

ADOPTION (INTERCOUNTRY ASPECTS) ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Convention adoptions – sections 3 to 8

Section 3. Convention adoption orders

22. **Section 3** provides for the substitution of section 17 of the 1976 and 1978 Acts with a new power enabling the Secretary of State to make regulations for Convention adoption orders. A Convention adoption order is an adoption order which is made in England and Wales or Scotland under the Convention as a Convention adoption order under section 17. It is envisaged that new regulations will be made which will modify existing jurisdictional requirements in order to comply with the Convention.

Section 4. Effect of Convention adoptions in England and Wales

23. Section 38(1) of the 1976 Act is amended by subsection (1) which inserts a new paragraph (cc) ‘which is a Convention adoption’, thereby adding to the list of types of adoption orders made.
24. The effect of this amendment is to enable Convention adoptions to be recognised in accordance with section 39 of the 1976 Act. A Convention adoption is an adoption order made under the Convention in any Convention country outside the British Isles which has been certified in accordance with the requirements of Article 23(1) of the Convention (see section 8).
25. Subsections (2) and (3) make provisions for simple adoptions.
26. Adoption law of the United Kingdom recognises only one type of adoption – **‘full adoption’**: this creates a new and irrevocable legal relationship between the child and adoptive parents which severs all legal ties between the child and his birth parents.
27. Section 39(2) of the 1976 Act (status conferred by adoption) provides that a child adopted in England and Wales is to be treated in law as if he were not the child of any person other than the adopters or adopter. In some other countries, however, certain forms of adoption do not have the effect of totally severing all ties from the birth parents – these are known as **‘simple adoptions’**.
28. Article 26 of the Convention provides for the recognition of both full and simple adoptions but does not prejudice the application of any legal provision in force in the Contracting State if it is more favourable to the child. By the amendment to section 38(1), all Convention adoptions will be recognised as full adoptions, but new section 39 (3A) provides a mechanism whereby a court may give a direction with regard to the child's status if this is more favourable to the child. Unless such an application is made the adoption is to be treated as a full adoption in accordance with Article 26(3).

*These notes refer to the Adoption (Intercountry Aspects) Act
1999 (c.18) which received Royal Assent on 27 July 1999*

29. Article 27 allows a receiving State to convert a simple adoption into a full adoption if its law so permits and provided the birth parents and relevant parties under Article 4 have given their consent to a full adoption. Where England is the receiving State, the Department of Health, as the Central Authority, will ensure in all cases that the birth parents are informed of the effects of a simple adoption in English or Scots law and seek to obtain their consent to a full adoption prior to a Convention adoption or a Convention adoption order being made.
30. Where the UK is not the receiving State, it is possible that a child may be brought to this country in circumstances where simple adoptions are recognised in both the State of origin and the receiving State and no consent to full adoption has been given (a so called 'third country case'). In those cases, the adoption will still be treated as a full adoption by operation of law, but if any issue of status arises where it is felt it would be more favourable to the child to treat the adoption otherwise than as a full adoption, an application may be made to the High Court.
31. Insertion of a new subsection (3A) provides that where a child has been adopted under a Convention order and the High Court is satisfied, on an application under this subsection,
 - (a) that under the law of the country in which the adoption was effected the adoption was not a full adoption;
 - (b) that the consents referred to in Article 4(c) and (d) of the Convention have not been given for a full adoption, or that the United Kingdom is not the receiving State (within the meaning of Article 2 of the Convention); and
 - (c) that it would be more favourable to the adopted child for a direction to be given under this subsection,the Court may direct that subsection (2) shall not apply, or shall not apply to such an extent as may be specified in the direction.
32. Article 4(c) of the Convention is concerned with consent to adoption. It places a responsibility on the competent authorities in the State of origin to be satisfied that consent to the adoption of the child has been given by the birth parent or legal guardian after being counselled about the effects of giving consent, in particular whether an adoption will terminate the legal relationship between the child and his birth family; that such consent has been freely given, without payment or any other inducement, and has not been withdrawn; and that the consent of the birth mother has only been given after the birth of the child.
33. Article 4(d) is concerned with the child. The competent authorities are to be satisfied that the child, according to his age and understanding, has been counselled about the proposed adoption; has given consideration to his wishes and feelings; that the child's consent to the adoption has been given freely and in the required legal form, and obtained without payment or inducement of any kind. (In most cases, however, children to be adopted will in fact be too young to give their consent to their adoption.)
34. The effect of this new subsection is to provide a new legal mechanism for the High Court to give a direction whether and to what extent a child adopted under a simple adoption under the Convention should be treated as if he were not the child of any person other than the adopters or adopter. It will be available only if the adoption was not a full adoption, if the consents to a full adoption were not given or the UK is not the receiving State. It must be more favourable to the adopted child for the direction to be given.
35. Situations where a court may be called upon to make a direction may be confined to cases where the birth parents come into unexpected money. Any request by the birth parents for contact may be dealt with under existing Children Act provisions.
36. The court may involve the Attorney General ((3B)(a)) and rules of court may be made for example as to the parties to any application.

