, or cause another to bring, a child into the United Kingdom under the circumstances specified in this section.
209. Subsection (6) allows regulations to prescribe the conditions which must be met in respect of a child brought into the United Kingdom under the circumstances specified in this section.
210. Subsection (7) allows regulations to provide for any provision in Chapter 2 to apply with modifications, or not to apply, to a child brought into the United Kingdom for adoption purposes.
211. Subsection (8) allows the Scottish Ministers to make regulations exempting adoptions from the application of this section where the prospective adopter is either a relative or guardian, or a step-parent of the child and any prescribed conditions are met.
212. Subsection (9) specifies the parliamentary procedure which applies on the first exercise of the power to make a statutory instrument containing regulations under subsection (8). The instrument will be subject to draft affirmative procedure when first made. Subsequent use of the power will be subject to negative resolution procedure.

Section 59 - Preliminary order where child to be adopted abroad

213. By virtue of subsection (1), on receiving an application from prospective adopters who intend to adopt a child under the law of a country or territory outwith the British Islands, a court may make an order vesting parental responsibilities and parental rights in relation to the child in those prospective adopters.
214. By virtue of subsection (2), if the prospective adopters meet the domicile or habitual residence requirements for an adoption order in Scotland, an order cannot be made under this section.
215. Under subsection (3), no order under this section may be made unless any requirements prescribed by the Scottish Ministers are satisfied.
216. Under subsection (4), an application for an order under this section cannot be made unless the child has lived with the prospective adopters for the whole of the 10 week period immediately preceding the application.
217. Subsection (5) provides that section 35 of the Act (effect of order on existing rights etc.) has effect in relation to an order under this section as it does in relation to adoption orders.
218. Subsection (6) gives the Scottish Ministers the power to make regulations by which any provision of this Act relating to adoption orders relate to orders under this section.

Section 60 - Restriction on removal of children for adoption outwith Great Britain

219. Subsection (1) makes it an offence for any person to take or send a protected child out of Great Britain to any place outwith the British Islands with a view to the adoption of that child. 'Protected child' is defined at subsection (9) as a child who is habitually resident in the United Kingdom or a Commonwealth citizen.
220. Subsection (2) makes it an offence for any person to assist in the transferring of care of a protected child to another person, knowing that the other person intends to take or send the child out of Great Britain which would be an offence under subsection (1). Subsection (4) then specifies the activities which would be deemed to constitute an offence under subsection (2), being facilitating the placing of the child or initiating or taking part in negotiations for such placing or in relation to an agreement to transfer the care of the child.
221. Subsection (3) outlines the exemptions to an offence committed under subsection (1). It is an offence to remove a protected child from the British Islands with a view to the adoption of that child unless an order has been made under section 59 of the Act, section 84 of the 2002 Act (giving parental responsibility prior to adoption abroad), or Article 57 of the Adoption (Northern Ireland) Order 1987 (adoption by persons domiciled outside Northern Ireland).
222. Subsection (5) makes special provision for adoptions with a foreign element where the prospective adopters are parents, relatives or guardians or step-parents of the child. The Scottish Ministers may by regulations modify the offence provisions at subsections (1) and (2) and the exceptions at subsection (3), or declare that they do not apply in relation to such persons if any conditions set out in the regulations are met.
223. Subsection (6) specifies the parliamentary procedure which applies to any regulations made under this provision. The first use of the power is subject to affirmative procedure. Thereafter such regulations will be subject to negative procedure.
224. Subsection (7) makes provision for reports by, or depositions made before, a British consular officer to be sufficient evidence in any proceedings under this section.
225. Subsection (8) prescribes the penalty for an offence under this section as a maximum of 3 months imprisonment, a fine not exceeding level 5 on the standard scale or both.

Section 61 - Regulations under section 58: offences

226. Subsection (1) makes it an offence for any person to bring, or cause another to bring, a child into the United Kingdom in circumstances where section 58 of the Act applies if the person has not applied to an adoption agency to have his or her suitability assessed or has failed to provide the agency with any information it may require all in terms of section 58(5) or if the person has not met any condition prescribed by regulations made under subsection (6) of that section.
227. Subsection (2) specifies the maximum penalty applicable to a person who has committed an offence under subsection (1). On summary conviction this is 6 months imprisonment or a fine up to the statutory maximum or both and on conviction on indictment imprisonment for a term not exceeding 12 months or a fine or both.

