

EXPLANATORY MEMORANDUM TO

THE ADOPTION (RECOGNITION OF OVERSEAS ADOPTIONS) ORDER 2013

2013 No. 1801

1. This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 The Adoption (Recognition of Overseas Adoptions) Order 2013 ('the Order') prescribes the countries and territories whose adoption orders are prescribed as 'overseas adoptions' for the purposes of section 87 of the Adoption and Children Act 2002 (the Act) and therefore recognised as adoptions under section 66 of the Act. Section 66(1)(d) of the Act provides that "adoption" for the purposes of Chapter 4 of the Act includes 'overseas adoptions'. Adoptions covered by Chapter 4 of the Act are recognised in England and Wales and the child is treated as the child of the adopter(s).
 - 2.2 To help ensure that adoption orders are only classed as overseas adoptions when the processes followed to obtain the adoption order are robust and provide safeguards equivalent to those used in our domestic legislation the only countries and territories prescribed in the Order are those that have implemented the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption ('The Convention').
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None
4. **Legislative Context**
 - 4.1 This Order is made under section 87(1) and (5) of the Act which enable the Secretary of State to prescribe a description of adoptions effected under the law of any country or territory outside the British Islands (not including Convention adoptions) to be prescribed as 'overseas adoptions' for the purposes of the Act and to prescribe the manner in which evidence of any overseas adoption may be given. It revokes and replaces The Adoption (Designation of Overseas Adoptions) Order 1973 and revokes the Adoption (Designation of Overseas Adoptions) (Variation) Order 1993.

- 4.2 An overseas adoption is automatically recognised in England and Wales as an “adoption” under section 66(1) of the Act. The effect of this recognition is that there is no need for the child to be readopted in a UK court in order for the adoption order to be recognised. The child is treated in law as if born to the adopter(s) (section 67 of the Act) and the other provisions of Chapter 4 of the Act also apply.

5. Territorial Extent and Application

- 5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 Section 66 of the Act provides for ‘overseas adoptions’ to be classed as an ‘adoption’ under the 2002 Act and automatically recognised in England and Wales. Prior to the coming into force of this Order ‘overseas adoptions’ were those made in countries or territories prescribed in the Adoption (Designation of Overseas Adoptions) Order 1973 (known as the 1973 Order or ‘the designated list’). The 1973 Order had not been reviewed since its introduction, other than a variation to add the People’s Republic of China in 1993. The countries included were mainly Commonwealth or former Commonwealth countries and European countries. As the list of countries had not been updated since 1973 it was quite out of date and included some countries that no longer exist or whose name had changed.
- 7.2 Adoption orders effected in the countries and territories prescribed in the 1973 Order are recognised in England and Wales so there is no need for the child to be readopted in a UK court.
- 7.3 Section 83 of the Adoption and Children Act 2002 applies to anyone habitually resident in the British Islands, who: (a) brings, or causes another to bring, a child who is habitually resident outside the British Islands into the United Kingdom for the purpose of adoption by the British resident, or (b) brings, or causes another to bring, into the United Kingdom a child adopted by the British resident under an external adoption effected within the period of twelve months ending with that time. ‘External adoption’ includes an overseas adoption.
- 7.4 Where section 83(1)(b) applies, because the child is being brought into the country within twelve months of the adoption order being effected, the adoptive parents have to comply with any regulations made under section

83(5). The requirements set out in the Adoption with a Foreign Element Regulations 2005 ('the 2005 Regulations') provide, amongst other things, that the prospective adopters be assessed and approved as eligible to adopt by an adoption agency and a certificate of eligibility be issued by the Secretary of State before the child can be brought into the UK. However, if the external adoption was effected more than 12 months before the child's entry to the UK then section 83 does not apply and there is no requirement for the adoptive parents to be assessed as suitable to adopt by an English or Welsh adoption agency or for a certificate of eligibility to be issued. The practical effect of this is that where a child has been adopted in a country or territory included in the 1973 Order and is brought back to the UK more than 12 months after the adoption was effected, section 83 does not apply and there is no need for the adoptive parents to comply with the requirements in the 2005 Regulations.

- 7.5 Many of the countries on the 1973 Order have not implemented the Hague Convention despite the protection and safeguards it affords children. It is therefore possible for a child to be adopted in a country that has not implemented the Hague Convention and be brought into the UK more than 12 months after that adoption without the need to comply with section 83 of the Act because that adoption is recognised and the child is therefore not being brought into the UK 'for the purposes of adoption'.
- 7.6 Once the Order comes into force anyone adopting a child in a country that is not included in the Order would be bringing the child back to the UK 'for the purposes of adoption' (because that adoption order would not be recognised in the UK by virtue of the Order) regardless of whether they were bringing the child back more than 12 months after the adoption and therefore have to comply with section 83 of the Act.
- 7.7 The purpose of the Hague Convention is to establish safeguards to protect the best interests of children and to produce a system of co-operation between countries to prevent child trafficking. The UK implemented the Hague Convention on 1 June 2003. Article 2 of the Order provides that adoptions prescribed as "overseas adoptions" and recognised in England and Wales are adoptions effected under the law of any country or territory listed in the Schedule to the order which are not Convention adoptions. The countries listed in the Schedule are all countries that have implemented the Hague Convention. Domestic adoption legislation in Hague Convention countries has to reflect the objectives of the Hague Convention and by recognising adoptions from these countries we also hope to encourage more countries to implement the Convention.
- 7.8 The Order may in the future also recognise adoptions effected under the law of any country or territory outside the British Islands that has signed (but not implemented) the Hague Convention and has a bilateral agreement with the UK Government. The Government carried out a public

