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A new Order--better late than never?

Family analysis: Has the government made it easier for overseas adoptions to be recognised? Ruth Cabeza, specialist family barrister at Field Court Chambers, explores the challenges in this area where family and immigration law collide.

Original news

Adoption (Recognition of Overseas Adoptions) Order 2013, SI 2013/1801

The countries and territories whose adoption orders are recognised under the Adoption and Children Act 2002 (ACA 2002) are listed in this Order. Adoptions made under those countries' and territories' orders will be recognised in England and Wales and the child will be treated as the child of the adoptive parents/guardians. This will come into force on 3 January 2014.

What are the differences between the current and new provisions?

The old list, originally drawn in 1973 was based on Commonwealth countries, with some other countries, mostly in the EU, included as well. The new list is a mirror of the Hague Convention and this, in turn, is consistent with ACA 2002, s 91 which gives a statutory basis for the recognition of adoptions which have taken place in Hague Convention countries.

ACA 2002, s 91 states:

'(1) Subsection (2) applies where any authority of a Convention country (other than the United Kingdom) or of the Channel Islands, the Isle of Man or any British overseas territory has power under the law of that country or territory--

(a) to authorise, or review the authorisation of, an adoption order made in that country or territory, or

(b) to give or review a decision revoking or annulling such an order or a Convention adoption.

(2) If the authority makes a determination in the exercise of that power, the determination is to have effect for the purpose of effecting, confirming or terminating the adoption in question or, as the case may be, confirming its termination.'

(3) Subsection (2) is subject to section 89 and to any subsequent determination having effect under that subsection.'

It is of note that although Cambodia and Guatemala have ratified the Hague Convention, the Adoption (Recognition of Overseas Adoptions) Order 2013 does not include them. That is because there are statutory instruments that preclude the grant of adoption orders to children originating from those countries on the grounds of public policy.

What are the implications if a country is not on the list?

If a country is not on the list there are two options for the adopter:

- o to get the adoption recognised under the common law--although this would give the adoption recognition pursuant to ACA 2002, s 67, it would not automatically grant citizenship under the British Nationality Act 1981 (BNA 1981), or
- o if it is important (and it usually is) for the child to have an entitlement to British citizenship the better way forward is to seek an adoption in this country--there is Home Office guidance which

states that ordinarily the Secretary of State will refuse to grant citizenship under BNA 1981, s 3 to an adoption order made in a country not on the designated list

How does the procedure differ if a country is a signatory to the Hague Convention?

Under the Hague Convention, if the adopters live in different member states, it is a requirement that the adoption takes place in accordance with the terms of the Convention. A Convention adoption requires the cooperation of both member states in the assessment process and the agreement of both member states to the adoption proceeding. The receiving state in which the adopters live must assess the adopters and the state of origin where the child lives must assess the child. It is therefore not possible to have a domestic adoption in any Convention country unless both the child and the adopters are habitually resident within it. Equally, if the child and the adopters are habitually resident in the same Convention country, it is not possible for them to adopt under the Convention.

In a Convention case, if one of the adopters is a British citizen, the child is entitled to automatic British citizenship under BNA 1981, s 1. The designated list, as updated, treats the domestic adoption made in a country which is a member of the Convention as an overseas adoption order, and it confers the full adoptive status on the child under ACA 2002, s 67. An overseas adoption order does not grant automatic eligibility to citizenship, but, subject to the adopters satisfying the Home Office that they have acted in compliance with all the laws of both the state in which the adoption took place and this country, the guidance indicates that the Secretary of State would ordinarily exercise their discretion in favour of granting citizenship.

What evidence is required for an overseas adoption?

The same as before, there is no bar to any sort of evidence being produced but adoption certificates or copies of the adoption register will be taken as proof. Other evidence will be subject to evaluation by the court--the court would need to be satisfied that there was a good reason why the applicants were not in a position to adduce an adoption certificate or a copy of the adoption register

Should immigration or family lawyers who deal with overseas adoption work be doing anything now to prepare for the changes?

Not really, it is just important to know that the list has finally been updated some 11 years after the passing of ACA 2002 and nine years after ACA 2002 came into force. I really don't understand why there has been such a huge delay and the impact of the inconsistency caused by the old list and the provisions of ACA 2002, s 91 has not yet been tested as far as I am aware--although I do have a case where we will be seeking an adoption order made in a Hague Convention country, not on the Adoption (Designation of Overseas Adoptions) Order 1973, SI 1973/19, in circumstances where the Convention did not apply, to be recognised and for the child to be granted citizenship. There is a power to do this although the guidance as set out above states that ordinarily such applications will be refused. However, it seems to me that the only party who has done something wrong in that case is the government who have dragged their feet in giving full and consistent effect to the provisions of ACA 2002, s 91.

Interviewed by Guy Skelton.

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