Section 62 - Declaration of special restrictions on adoptions from abroad

228. This section applies where the Scottish Ministers believe that it would be contrary to public policy to continue bringing children into the United Kingdom, in the cases outlined in subsection (2), from a country or territory outside the British Islands (the “relevant country”) due to practices taking place in that country or territory. Subsection (2) specifies two cases under which a child should not be brought into the country where this section would apply. The first is where a British resident wishes to bring into the United Kingdom for the purpose of adoption a child who is not a British resident and there have been, or would have to be, proceedings or dealings with authorities or agencies in the relevant country concerning the proposed adoption. The second case is where within the last 12 months a British resident has adopted a child in a relevant country and wishes to bring that child into the United Kingdom.
229. Subsection (3) allows the Scottish Ministers to declare by order that special restrictions are to apply for the time being to any relevant country in relation to the bringing in of children in the cases mentioned in subsection (2). Scottish Ministers will be able to apply restrictions to the bringing of children into the United Kingdom from outwith the British Islands who are adopted under the law of that country, or are brought into the United Kingdom for the purposes of adoption.
230. The Scottish Ministers must publish the reasons for making the declaration and a list of the restricted countries. Subsections (5) and (6) require the list to be kept up to date and for it to be published in such a way as the Scottish Ministers consider appropriate for bringing it, and the reasons for the declaration, to the attention of adoption agencies and the public.

Section 63 - Review

231. Subsection (1) states that the Scottish Ministers must review whether a country should continue to be restricted. Under subsection (2), where the Scottish Ministers deem that a country should no longer be restricted they must, by order, revoke the order containing the declaration made under section 62(3).

Section 64 - The special restrictions

232. This section makes provision for the special restrictions mentioned in section 62(3) of the Act. These restrictions are that the Scottish Ministers should take no further action in connection with bringing a child from outwith the British Islands into the United Kingdom who was adopted under the law of the relevant country, or is to be brought into the United Kingdom for the purposes of adoption.
233. Subsection (2), however, allows for action to be taken by the Scottish Ministers if the prospective adopter satisfies them that they should take this action despite the special restrictions.

234. Subsection (3) allows the Scottish Ministers to make regulations that provide for the procedure to be followed to determine whether further steps should be taken despite the special restrictions, and for matters which should be taken into account when making such a determination.

Section 65 - Imposition of extra conditions in certain cases

235. Subsection (1)(a) allows regulations to be made by Scottish Minister to set out additional steps agreed between the United Kingdom and a restricted country that the Scottish Ministers normally take in connection with bringing a child from the restricted country into the United Kingdom, and are not otherwise provided for by any enactment, to be specified in the restricted list in relation to that country. Subsection (1)(b) states that, where a step has been specified under subsection (1)(a), one or more conditions set out in the regulations must to be met in connection with a British resident bringing a child from the relevant restricted country into the United Kingdom in either of the cases specified in section 62(2).
236. Subsection (2) clarifies that such conditions are in addition to any conditions provided for by section 58 of the Act or any other enactment.
237. Subsection (3) makes it an offence for any person to bring, or cause to bring, a child into the United Kingdom for the purposes of adoption if they have not met any condition which they are required to meet in terms of regulations made under subsection (1) (b). Subsection (4) states that, if the step specified in the regulations had already been taken before the publication of the restricted list, no offence is committed in terms of subsection (3).
238. Subsection (5) prescribes the penalties for an offence made under subsection (3) being, on summary conviction a maximum of 6 months imprisonment or a fine up to the statutory maximum or both and on conviction on indictment imprisonment for a term not exceeding 12 months or a fine or both.

Section 66 - Power to charge

239. This section applies to adoptions referred to in section 58 of the Act or to which regulations made under section 1 of the Adoption (Intercountry Aspects) Act 1999 (regulations giving effect to Convention) apply. This will apply to any overseas adoption or any Convention adoption.
240. Subsection (2) allows the Scottish Ministers to charge a fee to adopters for services provided by Ministers in relation to adoption. Subsection (3) allows the Scottish Ministers to set the level of this fee, or waive the fee, as they see fit. However, subsection (4) provides that the income for these fees must not exceed the total cost of providing the services during any one financial year.
241. Subsection (5) defines “financial year” as the period of 12 months ending with 31st March.

