

**The Adoptions with a Foreign Element
(Special Restrictions on Adoptions from
Abroad) (Scotland) Regulations 2008**

**CONSULTATION ON DRAFT
REGULATIONS**

The Scottish Government

Edinburgh, 2008

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INTRODUCTION

This document accompanies the draft Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) (Scotland) Regulations. It sets out the policy behind the draft Regulations and seeks your comments on a number of issues within the Regulations. The consultation period runs until 4 September 2008.

There are specific questions on which we seek your views and these are highlighted in the document. However, we welcome comments on all of the proposals.

This document is primarily being distributed electronically and is available on the Scottish Government web-site at:-

www.scotland.gov.uk/adoptionspecialrestrictionsregs

If, however, you would wish to be sent the document in photocopy please contact

Suzanne Allan on 0131 244 0407

or e-mail adoptionregulations@scotland.gsi.gov.uk to arrange for a copy or copies to be sent to you.

Please send your response electronically to the above address or in hard copy to

*Adoption Special Restrictions Regulations Consultation, 2-A(N) Victoria Quay,
EDINBURGH, EH6 6QQ*

Please complete the details on the respondent information form at the end of this document and return it with your response. This will help ensure we handle your response appropriately. The form should be printed first to enable completion and then either scanned and emailed or sent as a hard copy (depending on how you intend to send your response). Thank you for your help.

BACKGROUND

The Adoption and Children (Scotland) Act 2007 ('the 2007 Act') introduced a range of reforms into the law relating to adoption of, and permanent care for, children who cannot remain with their birth families. The Act also contains provisions relating to adoptions from abroad. The full text of the 2007 Act may be found at:

http://www.opsi.gov.uk/legislation/scotland/acts2007/asp_20070004_en_1

Sections 62-65 of the 2007 Act contain provisions for special restrictions to apply in cases where Scottish residents wish to adopt from certain countries (see Annex A for a summary of the provisions). These restrictions will apply when Scottish Ministers are of the opinion that, because of practices taking place in that country in connection with the adoption of children, it would be contrary to public policy to further the bringing of children into the United Kingdom for the purpose of adoption. The Westminster Government has similar powers in the Children and Adoption Act 2006 ('the 2006 Act').

The Westminster Government (after consulting the Welsh Assembly Government) commenced the provisions in the 2006 Act on 6 July 2008 and have followed this with Special Restrictions on Adoptions from Abroad Orders for Cambodia and Guatemala and the Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008. The Orders (which will put the current restrictions on adoptions from Cambodia and Guatemala which were put in place by the Department for Children, Schools and Families using prerogative powers on behalf of England, Wales, Northern Ireland and Scotland on to a statutory footing in relation to England and Wales only) and Regulations will come into effect on 1 August 2008.

In order to ensure that the restrictions on adoptions from Cambodia and Guatemala continue to extend to Scotland, and to avoid a legal loophole, Scottish Ministers propose to commence sections 62-65 of the 2007 Act in August 2008 and then introduce similar Restrictions Orders and Regulations when the Scottish Parliament resumes in September.

The Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) (Scotland) Regulations 2008 make provision where there is a suspension of adoptions from a particular country and provide for the procedure to be followed and the matters to be taken into account by Scottish Ministers when considering whether a case should be processed as an exception to the suspension. The Regulations also provide for Scottish Ministers to impose extra conditions in relation to a country where there is a suspension in place.

COMMENTARY AND CONSULTATION QUESTIONS

Regulation 3 – Receipt of a request

This Regulation applies where Scottish Ministers receive a request from prospective adopters asking them to take the steps, which they are not permitted to take due to the special restrictions, in their particular case.

Regulation 4 – Determining whether an exception to the special restrictions should be made

Regulation 4(1) requires Scottish Ministers to consider all the information they have at their disposal and the matters and the matters set out in Regulation 6 when making a determination. Regulation 4(2) requires Scottish Ministers to notify the prospective adopters as to the result of that determination. When they are not so satisfied they must give reasons.

