

BRITISH ASSOCIATION FOR ADOPTION & FOSTERING

Briefing on new Clause 3 of the Children and Adoption Bill

1. Aim of the new clause

To give the High Court power, subject to safeguards, to facilitate the movement of a child from England and Wales to another country for the purpose of adoption, where the placement will promote the child's welfare.

2. Background

The Adoption and Children Act 2002, fully in force since 30 December 2005, made certain changes to the way intercountry adoption cases are dealt with. These affect not only the well publicised instances of children being brought into this country from overseas, but also the less well known movement in the other direction. It is, of course, entirely right that any such placements should be subject to close scrutiny to ensure that the child's welfare is safeguarded.

One of the safeguards in law for children who are to be adopted is that the court cannot make an adoption order (or in the case of children being taken overseas, an order authorising the proposed foreign adoption) unless it has received a report from an appropriately qualified and experienced social worker who has had the opportunity to observe the child and the prospective adopters together at home. The law prescribes certain minimum periods for which the child must have had his home with the prospective adopters before an application for an adoption order can be made.

In the case of prospective adopters who do not satisfy the requirements as to domicile or a period of habitual residence in this country which would enable them to make an application for an adoption order here, section 84 of the Adoption and Children Act 2002 empowers the High Court to make an order authorising such applicants to take abroad a child who is habitually resident in this country for the purposes of completing the adoption abroad. This applies whether or not the proposed adoption is to take place in a Convention country or not. Subsection 4 of section 84 provides that an application for a section 84 order may not be made unless "at all times during the preceding ten weeks the child's home was with the applicant or, in the case of an application by two people, both of them."

Section 85 of the Adoption and Children Act 2002 prohibits the removal of a child who is a Commonwealth citizen or habitually resident in the UK from the UK to a place outside the British Isles for the purpose of adoption unless an order has been made under section 84 (or the equivalent in Scotland and Northern Ireland). A person who does so remove a child or arranges to do so commits an offence.

3. Children going abroad for adoption

Although it is relatively rare for local authorities to wish to place a child overseas, the circumstances in which this most commonly arises would be those where a suitable relative of the child has been identified. Section 1 of the Adoption and Children Act 2002 provides that in making any decision about the adoption of a child, a court or adoption agency must regard the child's welfare as paramount consideration. The section also includes a checklist of factors that the court and agency must take into account. One of these (subsection (4)(f)) is "the relationship which the child has with relatives, and with any other person with whom the court or agency considers the relationship to be relevant, including (i) the likelihood of any such relationship continuing and the value to the child of its doing so, (ii) the ability and willingness of the child's relatives or of any such person to provide the child with a secure environment in which the child can develop and otherwise to meet the child's needs, (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child." Even before this provision was enacted, it was already regarded as good practice for local authorities to consider whether a child who could not be looked after by his or her birth parents, might be able to be placed with a member of the extended family. Where such a family member lives outside the country, if the proposed placement is for adoption, sections 84 and 85 will of course come into play. It will be necessary of course for an assessment of the relative's capacity to care to be undertaken but, where the placement does appear desirable, practical difficulties then arise because the child cannot be taken out of the country without an order under section 84, and the application for the section 84 order cannot be made until the child has already lived with the prospective adopter for at least ten weeks. For many if not most families, to arrange to spend what will probably be several months in this country in order to facilitate the obtaining of a section 84 order will simply not be possible. They are likely to have work commitments in their country of residence and may have other children in school, for example. The upshot of this is that in some cases it will prove impossible to achieve the placement of choice for the child.

4. What the new clause proposes

The new clause proposes a small amendment to section 84 of the Children Act which would give the court power to grant leave for an application to be made under section 84 before the period of ten weeks had elapsed while the child had lived with the prospective adopters. (In certain other domestic adoption proceedings, for instance applications by existing foster carers of a child, the court has power under section 42 of the Act to give leave for an application to be made before the required period of residence has elapsed.) The new clause also proposes a power to make court rules specifically to deal with the circumstances in which a court might grant leave for an early application, and for the court to have power to permit the applicants to take the child out of the country on an interim basis. It should be emphasised that this is not an attempt to waive completely the safeguards surrounding the taking of a child abroad for adoption. All that the new clause would do would be to **empower** the High Court in appropriate cases to facilitate the placement of the child with a suitable prospective adopter where the practical difficulties of complying with the usual residence requirements of section 84 were insuperable.

5. Safeguards

While it is of course true that once a child has left the jurisdiction it may be difficult if not impossible to ensure the child's return to the jurisdiction if, for some reason, the situation were to deteriorate but a number of comparable situations arise in respect of other children also. Where a child is placed for adoption by an adoption agency with adopters who are resident in this country, they are not prevented from taking the child out of the UK for a period of less than one month without the need to request the leave of the court or the consent of the birth parents. Similarly, in cases where adoption is not in question, the court (and this could be any level of court) may give permission under Schedule 2, paragraph 19 of the Children Act 1989 to a local authority for the child to be placed anywhere outside England and Wales. It is anomalous therefore that solely in the case of a proposed adoption, there is such an inflexible regime. The following safeguards will still apply if the new clause is passed:

- Only the High Court may make an order.
- Court Rules could prescribe the conditions that would have to be satisfied before deciding whether the ten week period of residence could be reduced, or, possibly – though this would be unlikely – waived altogether.
- The court would have power to attach conditions to any order which authorised the child to leave the country – these might, for example, include undertakings from the prospective adopters.

In any such case, the sort of matters that the court would wish to look at would be the level of support and supervision available to the child and the prospective adopters in the foreign country, and the strength of the relationship between the child and the proposed adopters.

6. Placement with non-relatives

Although the majority of cases in which it would be desired to place a child overseas would be with someone related by blood, there are certain other circumstances where the most suitable placement for the child would be with someone living abroad who would not be a close relative. For example:

- a) It should be noted that the restriction on removing a child under section 85 of the Act applies to any child who is a Commonwealth citizen or habitually resident in the UK. Prior to the introduction of this Act, the previous legislation imposed a similar restriction in respect of children who were *British or Irish citizens*. There may be some children who are habitually resident in this country but are not only nationals of another country, but have strong links with that other country and where it would be most appropriate for them to be adopted there.
- b) There are also some cases of which BAAF is aware where a local authority has wished to place a younger sibling with the family that has already adopted his or her older sibling but which has now moved abroad.
- c) In extremely rare cases, risks posed by a birth parent may be so great that one of the reasons for seeking a placement outside the jurisdiction is to ensure the safety of the child and proposed adopters.

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