

EXECUTIVE NOTE

THE ADOPTIONS WITH A FOREIGN ELEMENT (SCOTLAND) REGULATIONS 2009 SSI/2009/182

1. The above instrument (the 2009 Regulations) was made in exercise of the powers conferred by section 1(1) to (3) and (5) of the Adoption (Intercountry Aspects) Act 1999 (the 1999 Act) and sections 8, 58(5), (6), (7) and (10), 59(3) and (6) and 61(1) of the Adoption and Children (Scotland) Act 2007 (the 2007 Act). The instrument is subject to negative resolution procedure.

2. This instrument is one of a series of statutory instruments to be laid to implement the core provisions of the 2007 Act. The purpose of the instrument is to set out safeguards and procedures for intercountry adoption. The Regulations need to be read with the Adoption Agencies (Scotland) Regulations 2009 which make provision relating to the exercise by adoption agencies of their functions in relation to adoption.

Legislative Background

3. The 1999 Act enabled Scotland, England and Wales to give effect to the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (the Convention) which was concluded at the Hague on 29 May 1993. The Convention establishes an international system of co-operation that aims to prevent the abduction of, the sale of, and illegal traffic in children. The United Kingdom ratified the Convention on 27th February 2003. The Intercountry Adoption (Hague Convention) Regulations 2003 gave effect to the Convention in Scottish domestic law enabled by section 1 of the 1999 Act.

4. The 1999 Act established a Central Authority for each of Scotland, England and Wales to be responsible for the operation of the Convention and the appointment of approved adoption agencies as accredited bodies. The Central Authority is the body which is responsible for implementing the Convention. The functions of the Central Authority under the Convention are discharged, for Scotland, by the Scottish Ministers (in England the Secretary of State and in Wales the National Assembly for Wales). These functions can include providing information as to the laws of their States concerning adoption and other general information; ensuring that the prospective adopters are eligible and suitable to adopt; taking all necessary steps to obtain permission for the child to leave his own country and to enter and reside permanently in the adopter's country; and ensuring that the prospective adopters have agreed to the child being entrusted to them. An accredited body is a body approved by the Central Authority of the same State which may carry out functions under the Convention. In practice many of the functions are carried out by local authorities or adoption agencies approved as accredited bodies.

5. The 2007 Act modernises the existing legal framework for domestic and intercountry adoption. It replaces the 1978 Act making provision for intercountry adoption outwith the scope of the Convention (although some provisions will also apply to adoptions within the scope of the Convention).. Regulations governing adoptions within the scope of the Convention will continue largely to be enabled by the 1999 Act. Intercountry adoption in Scotland is currently regulated by two sets of Regulations:

- the Adoption of Children from Overseas (Scotland) Regulations 2001 (the 2001 Regulations) impose requirements with which a person who is habitually resident in the British Islands must comply before and after bringing a child who is habitually resident overseas into the country from a non-Hague Convention country for the purpose of adoption. These Regulations were enabled by the 1978 Act and apply to non-Convention cases.
- the Intercountry Adoption (Hague Convention) (Scotland) Regulations 2003 (the 2003 Regulations) which, together with corresponding legislation in England, Wales and Northern Ireland, enabled the UK to implement the Convention on 1st June 2003. The Regulations make provision in respect of the requirements and procedures to be followed in Scotland where the UK is either the receiving State (when a child is taken into the country for adoption) or the State of origin (where a child is taken out of the country for adoption by prospective adopters residing overseas). These Regulations were enabled by the 1999 Act and the 1978 Act.

6. The 2001 Regulations and the 2003 Regulations will be revoked when the 2007 Act is fully implemented. The 2009 Regulations use powers under both the 2007 Act and the 1999 Act to regulate all adoptions with a foreign element. They therefore make provision for adoptions under the Convention as well as non-Convention adoptions; they apply where children are brought into the UK and where children are removed from the UK for the purposes of adoption. The Regulations apply to these different cases as follows:-

