

*For guidance on adoption law, please see the JSB's 'Adoption and Children Act 2002: The law and procedure' by Judge Heather Swindells QC and Mr Justice McFarlane.*

## **9. ADOPTION (INTERCOUNTRY ASPECTS) ACT 1999**

### **9.1 Introduction**

Inter country adoption began as an altruistic response towards orphans and the abandoned children of servicemen in World War II, the Korean War and the Vietnam War. It developed because of the decline in babies available for adoption in receiving countries, the abandonment and institutionalisation of children due to extreme poverty in countries of origin, increased awareness that children overseas could be adopted, and the growth of intermediaries and agencies willing to arrange such adoptions. Now over 30,000 children from 50 countries are adopted outside their countries of origin each year with the USA being the main receiving country. The main countries of origin are Russia, China Vietnam, Columbia and Guatemala.

The revolution in Romania in December 1989 led to an increase in the number of such adoptions in the United Kingdom. Nevertheless, the numbers remain comparatively low with about 300 such orders being made each year.

### **9.2 Background to the act**

Official attitudes to intercountry adoption have been largely negative or neutral in the UK. There is no official programme bringing children into the country for adoption, and until 1998 some local authorities refused to assess would-be adopters. Unlike other adoptions of unrelated children in the UK, intercountry adoptions are not arranged through regulated or registered adoption agencies, the main focus of which appears to be on developing adoption for older British children with transracial or transcultural, concerns about their welfare being to the fore. As the Explanatory Notes to the Act makes clear, the complexities of procedures for intercountry adoption and the lack of sources of information about them meant that in about one quarter of all cases formal procedures were not followed which in turn gave rise to concerns for the welfare of children passing through the system.

The Home Office has been concerned that adoption should not be used as a mechanism for avoiding immigration control. Its response has been to restrict entry for settlement to children whose foreign adoption is recognised and to children who are to be adopted in the UK. Also, the adoption must be due to the inability of the birth parents to care for the child and there must be a genuine transfer of responsibility to the adoptive parents.

Adoption practices have tended to focus on the requirements of adults, rather than the needs of children (who are often removed from their culture and possibly exposed to racial abuse). Further, abuses such as abandonment, child sale and kidnapping are not uncommon and these have led a number of countries to declare a moratorium on intercountry adoptions. DNA tests are used in some cases to ensure that the person giving consent to the adoption is the child's mother.

For these reasons the UN Convention on the Rights of the Child states that intercountry adoption may be considered as an 'alternative means of care' if the child cannot be cared for 'in any suitable manner' in the country of origin. In the UK the lack of agency control has meant that adopters have not been subject to as rigorous assessment as those adopting domestically. A recent UNICEF report highlights the fact that adopters have also been exploited by unscrupulous intermediaries who charge high fees to facilitate adoptions overseas. The government has sought to ensure that the same principles and safeguards apply as in domestic adoptions, but in practice there has been a two-tier system with lower standards and ineffective controls against abuses in intercountry adoption.

### 9.3 The Hague Convention on Protection of Children

#### 9.4 Inception

By 1988 the Permanent Commission of the Hague Conference on Private International Law became so concerned about the increasing number of intercountry adoptions, allied to the general inadequacy of domestic legislation to control them and the need to involve the authorities in countries of origin as well as destination, that a Special Commission was established. Its task was to develop a new international convention on intercountry adoption to provide a coherent framework. There was a perceived need to establish legally binding standards and a system of supervision to ensure that these were observed. The meetings of the Special Commission involved 33 States which were Members of the Hague Conference and 24 non-member States as well as a large number of NGOs concerned with adoption and child welfare. The Convention was completed in 1993 and came into force in 1995. It has been ratified or acceded to by over 50 countries, including both sending and receiving countries. The three countries with the most intercountry adoptions, the USA, China and Russia, have indicated their interest in implementing the Convention.

#### 9.5 Objectives

The three objectives of the Convention are:

- to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child;
- to establish a system of co-operation between countries in order to prevent abduction, sale and trafficking in children; and
- to secure the recognition of adoptions made under the Convention.

The intended effects of the Convention are:

- to raise standards and eliminate abuses;
- to ensure that adoptions which follow the Convention's procedures will be more child-centred, simpler for prospective adopters and of certain effect.

These advantages should make Convention adoptions more attractive and discourage intending adopters from seeking children in jurisdictions where procedures remain unregulated.

## 9.6 Application

### Article 2

The Convention applies where a child who is habitually resident in one Contracting State is moved for or after adoption by a person who is habitually resident in another Contracting State.

