

## **EXPLANTORY MEMORANDUM TO**

### **THE ADOPTIONS WITH A FOREIGN ELEMENT (AMENDMENT) REGULATIONS 2009**

**2009 No.2563**

1. This explanatory memorandum has been prepared by the Department for Children, Schools and Families (“the Department”) and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

#### **2. Purpose of the instrument**

- 2.1 These Regulations amend the Adoptions with a Foreign Element Regulations 2005, S.I 2005/392, (“the Principal Regulations”). The amendments relate to the adoption by prospective adoptive parents (PAs) of a child from outside of the British Islands in accordance with the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 (“the Convention”).
- 2.2 The purpose of the amendment is to remove the requirement for the PAs to meet the child before the relevant Central Authority (the Secretary of State in relation to England and the Welsh Ministers in relation to Wales) can agree with the Central Authority in the child’s State of Origin that the adoption may proceed under Article 17(c) of the Convention (see below). This will enable the relevant Central Authority to make an Article17(c) agreement before the PAs travel to the State of Origin of the child.

#### **3. Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 None

#### **4. Legislative Context**

- 4.1 These Regulations are made under section 1(1) and (3) of the Adoption (Intercountry Aspects) Act 1999 which enables the Secretary of State to make provision giving effect to the Convention.
- 4.2 Chapter 1 of Part 3 of the Principal Regulations sets out the procedures to be followed where a couple or a person who is habitually resident in the British Islands wish to adopt a child who is habitually resident in a Convention country outside the British Islands in accordance with the Convention.
- 4.3 Regulation 19 of the Principal Regulations sets out the procedure to be

followed at the stage where information relating to the child to be adopted has been received from the Central Authority of the child's State of Origin (in accordance with Article 16 of the Convention). The adoption agency is required to notify the relevant Central Authority that it has met the PAs to discuss the Article 16 information and that the PAs have provided written confirmation that they have visited the child and wish to proceed with the adoption. Once the Central Authority has received such notification, it has to notify the Central Authority in the child's State of Origin that it is prepared to agree that adoption may proceed (under article 17(c) of the Convention).

- 4.4 Article 17(c) of the Convention provides that any decision in the child's State of origin that a child should be entrusted to PAs may only be made if the Central Authorities of both States have agreed that the adoption may proceed. The Convention does not provide that the PAs must meet the child before agreement under Article 17(c) can be made.
- 4.5 These Regulations remove the requirement in the Principal Regulations for the adoption agency to notify the Central Authority that the PAs have met the child before the Central Authority can enter into an Article 17(c) agreement.

## **5. Territorial Extent and Application**

- 5.1 This instrument applies to England and Wales only.

## **6. European Convention on Human Rights**

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

## **7. Policy Background**

- 7.1 The purpose of the Convention is to provide a common framework for intercountry adoption which ensures that adoptions take place in the best interests of the child and guards against the abduction, sale of, or traffic in children.
- 7.2 Articles 14 to 22 of the Convention set out the procedural requirements where prospective adopters who are habitually resident in one Contracting State wish to adopt a child who is habitually resident in another. These procedural requirements are given effect to in the law of England and Wales by the Principal Regulations.
- 7.3 The Convention itself does not require the PAs to meet the child before the Article 17(c) agreement is made. However this requirement in the Principal Regulations was intended to provide safeguards for both the child and the PAs by encouraging a gradual introduction of the child to the PAs, reflecting as far as possible domestic adoption procedures. However, the Department is aware that in practice this requirement may not in fact be supporting that aim.