- Part 2, Chapter 1 sets out the requirements and conditions that must be met by prospective adopters and the functions conferred on local authorities where a child is brought into the UK for adoption under section 58 of the Act other than an adoption under the Convention.
- Part 2, Chapter 2 applies where a person or relevant couple wishes to remove a child for the purposes of adoption under the law of a country or territory outside the British Islands under section 59 of the Act. Section 59 allows a court to make an order conferring parental rights and responsibilities on prospective adopters who intend to adopt a child under the law of a country or territory outwith the British Islands. Such an order allows the prospective adopters to take the child out of the country for the purposes of adoption. It may be made in both Convention and non-Convention cases. Regulations 7 and 8 apply where a child is to be taken out of the country for adoption outwith the scope of the Convention whilst regulation 9 applies provisions of the 2007 Act to orders under section 59 in both Convention and non Convention cases.
- Part 3 applies only to adoptions within the scope of the Convention. Chapter 1 applies where a person or relevant couple habitually resident in the British Islands wish to adopt a child who is habitually resident in a Convention country outside the British Islands. This is where the UK is the receiving State in terms of the Convention. The Convention requires that the receiving State has the function of ensuring that the prospective adopters are suitable and eligible to adopt and is responsible for ensuring that the child will be

authorised to enter and reside permanently in that State (this is done by the Central Authority-paragraph 4 above refers). Chapter 1 regulates the procedures to be followed for assessing the prospective adopters' suitability, the functions of local authorities and adoption panels in that regard, the requirements which the prospective adopters must meet and the procedures which must be followed by the Central Authority when a child is to be brought into the UK. It also makes provision for the making of a Convention adoption order (an adoption order within the scope of the Convention made in the UK).

- Part 3, Chapter 2 applies where a person or relevant couple habitually resident in a Convention country outside the British Islands wish to adopt a child who is habitually resident in the British Islands. This is the case where the UK is the State of origin for the purposes of the Convention. Chapter 2 regulates the functions of adoption agencies, adoption panels and the Central Authority when a child is being considered for adoption under the Convention. The role of the State of origin is to ensure that the child is adoptable, that parental consent requirements are satisfied and that the required consents have not been induced by payment and the child is placed with the adopters in the State of origin before they are removed to the receiving State. Before prospective adopters may take the child out of the country to be adopted they must apply for an order under section 59 of the Act to give them the necessary parental rights and responsibilities to allow this. Regulation 50 prescribes the requirements which must be met before a section 59 order may be made in a Convention case.
- Part 3, Chapter 3 makes miscellaneous provisions, modifications and offences relating to certain provisions in Part 3, Chapter 1 which relate to adoptions within the scope of the Convention.

Policy Background

7. Children need stable homes that help them achieve their full potential. The Scottish Government's priority is to ensure that the best interests of each child are met. Each child has different needs and it is vital that they are placed with adopters who can meet these needs. Although there are many children in Scotland looking for an adoptive family, there are also children in other countries for whom intercountry adoption may be their only opportunity to belong to a permanent family. The Scottish Government, in accordance with its international obligations, allows intercountry adoption to take place where:

- the child cannot be cared for in any suitable manner in his/her country;
- the adoption would be in the interests of the child and with respect to the child's fundamental rights as recognised in international law; and
- the prospective adopter has been approved as suitable to adopt a child habitually resident outside the British Islands by an adoption agency (a local authority or a registered adoption service registered by the Scottish Commission for the Regulation of Care and whose registration includes intercountry adoption).

8. The 2009 Regulations underpin a number of policy objectives. These are to:-
- establish safeguards to ensure intercountry adoption takes place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
 - ensure prospective intercountry adopters have been assessed and approved in accordance with the appropriate procedures; and
 - enable the UK to continue to meet its duties under international law

Consultation

9. Draft Regulations were published on the Consultations section of the Scottish Government web site. This consultation was supplemented by discussions with the Association of Directors of Social Work's Adoption and Fostering Sub-Group and the Scottish Committee of the British Association for Adoption and Fostering. Responses were in broad agreement with the principles of the Regulations however, as a result of comments included in those responses, some technical changes were made to the Regulations to clarify their intent.

Financial Effects

10. The instrument has no significant effect on the Scottish Government, local authorities or on the voluntary sector as its provisions codify current procedures. The 2007 Act removes the exemption of parents, guardians and relatives of the child from the need to undergo a 'homestudy' in terms of the 2001 Regulations when bringing a child into the country for the purpose of adoption. This is unlikely to affect more than a handful of cases each year so the additional costs on adoption agencies will be negligible. The existing arrangements whereby agencies may charge prospective adopters reasonable fees for assessment will remain unchanged.

11. A Regulatory Impact Assessment has not been submitted with the instrument as it is considered that the instrument will have no impact on business.

Children, Young People and Social Care Directorate