

ADOPTION AND CHILDREN ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Adoption

Chapter 6 – Adoptions with a Foreign Element

215. The provisions in this Chapter incorporate many of the measures of the Adoption (Intercountry Aspects) Act 1999 and extend those measures with new safeguards and penalties.
216. The Adoption (Intercountry Aspects) Act 1999 (“the 1999 Act”) applies to England and Wales and to Scotland and amends both the Adoption Act 1976 and the Adoption (Scotland) Act 1978. It makes provision to regulate intercountry adoption, enables (together with equivalent Northern Ireland legislation) the United Kingdom to ratify the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption and introduces sanctions against those failing to follow the proper procedures for bringing children into the United Kingdom. The 1999 Act also clarifies that local authorities have a duty to provide, or arrange to provide, an intercountry adoption service and provides that children who are the subject of a Convention adoption will receive British nationality automatically.
217. The 1999 Act will largely be repealed for England and Wales when this Act is implemented, as the majority of the provisions amend the Adoption Act 1976 and have been incorporated into this Act. Sections 1 (power to make regulations giving effect to the Convention), 2 (Central Authorities and accredited bodies) and 7 (amendments to the British Nationality Act 1981) and Schedule 1 (which sets out the text of the Convention so far as material) of the 1999 Act will remain. *Section 144(1)* defines a Convention adoption order as an adoption order which is made by virtue of regulations made under section 1 of the 1999 Act. The regulations which are to be made under section 1 of the 1999 Act will apply, with or without modification, the provisions of this Act, for example the conditions which must be satisfied before an application for a Convention adoption order may be made. Convention adoptions made in a country outside the British Islands are recognised, see *section 66(1)*.

Section 83: Restriction on bringing children in

218. *Section 83* imposes restrictions on British residents bringing or causing someone else to bring a child habitually resident outside the British Islands into the United Kingdom with the intention of adopting the child in the United Kingdom, unless the person complies with prescribed requirements and meets prescribed conditions. It also makes it a criminal offence for a British resident to bring or cause someone else to bring a child habitually resident outside the British Islands who he has adopted within the last six months into the United Kingdom, unless he complies with prescribed requirements and meets prescribed conditions. A person would be liable on summary conviction to up to six months’ imprisonment or a fine not exceeding the statutory maximum, or both,

or, in the event of the case being referred to the Crown Court, to up to twelve months' imprisonment or an unlimited fine, or both.

219. It is intended that regulations will require the British resident to be assessed and approved as suitable to adopt by a United Kingdom adoption agency prior to bringing a child into the United Kingdom.
220. The restrictions in this section do not apply if the child is intended to be adopted under a Convention adoption order (*subsection (2)*), as the provisions in the Hague Convention will apply in such circumstances.
221. This section replaces and strengthens section 56A of the Adoption Act 1976 which was inserted by section 14 of the Adoption (Intercountry Aspects) Act 1999. It extends to England and Wales only, but *section 133* makes similar provision for Scotland.

Section 84: Giving parental responsibility prior to adoption abroad

222. *Section 84* provides that the High Court may make an order for the transfer of parental responsibility for a child to prospective adopters who are not domiciled or habitually resident in England or Wales but who intend to adopt the child outside the British Islands. An order cannot be made where the prospective adopters meet the requirements of domicile or habitual residence to allow an adoption order to be made in England and Wales. Regulations will prescribe the requirements which must be satisfied before an order may be made (*subsection (3)*). An application for an order may not be made unless the child's home has been with the applicant(s) at all times during the preceding 10 weeks (*subsection (4)*). An order under this section has the same effect as an adoption order in extinguishing parental responsibility (*subsection (5)*). *Subsection (6)* provides that regulations may be made to apply any provision of this Act which refers to adoption orders to orders made under this section with or without modifications.

Section 85: Restriction on taking children out

223. *Section 85* imposes restrictions on taking children who are Commonwealth citizens or habitually resident in the United Kingdom out of the United Kingdom for the purpose of adoption. It is an offence unless the proposed adopters have obtained an order under *section 84* or the child is removed under the authority of an order under section 50 of the Adoption (Scotland) Act 1978 or Article 57 of the Adoption (Northern Ireland) Order 1987. A person would be liable on summary conviction to up to six months' imprisonment or a fine not exceeding the statutory maximum, or both, or, in the event of the case being referred to the Crown Court, to up to twelve months' imprisonment or an unlimited fine, or both.