Section 5. Effect of Convention adoptions in Scotland

37. This section makes to the 1978 Act amendments similar to those made to the 1976 Act by section 4.

Section 6. Annulment etc. of Convention adoptions

38. Subsection (1) amends section 53(1) of the 1976 Act and section 47(1) of the 1978 Act (annulment etc. of overseas adoptions) to provide for the High Court to annul a Convention adoption or a Convention adoption order on the ground that the particular adoption or order is contrary to public policy. The effect of any annulment will be that the Convention adoption will cease to have effect in the Great Britain.
39. This amendment implements Article 24 of the Convention: ‘ The recognition of an adoption may be refused in a contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child’.
40. Subsection (2) amends subsection 53(5) of the 1976 Act and subsection 47 (5) of the 1978 Act to provide that except as provided by section 53(1) or section 47(1) of the 1978 Act, the validity of a Convention adoption or Convention adoption order shall not be challenged in any court in England and Wales or Scotland.
41. Subsection (4) provides for the recognition in England, Wales and Scotland of determinations made in Convention countries relating to Convention adoptions and Convention adoption orders and of determinations made in respect of any adoption in the Channel Islands, Isle of Man or any colony. A ‘determination’ essentially means a decision of a court or other competent authority to authorise or review an adoption or the revocation or annulment of an adoption. It also makes minor amendments consequent on the proposed repudiation of the 1965 Convention.

Section 7. Acquisition of British citizenship by Convention adoptions

42. This section amends section 1(5) of the British Nationality Act 1981 by providing that if a child who does not have British nationality is adopted either in any UK court or outside the British Islands under the 1993 Convention, he will be able to acquire British nationality automatically provided that at least one of the adoptive parents is a British citizen at the time the adoption order is made and in the case of a Convention adoption, that the adopter or, in the case of an adoption by a married couple, both of the adopters are habitually resident in the UK. In the British Nationality Act in this amendment ‘UK’ includes the Channel Islands and the Isle of Man. This section will have effect throughout the British Islands (section 18(5)).
43. This amendment implements Article 26(2) of the Convention which requires a Contracting State, where an adoption has the effect of terminating a pre-existing legal parent-child relationship, to ensure that
- “the child shall enjoy in the receiving State, and any other Contracting State where the adoption is recognised, rights equivalent to those resulting from adoptions having this effect in each such State
44. Under the present law, an adoption order made in a UK court automatically confers British nationality on a child who is not a British citizen where at least one of the adopters is a British citizen. The amendment therefore ensures that the adopted child enjoys the same status from the making of a Convention adoption order as he would if the adoption was made in the UK.
45. Subsections (2) and (3) make necessary minor amendments to subsections (6) and (8) respectively of the 1981 Act as a consequence of the amendment to section 1(5) of the Act.

Section 8. Meaning of ‘Convention adoption’ and related expressions

46. This section provides for the necessary amendments to be made to section 72 of the 1976 Act and section 65 of the 1978 Act (interpretation), giving the meaning of ‘the Convention’, ‘Convention adoption’, ‘Convention adoption order’ and ‘Convention country’. A Convention adoption is an adoption effected outside the British Islands under the 1993 Convention and which has been certified under Article 23(1) of the Convention.
47. Article 23(1) falls under that part of the Convention dealing with the recognition and effects of adoption. It requires that where an adoption has been certified by the competent authority of the State of the adoption as having been made in accordance with the Convention, the adoption shall be recognised by operation of law in the other Contracting States. The certificate is to specify when and by whom the agreements under Article 17(c) were given.
48. Article 17(c) of the Convention falls under the general heading of duties of Central Authorities and accredited bodies and requires the Central Authorities of both States to have agreed that the adoption may take place. Agreement will only be given by each Central Authority if it is satisfied that the requirements of the relevant Articles of the Convention for which each is responsible have been met. A Convention adoption order is an adoption order made in England, Wales or Scotland as a Convention adoption.