### Articles 4 and 5

- Adoptions can only take place after the competent authorities in the child's State have established that the child is 'adoptable' and those in the prospective adopter's State have established that they are eligible and suitable to adopt.
- A child is only 'adoptable' if adoption overseas is in his or her best interests, the required informed consents have been given freely and without inducements, and consideration has been given to the child's wishes and opinions.
- The Receiving State must also have determined that the child will be able to enter and reside there.

### Articles 6 and 7

- Contracting States must designate a Central Authority to discharge the duties under the Convention.
- These include promoting co-operation over intercountry adoption internally, providing information to other Central Authorities and the Permanent Bureau about the law in their country, and eliminating obstacles to the operation of the Convention.

### Articles 8 and 9

- Central Authorities may delegate to other public authorities or accredited bodies duties in respect of individual adoptions such as the collection and exchange of information about the child and the applicants, and measures to prevent abuses of adoption practice.

### Article 22

- Individual intermediaries are permitted to undertake some of the functions of Central Authorities where the domestic law of the country allows this.

- An individual State can declare that it will not allow children habitually resident there to be adopted through such arrangements, and the formal reports on eligibility and adoptability remain the responsibility of Central Authorities or other official bodies.
- In the absence of such a declaration the State will accept private arrangements (Article 22(1)(5)).

### 9.7 Procedure

- Prospective adopters must apply for intercountry adoption via the Central Authority in their State of habitual residence.
- A 'homestudy' report must be prepared on the applicants, their background, reasons for adopting and the children for whom they are qualified to care.
- This is transmitted to the child's State where a comparable report is prepared on the child.
- This is forwarded to the Central Authority in the applicants' State together with proof of the required consents.
- Article 29 forbids any contact between the applicants and the child's parents or carer until after their consent has been given, the child's adoptability has been established and the applicants have been found eligible and suitable to adopt.
- Articles 14-17 provide that the adoption can only progress if the prospective adopters accept the selected child and both Central Authorities agree.
- The adoption order can either be made in the child's or the applicant's State.
- By Article 21, if the child enters the applicants' State before the adoption order is made and the placement breaks down, the Central Authority there must protect the child, consult with the Central Authority child's State of origin about alternative placements and, as a last resort, return the child to it.
- Breakdown following adoption is governed by the domestic law of the adopter's State.
- An adoption made under the Convention is recognised in all other Convention countries. By Article 24, recognition may only be refused if the adoption is 'manifestly contrary to public policy, taking into account the welfare of the child.'
- By Article 33 'improper financial or other gain' from intercountry adoption activities is forbidden (and by Article 8 the Central Authorities have a responsibility to prevent this). Reasonable costs and expenses are, however, permitted.

It is too soon to judge whether the Convention will successfully regulate intercountry adoption and improve practice. There are currently wide variations in practice; some States have large numbers of accredited agencies and operate few controls on them, in others

arrangements are closely supervised by the Central Authority or a well-established agency. A large number of children are adopted from non-Convention countries. The fact that applicants remain willing to adopt from countries with poor standards creates 'a market for children' in those States and undermines the work of the Convention. Concerns about abuses in Guatemala led UNICEF to propose that Convention countries should suspend all intercountry adoptions from there but there is no power in the Convention to do this. The Special Commission agreed that States should seek to apply the same safeguards in arrangements with non-Convention countries and encourage such States to join the Convention.

### 9.8 UK legislation

The Adoption (Intercountry Aspects) Act 1999 was passed to give effect to the Hague Convention in England, Wales and Scotland. Schedule 1 of the Act contains the text of the Convention.

Most of its provisions were incorporated into the Adoption and Children Act 2002 (ACA 2002) and only sections 1, 2, 7 and Schedule 1 will remain in force following the Commencement Date of the 2002 Act. Until that time reference should be made to the 1999 Act.

### 9.9 Restrictions and offences

In all cases the same process, based on that operated by the Department of Health for many years, is used for determining the eligibility and suitability of the applicants and regulating entry to the country for or after adoption.

By section 83(7) and (8) of that Act, a person who brings a child to the UK without previously obtaining notification of approval from the Department of Health commits an offence punishable on summary conviction by a term of imprisonment not exceeding six months or a fine up to the statutory maximum (or both). Conviction on indictment may lead to a sentence of imprisonment of up to 12 months, or a fine, or both.

