

These notes refer to the Adoption and Children Act (Northern Ireland) 2022 (c.18) which received Royal Assent on 27 April 2022

Adoption and Children Act (Northern Ireland) 2022

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 - Adoption

Chapter 6 - Adoptions with a Foreign Element

The provisions in this Chapter incorporate many of the measures of the Adoption (Intercountry Aspects) Act (Northern Ireland) 2001 (“the 2001 Act”) and extend those measures with new safeguards and penalties.

The 2001 Act amended the Adoption (Northern Ireland) Order 1987, making provision to regulate intercountry adoption. The Act (together with equivalent Great Britain legislation) enabled the United Kingdom to ratify the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption and introduced sanctions against those failing to follow the proper procedures for bringing children into the United Kingdom. The 2001 Act also clarifies that Trusts 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.

The 2001 Act will largely be repealed when this Act is implemented, as the majority of the provisions amended the Adoption (Northern Ireland) Order 1987 and have been incorporated into this Act. Section 1 (power to make regulations giving effect to the Convention), section 2 (Central Authorities and accredited bodies) and Schedule 1 (which sets out the text of the Convention so far as material) of the 2001 Act will remain. Section 159(1) defines a Convention adoption order as an adoption order which is made by virtue of regulations under section 1 of the Adoption (Intercountry Aspects) Act (Northern Ireland) 2001. The regulations which are to be made under section 1 of the 2001 Act will apply, with or without modification, to 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 United Kingdom, the Channel Islands or the Isle of Man are recognised, see section 65(1).

Section 82: Restriction on bringing children in

Section 82 imposes restrictions on British residents bringing or causing someone else to bring a child who is habitually resident outside the United Kingdom, any of the Channel Islands or Isle of Man 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 they have adopted within the last twelve months into the United Kingdom, unless they comply with prescribed requirements and meets prescribed conditions.

It is intended that regulations will require the British resident to be assessed and approved as suitable to adopt by an adoption agency, including a Great Britain adoption agency, prior to bringing a child into the United Kingdom (*subsection (4)*).

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.

Regulations may be made to apply any provision of Chapter 3 of this Act which refers to adoption orders with or without modifications (*subsection (6)*) and that if a notice of intention to adopt has been given, the regulations may impose functions in respect of the child on the authority to which the notice was given.

A person guilty of an offence under section 82 will 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 being convicted on indictment, to up to twelve months' imprisonment or a fine, or both (*subsections (7) and (8)*).

Section 83: Giving parental responsibility prior to adoption abroad

Section 83 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 Northern Ireland but who intend to adopt the child outside the United Kingdom, the Channel Islands or the Isle of Man. 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 Northern Ireland. 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 84: Restriction on taking children out

Section 84 imposes restrictions on taking children, who are Commonwealth citizens or habitually resident in the United Kingdom, from the United Kingdom to a place outside the United Kingdom, any of the Channel Islands, and the Isle of Man for the purpose of adoption. It is an offence unless the proposed adopters have obtained an order under section 83 or the child is removed under the authority of an order under section 59 of the Adoption and Children (Scotland) Act 2007 or section 84 of the Adoption and Children Act 2002. A person will 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 conviction on indictment, to up to twelve months' imprisonment or an unlimited fine, or both.

Section 85: Power to modify sections 82 and 84

Subsection (1) provides a power to provide by regulations that section 82 does not apply if the adopters or prospective adopters are natural parents, natural relatives or guardians or if the British resident in question is 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 82. Different provision can be made in relation to different cases.

Subsection (2) provides a power to provide that section 84(1) applies with modifications or does not apply if the prospective adopters are parents, relatives or guardians of the child (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 84 or for section 84 to be modified in relation to that group. Different provision can also be made in relation to different cases.

Section 86: Declaration of special restrictions on adoptions from abroad

Section 86 makes provision regarding the restriction of intercountry adoptions from countries where the Department has determined that it would be contrary to public policy to further the bringing of children into the United Kingdom by British residents in the cases specified in *subsection (2)*. The provisions apply equally to adoptions from countries that are signatories to the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, concluded at The Hague on 29th May 1993, and those that are not.

Subsection (2) provides that the cases to which the section applies are, under paragraph (a), where a British resident wishes to bring or cause another person to bring a child who is not a British resident into the United Kingdom for the purposes of adoption by the British resident and there have been, or would have to be, some proceedings in the country that has given rise to the concern or dealings with authorities or agencies there; and, under paragraph (b), where a British resident wishes to bring or to cause another to bring a child into the United Kingdom having adopted the child abroad within 12 months of the

date on which they bring the child in. The term British resident is defined in *subsection (8)*.

Subsection (3) provides that the suspension is achieved through a declaration made by order by the Department that ‘special restrictions’ are to apply in relation to bringing children into the United Kingdom in the cases specified in *subsection (2)*. The Department must publish the reasons for making the declaration in relation to each restricted country (*subsection (5)*) and must publish a list of restricted countries, the ‘restricted list’, which it must keep up to date (*subsection (6)*). *Subsection (7)* requires publication of both the restricted list and the reasons in whatever way the Department thinks appropriate for bringing them to the attention of adoption agencies and members of the public.