Section 86: Power to modify sections 83 and 85

224. *Subsection (1)* provides a power to provide by regulations that section 83 does not apply to natural parents, natural relatives, guardians or a partner of the parent of the child. *Subsection (1)* also enables conditions to be prescribed which would need to be met for a group to be excluded from the application of section 83. Different provision can be made in relation to different cases.
225. *Subsection (2)* provides a power to provide that section 85(1) applies with modification or does not apply if the prospective adopters are parents, relatives, guardians (or one of them is) or the prospective adopter is a partner of a parent of the child. Again, subsection (2) enables conditions to be prescribed which would need to be met for a group to be excluded from the application of section 85 or for section 85 to be modified in relation to that group. Different provision can also be made in relation to different cases.
226. *Subsection (3)* provides that the first set of regulations to be made under section 86 are to be subject to the affirmative resolution procedure. Under *subsection (4)* regulations

under the new section will be made by the Secretary of State in consultation with the National Assembly for Wales.

Section 87: Overseas adoptions

227. Overseas adoption orders are recognised automatically in England and Wales. *Section 87* provides that for the purposes of the Act and the Adoption Act 1976 overseas adoptions are those specified by an order made by the Secretary of State describing adoptions effected under the law of any country or territory outside the British Islands, and are not Convention adoptions. Regulations may set out requirements that ought to be met in order for an adoption to be classified as an overseas adoption. The regulations may be made by the Secretary of State, following consultation with the National Assembly for Wales. *Subsection (3)* imposes a duty on the Secretary of State to exercise his powers to make an order so as to secure that adoptions made after that date are not overseas adoptions if he considers they are not likely within a reasonable time to meet the requirements prescribed by regulations. *Subsection (5)* enables the Secretary of State to provide in the order the manner in which evidence of any overseas adoption may be given.
228. It is intended to review which countries' adoption orders will be recognised in the United Kingdom. This section allows the Secretary of State to specify clear criteria that must be met for a country to be included on the revised "designated list". It also ensures that the status of those adopted from countries included on the previous "designated list" is not undermined by the introduction of a new order.

Section 88: Modification of section 67 for Hague Convention adoptions

229. *Section 88* provides that where the High Court, on an application, is satisfied that the conditions set out in *subsection (2)* are met, it may direct that *section 67(3)* (which provides for the status conferred by adoption) does not apply or does not apply to any extent which may be specified in the direction. The reason for this provision is as follows. Adoption law of the United Kingdom recognises only one type of adoption, which is full adoption, and 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. A child adopted in England and Wales is to be treated in law as not being the child of any person other than the adopters. In some countries, however, certain forms of adoption do not have the effect of totally severing all ties from the birth parents and these are known as simple adoptions.
230. Article 26 of the Hague Convention provides for the recognition of both full and simple adoptions. Article 27 of the Hague Convention 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 of the Hague Convention have given their consent to a full adoption. Where the receiving State is England and Wales, the Central Authority will ensure that in all cases the birth parents are informed of the effects of a simple adoption in England and Wales and seek to obtain their consent to a full adoption prior to a Convention adoption being made in a country outside the British Islands or a Convention adoption order being made here. Where the receiving State is not England and Wales, it is possible that the child may be brought to this country in circumstances where simple adoptions are recognised, both in the State of origin and the receiving State, and so no consent to full adoption has been given. 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.

Section 89: Annulment etc. of overseas or Hague Convention adoptions

231. *Section 89* provides for the High Court to annul a Convention adoption or a Convention adoption order on the grounds that the adoption is contrary to public policy. Where an

*These notes refer to the Adoption and Children Act 2002
(c.38) which received Royal Assent on 7th November 2002*

overseas adoption or a determination under [section 90](#) is shown to be contrary to public policy or the authority which made the adoption or determination was not competent to entertain the case, the High Court may order that the overseas adoption or determination should cease to be valid.

Section 90: Section 89: supplementary

232. [Section 90](#) makes supplemental provision in respect of annulment of overseas or Convention adoptions and Convention adoption orders. It specifies that the application must be made in the prescribed manner and within any prescribed period ([subsection \(1\)](#)), that the adopted person or adopter(s) must have been habitually resident in England and Wales immediately before the application ([subsection \(2\)](#)), and that the court is bound by any finding of fact by the authority when determining whether that authority was competent to entertain the case ([subsection \(3\)](#)).

Section 91: Overseas determinations and orders

233. [Section 91](#) makes further provision in relation to overseas determinations and orders. It provides that where any authority of a Convention country (other than the United Kingdom) or the Channel Islands, the Isle of Man or any British overseas territory has the power to authorise or review the authorisation of an adoption order made in that country or territory, or to give or review a decision revoking or annulling an adoption order or a Convention adoption, that determination will be recognised in the United Kingdom. This is subject to [section 89](#) and any subsequent determination.