consultation on the options for the future of the designated list and this was the preferred option. Any bilateral agreement will set out an agreed procedure for processing intercountry adoptions between the UK and the country concerned that reflects the processes required by the Hague Convention. It is expected that bilateral agreements will be rare as the usual expectation is that all countries should implement the Hague Convention as soon as they are able. For a country to implement the Hague Convention they often need to amend their legislative frameworks and internal processes which can be a lengthy process. A bilateral agreement will enable us to recognise adoptions whilst countries are in transition. No bilateral agreement will be agreed without due process and evidence that the adoption processes and procedures in the country concerned are robust. There are no bilateral agreements in place at present.

7.9 Part 2 of the Children and Adoption Act 2006 makes provision for special restrictions to be put in place which effectively suspend intercountry adoptions from a country or territory outside the British Islands where there are concerns about adoption practices in that country. It will remain possible to suspend intercountry adoptions from countries that are included in the Order if there are concerns about adoption processes in that country. There are currently restrictions in place in relation to four countries: Guatemala, Cambodia, Haiti and Nepal. The Hague Convention is not in operation between the UK and Cambodia and Guatemala because the UK Government objected to their accession. Both countries are therefore not included in the Schedule to the 2013 Order. Nepal and Haiti have both signed the Hague Convention and are working towards implementation.

7.10 The Order lists those countries that have implemented the Hague Convention. Should a country leave or implement the Hague Convention we propose to amend the Order as necessary.

8. Consultation outcome

8.1 Officials sought the views of key stakeholders before carrying out a public consultation which closed in January 2012. The results of the consultation supported the proposed amendment to the 1973 Order to only recognise adoptions from countries that have ratified the Hague Convention or with whom the UK Government has entered into a bilateral agreement with. Ministers from the Home Office (HO), Foreign Office (FCO), the Scottish Parliament, the Welsh Assembly Government and the Northern Ireland Assembly also agreed that the amendments should be made.

8.2 **Options contained within the consultation document:**

Option 1: Do you think that the 1973 Order should be revoked and not replaced?

Option 2: Do you think that the 1973 Order should be revoked and replaced with an order recognising only those adoptions made in a country that has implemented the Hague Convention?

Option 3: Do you think that the 1973 Order should be revoked and replaced with an order recognising adoptions made in a country that has implemented the Hague Convention or has signed (but not yet ratified) the Hague Convention AND with whom the United Kingdom has a bilateral agreement?

Option 4: Do you think that the 1973 Order should be retained but that references to countries should be updated where necessary?

The consultation document also asked the following supplementary question:

Do you consider that recognising as overseas adoptions those adoptions made under the domestic legislation of Hague Convention countries provides sufficient safeguards for children?

Responses to the consultation

There were 17 responses to the consultation, covering 33 organisations and individuals. Responses came from a variety of sources including an adopted child, adoptive/prospective adoptive parents, academics, the Association of School and College Leaders (ASCL), Children and Families Across Borders (CFAB), Network for Intercountry Adoption (NICA), the British Association for Adoption & Fostering (BAAF), a Sure Start Children's Centre, Voluntary Adoption Agencies and Local Authorities.

There were two joint responses; one was on behalf of a consortium of 15 adoption agencies from the Midlands and the other was on behalf of the Intercountry Adoption Centre (IAC), the British Association for Adoption and Fostering (BAAF) and a solicitor specialising in intercountry adoption

9. Guidance

- 9.1 The Department will work with the HO and FCO to support Entry Clearance Officers and British Embassy staff in implementing the new Order.
- 9.2 Information will be posted onto the intercountry adoption section of the Department for Education website. A letter will be sent to all adoption agencies in England and Wales that deal with intercountry adoptions giving details of the change and explaining the implications for prospective

adopters. We will produce Intercountry adoption statutory guidance prior to the order coming into force on 3 January 2014.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument because the impact will be minimal. None of the changes are expected to impose any additional burdens on local authorities, voluntary adoption agencies or the courts. There may be a small increase in prospective adopters contacting adoption agencies for an explanation of the changes and to check whether their adoption order is recognised because they have adopted from a country that was previously recognised as an overseas adoption but does not appear on the 2013 Order and who will have to adopt in a UK court for the adoption order to be recognised. There may also be a corresponding decrease where prospective adopters have adopted from countries that were not prescribed in the 1973 order but are on the 2013 Order and who no longer have to readopt in the UK. We are unable to assess what impact this might have on the courts in respect of an increase or decrease in applications for adoption orders. The intercountry adoption community is small; there were just 87 applications in 2012 (England only). The policy also forms part of the Red Tape Challenge as it is improving current legislation.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 Regular contact is maintained with key stakeholders including HO, FCO, UKBA (representing Entry Clearance Officers) and adoption agencies, providing opportunity for any issues to be raised about the new arrangements.

12.2 The expectation is that countries that withdraw from or implement the Hague Convention in the future will be taken off or added to the 2013 Order at a suitable opportunity. Countries may also be added if they have signed but not implemented the Hague Convention and have a bilateral agreement with the UK Government.

13. Contact

13.1 Berni Thomas, at the Department for Education Tel: 01325 735305 or email: berni.thomas@education.gsi.gov.uk, can answer any queries regarding the instrument.