- 7.4 In some cases it has the effect of forcing the adoption out of the Convention procedures. This is because in some countries the child is handed over and “entrusted” to the PAs before the relevant Central Authority in England or Wales as the case may be is able to issue a letter to the child’s State of Origin indicating agreement under Article 17(c). Article 17 of the Convention makes it clear that the child cannot be entrusted prior to agreement between the two Central Authorities that the adoption may proceed.
- 7.5 Furthermore, the Department does not think that the amendments made by this instrument will result in lesser safeguards for the child: the assessment process for the PAs remains unchanged and PAs are not obliged to proceed with the adoption if, on meeting the child, the match is unsuccessful. In addition, the Department intends to amend guidance to adoption agencies to encourage them to continue with the current practice which is that the PAs visit the child first, then come away to consider and discuss with them, before proceeding.
- 7.6 Agreement under Article 17c recognises that both the State of origin and the UK as Receiving state have completed all stages of the adoption process and thus the way is clear for the adoption to proceed. However, it does not require that the adoption *must* proceed. This proposed amendment is therefore not intended to make any fundamental changes to the overall process, but rather to facilitate the exchange of the Article 17(c) agreement earlier in the adoption process, which in some cases will be prior to the PAs meeting the child, to avoid adoptions falling out of the Convention.
- 7.7 These Regulations also make a minor amendment to regulation 20(3) of the Principal Regulations to make it clear that where the PAs do not wish to proceed with the adoption at any stage before a Convention adoption order is made and the child has entered the United Kingdom, they must notify their UK adoption agency, who must in turn inform the relevant Central Authority.

## **8. Consultation Outcome**

- 8.1 The Department has consulted 2 key stakeholders (British Association for Adoption and Fostering and the Intercountry Adoption Centre) on the amendments made by this instrument, and has taken advice from 4 other Convention countries on the point at which they issue the Article 17(c) agreement letter.
- 8.2 Both stakeholders support this change. The Intercountry Adoption Centre, which has extensive experience in intercountry adoption, advises that this would reduce delays for the child and generally result in better introduction and placement practices. They advise that PAs would be in a position to care for the child from the moment of introduction in familiar surroundings as part of properly supervised introductions, as would happen in domestic adoption practice, without fear of contravening the Principal Regulations and thereby jeopardising

the possibility of securing a Convention adoption for the child. Both stakeholders fully support a change that reduces the risk of an adoption falling out of the Convention.

- 8.3 The Department has not carried out a full public consultation as intercountry adoption is a very small and specialised field.
- 8.4 The Department acknowledges that these Regulations are being laid during recess and would not ordinarily seek to do so. However, this matter has now become very urgent in relation to adoptions from China, which represent over half of our intercountry adoptions overall. We have been involved in negotiations with China since 2006 in relation to our procedures but they have very recently indicated that they are not prepared to allow any further adoptions to the UK unless we agree to make the Article 17(c) agreement prior to the PAs travelling to China to meet the child, bringing our procedures in line with the other 14 countries with which it permits intercountry adoptions.
- 8.5 We are seeking to introduce the change as soon as possible in order for adoptions from China to be able to continue: we anticipate about 100 adoptions both this year and next, based on the number of applications already with China and the time taken for matches between PAs and children to be made (currently 3-4 years on average).

## **9. Guidance**

- 9.1 A letter will be sent to all adoption agencies in England and Wales that deal with Intercountry adoptions setting out what they will need to do to prepare for implementation of this change.
- 9.2 Current administrative instructions will be amended to reflect this change.
- 9.3 We currently write to all PAs setting out the Convention procedures and the requirements relating to entrustment. For all future adoptions, we will write to each PA and adoption agency at the appropriate stage reminding them about the regulation change and that we still expect them to continue with the current practice of notifying the UKAA once they have met the child and that they wish to proceed with the adoption.

## **10. Impact**

- 10.1 The impact on the public sector of this change is minimal: some local authorities, in their capacity as an adoption agency, process intercountry adoption applications, but most applications are processed by non-profit making voluntary adoption agencies.
- 10.2 An impact assessment has not been prepared for the instrument because the impact will be minimal.

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

## **12 Monitoring and Review**

12.1 Regular contact is maintained with key stakeholders representing PAs and Adoption Agencies, providing opportunity for any issues to be raised about the new arrangements.

## **13 Contact**

13.1 Mary Lucking at the Department for Children, Schools and Families, Tel: 0207 783 8557 or email [mary.lucking@dcf.gov.uk](mailto:mary.lucking@dcf.gov.uk) can answer any queries regarding the instrument.

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