Section 87: Review

Subsection (1) requires the Department to keep the restricted list under review. If the Department no longer has reason to believe that it would be contrary to public policy to further the bringing of children into the United Kingdom from a restricted country, the Department is required to revoke the order containing the declaration made in relation to that country (*subsection (2)*).

Section 88: The special restrictions

Section 88 makes provision for the special restrictions that may be applied by virtue of section 86. *Subsection (1)* provides that the Department is not to take any step which it may otherwise have taken to further the bringing of a child into the United Kingdom in the cases specified in section 86(2).

The effect of the restrictions is that the Department would no longer process intercountry adoption cases from the restricted country. The steps referred to would include, for example, the issuing of a certificate of eligibility to adopt and the forwarding of matching reports from the child’s country of origin to the prospective adopters by those acting on behalf of the Department.

Subsection (2) also provides, however, for adoptions to be permitted to continue in exceptional cases, that is, cases where the prospective adopters or adopters are able to satisfy the Department that the adoption should proceed. *Subsection (3)* allows regulations to provide for the procedure to be followed by the Department in the consideration of exceptional cases and a non-exhaustive list of matters that must be taken into account.

Cause 89: Imposition of extra conditions in certain cases

Subsection (1)(a) allows regulations to be made by the Department to set out additional steps agreed between the United Kingdom and a restricted country that the Department normally takes in connection with bringing a child from the restricted country into the United Kingdom, and are not otherwise provided for by any statutory provision, to be specified in the restricted list in relation to that country. *Subsection (1)(b)* states that, where a step has been specified under *subsection (1)(a)*, one or more conditions set out in the regulations must

be met in connection with a British resident bringing a child from the relevant restricted country into the United Kingdom in either of the cases specified in section 86(2). *Subsection (2)* clarifies that such conditions are in addition to any conditions provided for by section 82 of the Act or any other statutory provision.

Subsection (3) provides that a person who brings, or causes another to bring, a child into the United Kingdom is guilty of an offence, if any condition required to be met by virtue of subsection (1)(b) is not met. If the step specified in the regulations has already been taken before the country was added to the restricted list, no offence would be committed (*subsection (4)*). 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 conviction on indictment, to up to twelve months' imprisonment or a fine, or both (*subsection(5)*).

Section 90: Overseas adoptions

Section 90 provides that for the purposes of the Act and the Adoption (Northern Ireland) Order 1987, overseas adoptions are those which are specified by regulations made by the Department describing adoptions effected under the law of any country or territory outside the United Kingdom, the Channel Islands and the Isle of Man, and are not Convention adoptions (*subsection (1)*). *Subsection (2)* provides that regulations may prescribe the requirements that ought to be met by an adoption of any description effected after the commencement of the regulations for it to be an overseas adoption for the purposes of this Act. The regulations may contain provision as to the manner in which evidence of any overseas adoption may be given (*subsection (5)*). *Subsection (3)* imposes a duty on the Department to exercise its powers to make an order so as to secure that adoptions made after that date are not overseas adoptions if it considers that they are not likely within a reasonable time to meet the requirements prescribed by regulations.

Section 91: Modification of section 66 for Hague Convention adoptions

Section 91 provides that where the High Court, on an application, is satisfied that each of the conditions set out in *subsection (2)* are met in the case of a Convention adoption, it may direct that section 66(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 or her birth parents. A child adopted in Northern Ireland 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.

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 Northern Ireland, the Department will ensure that in all cases the birth parents are informed of the effects of a simple adoption in Northern Ireland and seek to obtain their consent to a full adoption prior to a Convention adoption being made in a country outside the United Kingdom, Channel Islands or Isle of Man or a Convention adoption order being made here. Where the receiving State is not Northern Ireland, 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 92: Annulment etc. of overseas or Hague Convention adoptions

Section 92 provides for the High Court to annul a Convention adoption or a Convention adoption order on the ground that the adoption is contrary to public policy. Where an overseas adoption or a determination under section 94 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 93: Section 92: supplementary

Section 93 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 manner and within any period as prescribed in rules of court (*subsection (1)*), that the adopted person or adopter(s) must have been habitually resident in Northern Ireland 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 94: Overseas determinations and orders

Section 94 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 92 and any subsequent determination.

Section 95: Power to charge

Section 95 provides the Department with the power to charge a fee to adopters or prospective adopters for services provided or to be provided by the Department in relation to intercountry adoptions (*subsection (2)*). The Department may determine how much to charge, and may, in particular, charge a single flat fee or set different fees for different cases (*subsection (3)*), providing the fee income received, taking one financial year with another, is not greater than the cost of providing the services (*subsection (4)*). Subsection (3) also provides the Department with discretion to waive the fee in any given case.