Section 67 - Meaning of “overseas adoption”

242. Subsection (1) defines “overseas adoption” as an adoption as described in regulations made by the Scottish Ministers where the description is that of an adoption effected under the law of any country or territory outwith the British Islands (namely outwith the United Kingdom, Channel Islands and Isle of Man), but that is not a Convention adoption.
243. Subsection (2) allows for regulations to specify requirements that should be met by an adoption for it to be an overseas adoption after commencement of the regulations.
244. Subsection (3) restricts the Scottish Ministers’ power to make regulations under subsection (1) while regulations under subsection (2) are in force. The power must be

exercised to ensure that adoptions effected after the coming into force of regulations under subsection (2) are not overseas adoptions if they are unlikely, within a reasonable time, to comply with the requirements in those regulations.

245. Subsection (4) provides that any regulations made under subsection (1) may indicate how evidence of overseas adoptions may be given.

Section 68 - Annulment and recognition

246. By virtue of subsection (1), the Court of Session can, on an application under this subsection, annul a Convention adoption or a Convention adoption order on the ground that the adoption or order is contrary to public policy.
247. By virtue of subsection (2), the Court of Session can, on an application under this subsection, order that an overseas adoption or a determination (defined as a “relevant determination” in terms of section 70 of the Act) is to cease to be valid in Great Britain on the ground that the adoption or determination is contrary to public policy or that the authority which authorised the adoption or made the determination was not competent to do so. The Court of Session may also decide the extent to which a determination has been affected by a subsequent determination.
248. By virtue of subsection (3), the Court of Session may, in proceedings in that court, decide that an overseas adoption or determination is for the purposes of those proceedings to be treated as invalid in Great Britain on the grounds that the adoption or determination is contrary to public policy or the authority which authorised the adoption or made the determination was incompetent.
249. By virtue of subsection (4), an order or decision by the High Court on an application under section 89(2) of the Adoption and Children Act 2002 (annulment etc. of overseas or Hague Convention adoptions) is to be recognised and have effect as if it were an order or decision of the Court of Session on an application under subsection (2).
250. By virtue of subsection (5), the validity of a Convention adoption, a Convention adoption order, an overseas adoption or a determination may not be called into question in any proceedings in any court in Scotland, except by virtue of this section.

Section 69 - Section 68: supplementary provision

251. By virtue of this subsection, any application for an order under section 68 or a decision made under subsection (2)(b) of that section is to be made as prescribed by regulations made by the Scottish Ministers and within such a period as prescribed.
252. By virtue of subsection (2), no application is to be made under section 68 of the Act unless immediately before the application is made the person adopted was habitually resident in Scotland or the persons on whose application the adoption order was made were habitually resident in Scotland.
253. By virtue of subsection (3), in deciding in pursuance of section 68 whether or not an authority as mentioned in section 70 of the Act was competent to hear a particular case, a court is to be bound by any finding of fact made by the authority and stated by the authority to be so made for the purpose of determining whether the authority was competent to hear the case.

Section 70 - Effect of determinations and orders made outwith Scotland

254. Subsection (2) provides that where an authority makes a decision pursuant to the exercise of a power of the type mentioned in paragraph (a) or (b) of subsection (1), the decision has effect in Scotland as it has in the country or relevant territory in which it was made.
255. This only applies if the authority is:

*These notes relate to the Adoption and Children (Scotland) Act
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that of a Convention country (other than the United Kingdom) which has exercised a legal power to make decisions (specified in subsection (1)(a)) in relation to Convention adoptions or Convention adoption orders, or

that of any of the Channel Islands or Isle of Man or any British overseas territory within the meaning of the British Nationality Act 1981 which has exercised a legal power to make decisions (specified in subsection (1)(b)) in relation to Convention adoptions, Convention adoption orders or adoptions effected in that territory. (Subsection (1)(b) as read with subsection (3))

256. Subsection (4) provides that section 35 of the Act applies in relation to an order under Article 17 or Article 18 of the Northern Ireland Order as if it were an adoption order.
257. By virtue of subsection (5), sections 35(2) and (3) and 43 of the Act apply in relation to a child who is the subject of an order which is similar to an order under section 59 of the Act and is made (whether before or after the Act is enacted and brought into force) in England or Wales, Northern Ireland, the Isle of Man or any of the Channel Islands.