Only adoption agencies may make arrangements for adoption. By sections 92-94 ACA 2002 a person who undertakes an assessment, or arranges a placement commits an offence. Section 92 sets out a wide variety of circumstances covered by the prohibition including:

- a) asking a person other than an adoption agency to provide a child for adoption or to provide prospective adopters;
- b) offering to find a child for adoption;
- c) offering a child for adoption to a person other than an adoption agency;
- d) handing a child to a person other than an adoption agency with a view to that person or another person adopting the child;
- e) receiving a child handed over with a view to the child being adopted by that or another person;

- f) agreeing with another person that a child should be adopted, or facilitating adoption, where no adoption agency is involved;
- g) initiating or taking part in negotiations where the purpose is the conclusion of an agreement re adoption;
- h) causing any other person to do any of the above steps.

Of the above list, no offence is committed under d), e), g), h) or i) if the prospective adopters (or one of them) are parents, relatives or guardians of the child or the prospective adopter is the partner or parent of the child.

By section 93 ACA 2002 a person guilty of an offence under the section is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding £10,000 or both (section 92(5)). Defences are given requiring knowledge or reason to suspect that the step taken would contravene the restrictions in section 92 – see section 93(2) and (3).

### 9.10 Processing the application

By regulation 3 Adoption of Children From Overseas Regulations 2001 (SI 2001 no. 1251) (or the Welsh equivalent) intending adopters must be assessed and approved by a local authority or voluntary adoption agency. Currently, only two agencies provide this service in England, namely, parents and Children Together and the Doncaster Adoption and Family Welfare Society. By section 94(1) ACA 2002 'home studies' provided by independent social workers cannot be used.

Applicants are approved to adopt from a specific country. If they wish to adopt from elsewhere they must demonstrate that they fully understand the cultural and other needs of a child from that country and obtain a new approval from the agency (*Intercountry Adoption Guide* (2001) DH, para 6.6). The process of approval involves counselling and assessment, referral to the agency's adoption panel for a recommendation and notification of the applicants.

Where the applicant are approved the agency notifies the Secretary of State who decides whether to endorse the application. In Wales these functions are devolved to the National Assembly. Adoption specialists in the Department of Health review the reports provided by the agency, if they are satisfied a Certificate of Eligibility is issued and forwarded to the relevant body in the applicant's chosen country (*Intercountry Adoption Guide* (2001) DH, paras 5.3-5.6).

Judicial review is not available where the applicants are rejected by the Department acting on professional advice (*R v Secretary of State for Health ex p Luff* [1992] 1 FLR 59).

### 9.11 Finding a child

There is no single process for finding a suitable child. Applicants may use the services of an overseas agency or an intermediary and in some countries it remains possible to identify a child directly through an orphanage.

Section 123 ACA 2002 imposes restrictions on advertising adoption. These cannot prevent intending adopters from locating children via internet advertisements if these are not held by an internet service provider in the UK. The Kilshaws identified the twins through an advert placed by an overseas agency: see *Flintshire CC v K.* [2001] 2 FLR 476, FD.

When a child has been matched with the applicants they are informed and must decide whether or not to accept. If they do they must arrange to travel to the child's country and continue the process there. They must obtain entry clearance to bring the child to the UK. Before granting this, the immigration officer checks with the Department of Health that the required procedures have been followed and either a recognised adoption order has been obtained or that it is likely that a court in England will grant the order. (*Intercountry Adoption Guide* (2001) DH, paras 5.7-5.15).

Where the child has not been adopted, the applicants must complete the process by adopting here. Even where an order has been obtained some countries require further reports on the child's welfare.

Depending on the country of origin of the child, one of three separate regimes (termed 'Convention Adoptions', 'Designated Country Adoptions' and 'Non-Convention Adoptions') will apply to intercountry adoptions in the UK.

### 9.12 Convention adoptions

The Central Authority for England is the Secretary of State for Health; communications can be sent to the Department of Health in relation to any part of Great Britain - Adoption (Intercountry Aspects) Act 1999, s.2(1),(2). In Wales, the National Assembly for Wales performs these functions and in Scotland, the Secretary of State within the Scottish Executive.

Adoption societies whose approval covers intercountry adoption are accredited bodies but local authorities, as public authorities with responsibility to provide adoption services, will deal with the majority of cases - Adoption (Intercountry Aspects) Act 1999, s. 2(3) and (4); Adoption and Children Act 2002, ss. 2(8) and 3.

Detailed provisions defining 'Convention adoption orders' and setting out the conditions which must be satisfied before such an order can be made are provided by regulations to be made under the 1999 Act.