Regulation 5 – Further requests

This Regulation allows Scottish Ministers to ignore a further request if they consider that it does not offer any new information or any information that would not have changed the outcome of their decision if it had accompanied the original request.

- **Do you agree with the procedure, as outlined in these 3 regulations, to be followed in determining whether an exception to the special restrictions should be made?**
- **Are there any other elements which need to be added or are there any aspects of the process which are unnecessary?**

Regulation 6 – Matters to be taken into account

This Regulation sets out the matters to be taken into account by Scottish Ministers when making a decision.

- **Do you agree with the (non-exhaustive) list of matters outlined in this Regulation, both in cases where a specific child has been identified and ‘in any other case’?**
- **Are there any other matters which should be taken into account that are not currently cited or are there any matters listed which are unnecessary?**

Regulation 7 – Imposition of extra conditions

Regulation 7(1) enables Scottish Ministers to specify, in the restricted list, a step in relation to a country or territory in respect of which special restrictions are in place. Where a step has been specified, Regulation 7(2) provides that Scottish Ministers must notify the prospective adopters in writing before the adoption of a child from that country can proceed. Any person who brings, or causes another person to bring, a child into the United Kingdom for the purposes of adoption in contravention of this condition will commit an offence under section 65(3) of the Act.

- **Do you agree with the provisions in this regulation regarding the specifying of a step and imposing extra conditions for ‘pipeline’ cases?**

SUMMARY OF CONSULTATION QUESTIONS

Do you agree with the procedure, as outlined in Regulations 3-5, to be followed in determining whether an exception to the special restrictions should be made?

Are there any other elements which need to be added or are there any aspects of the process which are unnecessary?

Do you agree with the (non-exhaustive) list of matters outlined in Regulation 6, both in cases where a specific child has been identified and ‘in any other case’?

Are there any other matters which should be taken into account that are not currently cited or are there any matters listed which are unnecessary?

Do you agree with the provisions in Regulation 7 regarding the specifying of a step and imposing extra conditions for ‘pipeline’ cases?

ANNEX A: RELEVANT SECTIONS OF THE 2007 ACT

1. Section 62 of the 2007 Act enables Scottish Ministers, where they have determined that because of practices taking place in a country outwith the UK it would be contrary to public policy to further the bringing of children into the UK, to declare, by order, that ‘special restrictions are to apply in the cases outlined in section 62(2), from a country or territory outside the British Islands (the "relevant country") due to practices taking place in that country or territory. Section 62(2) specifies the two cases under which a child should not be brought into the country where this section would apply. The first is where a British resident wishes to bring into the United Kingdom for the purpose of adoption a child who is not a British resident and there have been, or would have to be, proceedings or dealings with authorities or agencies in the relevant country concerning the proposed adoption. The second case is where within the last 12 months a British resident has adopted a child in a relevant country and wishes to bring that child into the United Kingdom.
2. Section 62(3) allows the Scottish Ministers to declare by order that special restrictions are to apply for the time being to any relevant country in relation to the bringing in of children in the cases mentioned in section 62(2). Scottish Ministers will be able to apply restrictions to the bringing of children into the United Kingdom from outwith the British Islands who are adopted under the law of that country, or are brought into the United Kingdom for the purposes of adoption. Scottish Ministers must also publish the reasons for making the declaration and a list of the restricted countries (the “restricted list”). Sections 62(5) and (6) require the list to be kept up to date and for it to be published in such a way as the Scottish Ministers consider appropriate for bringing it, and the reasons for the declaration, to the attention of adoption agencies and the public. Section 63(1) requires Scottish Ministers to keep the restricted list under review and to revoke the order made under section 62 if satisfied that there is no longer reason to believe that it would be contrary to public policy to further the bringing of children into the UK from a restricted country.
3. Section 63 requires Scottish Ministers to keep the restricted list under review and to revoke the order made under section 62(3) if satisfied that there is no longer reason to believe that it would be contrary to public policy to further the bringing of children into the UK from a restricted country.
4. Section 64 makes provision for the special restrictions mentioned in section 62(3) of the Act. These restrictions are that the Scottish Ministers should take no further action in connection with bringing a child from outwith the British Islands into the United Kingdom who was adopted under the law of the relevant country, or is to be brought into the United Kingdom for the purposes of adoption. Section 64(2), however, allows for action to be taken by the Scottish Ministers if the prospective adopter satisfies them that they should take this action despite the special restrictions and section 64(3) allows the Scottish Ministers to make regulations that provide for the procedure to be followed to determine whether further steps should be taken despite the special restrictions, and for matters which should be taken into account when making such a determination.
5. Section 65(1)(a) allows regulations to be made by Scottish Minister to set out additional steps agreed between the United Kingdom and a restricted country that the Scottish Ministers normally take in connection with bringing a child from the restricted country

into the United Kingdom, and are not otherwise provided for by any enactment, to be specified in the restricted list in relation to that country. Section 65(1)(b) states that, where a step has been specified under section 65(1)(a), one or more conditions set out in the regulations must to 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 62(2).

6. Section 65(2) clarifies that such conditions are in addition to any conditions provided for by section 58 of the 2007 Act or any other enactment. Section 65(3) makes it an offence for any person to bring, or cause to bring, a child into the United Kingdom for the purposes of adoption if they have not met any condition which they are required to meet in terms of regulations made under subsection (1)(b). Section 65(4) states that, if the step specified in the regulations had already been taken before the publication of the restricted list, no offence is committed in terms of section 65(3).
7. Section 65(5) prescribes the penalties for an offence made under section 65(3) being, on summary conviction a maximum of 6 months imprisonment or a fine up to the statutory maximum or both and on conviction on indictment imprisonment for a term not exceeding 12 months or a fine or both.

ANNEX B: THE ADOPTIONS WITH A FOREIGN ELEMENT (SPECIAL RESTRICTIONS ON ADOPTIONS FROM ABROAD) (SCOTLAND) REGULATIONS 2008

SCOTTISH STATUTORY INSTRUMENTS

2008 No.

CHILDREN AND YOUNG PERSONS

The Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) (Scotland) Regulations 2008

<i>Made</i> - - - -	2008
<i>Laid before the Scottish Parliament</i>	2008
<i>Coming into force</i> - -	2008

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 64(3), 65(1) and 117(2)(a) and (3) of the Adoption and Children (Scotland) Act 2007⁽¹⁾ and all other powers enabling them to do so.

Citation and commencement

- 1) These Regulations may be cited as the Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) (Scotland) Regulations 2008 and come into force on [] 2008.

Interpretation

- 2) —(1) In these Regulations—
“the Act” means the Adoption and Children (Scotland) Act 2007;
“request” means a request that is made in writing by the prospective adopters stating that the Scottish Ministers should take any step as mentioned in section 64(1) of the Act despite an order having been made under section 62(3) of the Act in relation to the State of origin;
“the State of origin” means the country or territory from which the prospective adopters wish to bring a child into the United Kingdom.
(2) For the purposes of these Regulations the Scottish Ministers are “satisfied that the case is exceptional” if they are satisfied that they should take any step as mentioned in section 64(1) of the Act despite an order having been made under section 62(3) of the Act in relation to the State of origin.

Receipt of a request

- 3) —(1) On receipt of a request, the Scottish Ministers must—
 - (a) acknowledge receipt of the request in writing as soon as is practicable,

(1) 2007 asp 4.

- (b) make such enquiries of the prospective adopters as appear necessary to clarify—
 - (i) the reasons why the prospective adopters consider that the Scottish Ministers should be satisfied that the case is exceptional, or
 - (ii) any other information that has been submitted by the prospective adopters,
 - (c) make such further enquiries as they consider appropriate, and
 - (d) ask the prospective adopters whether there is any further information that they have not submitted but that they consider relevant to the request.
- (2) The Scottish Ministers may defer making a determination in accordance with regulation 4 until—
- (a) the prospective adopters confirm that there is no further information that they consider relevant to the request, or
 - (b) where the prospective adopters indicate that there is further information that they consider relevant to the request, that information has been received.