Where at least one of the adopters is a British citizen, a 'Convention adoption' (i.e. an adoption order made in a Convention Country outside the British Isles) gives the child British citizenship and there are no restrictions on the adopters bringing the child to the UK - Adoption (Intercountry Aspects) Act 1999, s.7 amending British Nationality Act 1981, s.1. Similarly, prospective adopters may bring a child from a Convention country to the UK for adoption, providing that they have followed the required procedures in the UK and completed the necessary stages in the child's home State (to be set out in Regulations made under the 1999 Act).

The High Court has power to annul adoptions made under the Convention which are contrary to public policy - Adoption and Children Act 2002, s. 89(1) implementing art. 24. Similarly, a Convention adoption can be annulled by the State which made it, s.91.

### 9.13 Designated country adoptions

Where a child is adopted overseas in a country listed in the Adoption (Designation of Overseas Adoptions) Order 1973 (1973 SI No 19) the order is recognised as an adoption order in the UK so long as it is valid in the country where it was made.

The adoption is an 'overseas adoption' - Adoption and Children Act 2002, s. 87(1), (2)(b).

Designated countries include many but not all Commonwealth Countries, members of the European Union and some other European Countries, the U.S.A. and China.

Inclusion in the list does not indicate that the country applies similar standards to those in the UK or that there is a bilateral agreement with the UK relating to intercountry adoption.

The list will be revised following the implementation of the Hague Convention (ACA 2002 Explanatory Notes para 10). Countries will only appear on the new list if their adoption practices meet specific requirements, Jacqui Smith, Hansard, Commons, May 20, 2002, Vol. 386, col. 25, Adoption and Children Bill, Report Stage.

The applicants do not need to re-adopt the child but must have complied with the formal procedures set out in regulations, unless the adoption was completed more than six months before the entry to the UK - Adoption and Children Act 2002, s. 83(1)(b), (3).

### 9.14 Non Convention adoptions

Where the child has not been adopted in either a Convention or Designated country an adoption order must be obtained from a court in the UK. The applicants must notify their local authority of their intention to adopt within 14 days of entering the UK - Adoption of Children from Overseas Regulations 2001, 2001 S.I. No 1251, reg. 3(3). It is an offence to fail to do so, s.83(7). Until the notification is made the child is a private foster child - Children Act 1919 Part X.

The local authority must investigate and prepare a report for the court - ACA 2002 section 44(5). No application can be made until the child has had his home with the applicants for the required period. By section 42(5) ACA 2002, in non agency, non-step-parent cases and where the applicants are not local authority foster parents the probationary period is three years. The requirements in chapter 3 of the Act may be modified for overseas adoptions. The government proposes that the probationary period should be six months where applicants have complied with the proper procedures and 12 months in other cases (Jacqui Smith, Hansard, *Commons*, May 20, 2002 Vol. 386, col. 23, Adoption and Children Bill, Report Stage).

The order can only be made if the court is satisfied that the local authority has had sufficient opportunities to see the child with the applicants - ACA 2002 section 42(7). These provisions are intended to ensure local authorities are aware of children brought in for adoption. Prior to their introduction the courts could be faced with applications from unsuitable people with established relationships with the child so that there was no alternative to granting an adoption order.

### 9.15 Miscellaneous

A copy of the Court Service Guide Adoption (Intercountry Aspects) Act 1999 - *A Guide for the User* may be obtained from [www.courtservice.gov.uk](http://www.courtservice.gov.uk).

Readers are also referred to the Intercountry Adoption Supplement dated January 2003 containing Guidance issued by the President of the Family Division revising that contained in the October 2001 publication *Adoption Proceedings - A New Approach*. From this document it may be seen that by reason of the more specialised nature of intercountry adoption proceedings, certain courts are designated as intercountry adoption centres with the other adoption centres transferring cases into them. Outside London, there are 12 designated county courts. In London, the High Court and PRFD are designated. This is an initial position and may change as experience builds of numbers of cases and the way in which the jurisdiction is exercised

All intercountry adoption proceedings should be listed before a High Court judge or a circuit judge who is an adoption judge and who is authorised by the Family Division Liaison Judge to hear intercountry adoption proceedings.

The proceedings are to be heard either at an intercountry adoption centre or at a court at which a High Court judge sits from time to time.

Directions hearings may be listed before a district judge at an intercountry adoption centre under arrangements made by the local circuit judge in charge of adoption in liaison with the Family Division Liaison Judge.