Determining whether an exception to the special restrictions should be made

- 4) —(1) In determining whether they are satisfied that the case is exceptional, the Scottish Ministers must—
- (a) consider all the information they hold that is relevant to the request, and
 - (b) take into account the matters referred to in regulation 6.
- (2) After making a determination, the Scottish Ministers must—
- (a) notify the prospective adopters in writing as to whether they are satisfied that the case is exceptional, and
 - (b) where they are not so satisfied, give reasons.

Further requests

- 5) —(1) This regulation applies where the Scottish Ministers have made a determination in accordance with regulation 4 and the prospective adopters submit a further request.
- (2) The Scottish Ministers must consider that further request if they consider that it contains—
- (a) new information, or
 - (b) information that might have led to them being satisfied that the case was exceptional if it had been available at the time they made the determination.

Matters to be taken into account

- 6) —(1) In determining under regulation 4 whether or not they are satisfied that a case is exceptional, the Scottish Ministers must take the following matters into account (whether or not they also take other matters into account)—
- (a) where the prospective adopters wish to adopt a particular child—
 - (i) the circumstances leading to the child becoming available for adoption,
 - (ii) whether any competent authority in the State of origin has made a decision in relation to the adoption or availability for adoption of the child,
 - (iii) the relationship of the child to the prospective adopters, including how and when it was formed,
 - (iv) the child’s particular needs and the capacity of the prospective adopters to meet those needs, and
 - (v) the reasons why the State of origin was placed on the restricted list⁽²⁾; or
 - (b) in any other case, the reasons why the State of origin was placed on the restricted list.

(2) “Restricted list” is defined in section 62(5) of the Act as the list of restricted countries.

(2) In this regulation, a “competent authority” means a court or a person who performs functions which correspond to the functions of an adoption agency or to the functions of the Scottish Ministers in respect of intercountry adoption.

Imposition of extra conditions

7) —(1) The Scottish Ministers may specify in the restricted list, in relation to any restricted country⁽³⁾, a step which is not otherwise provided for by virtue of any enactment but which, by virtue of the arrangements between the United Kingdom and that country or territory, the Scottish Ministers normally take in connection with the bringing in of a child where that country or territory is concerned.

(1) If a step has been specified under paragraph (1), the condition which is to be met for the purposes of section 65(1)(b) of the Act is that the Scottish Ministers have notified the prospective adopters in writing that the adoption may proceed.

(2) A notification for the purpose of paragraph (2) must state that it is given for the purpose of that paragraph.

[A member of the Scottish Executive]
[Authorised to sign by the Scottish Ministers]

St Andrew’s House,
Edinburgh
[] 2008

(3) “Restricted country” is defined in section 62(4) of the Act as being a country or territory in relation to which a declaration that special restrictions are for the time being to apply has effect.

RESPONDENT INFORMATION FORM: DRAFT ADOPTIONS WITH A FOREIGN ELEMENT (SPECIAL RESTRICTIONS ON ADOPTIONS FROM ABROAD) (SCOTLAND) REGULATIONS 2008

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick one box)
- (a) as an individual go to Q2a/b and then Q4
- (b) on behalf of a group/organisation go to Q3 and then Q4

INDIVIDUALS

- 2a. Do you agree to your response being made available to the public (in The Scottish Government library and/or on The Scottish Government website)?

Yes (go to 2b below)

No, not at all We will treat your response as confidential

- 2b. Where *confidentiality is not requested*, we will make your response available to the public on the following basis (please tick one of the following boxes)

Yes, make my response, name and address all available

Yes, make my response available, but not my name or address

Yes, make my response and name available, but not my address

ON BEHALF OF GROUPS OR ORGANISATIONS:

- 3 The name and address of your organisation *will be* made available to the public (in the Scottish Government library and/or on the Scottish Government website). Are you also content for your response to be made available?

Yes

No We will treat your response as confidential

SHARING RESPONSES/FUTURE ENGAGEMENT

- 4 We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response?

Yes

No