EXPLANATORY MEMORANDUM TO

THE ADOPTIONS WITH A FOREIGN ELEMENT (SPECIAL RESTRICTIONS ON ADOPTIONS FROM ABROAD) REGULATIONS 2008

2008 No. 1807

THE SPECIAL RESTRICTIONS ON ADOPTIONS FROM ABROAD (CAMBODIA) ORDER 2008

2008 No. 1808

THE SPECIAL RESTRICTIONS ON ADOPTIONS FROM ABROAD (GUATEMALA) ORDER 2008

2008 No. 1809

1. This explanatory memorandum has been prepared by the Department for Children, Schools and Families (DCSF) and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 The Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008 make provision where there is a suspension of intercountry adoption from a particular country or territory. The Regulations provide for the procedure to be followed and the matters to be taken into account by the appropriate authority or, as the case may be, the Secretary of State when considering whether a case should be processed as an exception to the suspension. The Regulations also provide for the Secretary of State to impose extra conditions in relation to a country where there is a suspension in place.

2.2 The Special Restrictions on Adoptions from Abroad (Cambodia) Order 2008 imposes a statutory suspension of adoptions from Cambodia by British residents.

2.3 The Special Restrictions on Adoptions from Abroad (Guatemala) Order 2008 imposes a statutory suspension of adoptions from Guatemala by British residents.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Background

4.1 Section 9 of the Children and Adoption Act 2006 (“the Act”) makes provision

regarding the restriction of intercountry adoptions from a country or territory outside the British Islands (the other country) where the Secretary of State has reason to believe that because of practices taking place in the other 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 by British residents for the purposes of adoption or within 12 months of an adoption in the other country.

4.2 Section 9(4) provides for the Secretary of State to declare by order that special restrictions are to apply for the time being in relation to a country or territory. The Secretary of State must publish the 'restricted list' and the reasons for declaring a country 'restricted' in whatever way he thinks appropriate to bring them to the attention of adoption agencies and members of the public. Section 10 requires the Secretary of State to keep each restricted country under review to determine whether it should remain a restricted country. The provisions in section 9 apply equally to adoptions from countries in which the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (the Hague Convention) is in force and those that are not. Cambodia acceded to the Hague Convention on 6 April 2007. Guatemala acceded to the Hague Convention on 26 November 2002. The United Kingdom has objected to the accession of both Cambodia and Guatemala; the Hague Convention is not therefore in force between these countries and the United Kingdom.

4.3 The Special Restrictions on Adoptions from Abroad (Cambodia) Order 2008 and the Special Restrictions on Adoptions from Abroad (Guatemala) Order 2008 constitute the first exercise of the power under section 9(4) of the Act.

4.4 Section 11(1) of the Act provides that the special restrictions are that the appropriate authority is not to take any step which that authority might have taken in connection with furthering the bringing of a child into the United Kingdom by a British resident for the purposes of adoption or within 12 months of an adoption in that country or territory. Annex A summarises the procedures for the processing of intercountry adoption casework.

4.5 Section 11(2) of the Act permits the processing of cases involving adoptions from countries that are the subject of an order under section 9(4) where the relevant authority (see 7.1 below) is satisfied that the case should be processed despite the special restrictions.

4.6 Section 11(3) of the Act enables the Secretary of State to make regulations providing for the procedure to be followed by the 'appropriate authority' or, as the case may be the Secretary of State in determining whether a case should be processed. The Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008 constitute the first exercise of that power. The 'appropriate authority' is defined in section 11(4) of the Act as meaning (i) in a case under the Hague Convention, the central authority in relation to England, to Wales or to Northern Ireland as the case may be (i.e. the Secretary of State, the Welsh Ministers and the Department of Health, Social Services and Public Safety in Northern Ireland respectively) and (ii) in a non-Convention case, in relation to England and Wales, the Secretary of State and, in relation to Northern Ireland, the Secretary of State for the purposes of steps which he takes and the Department of Health, Social Services and Public Safety in Northern Ireland for the purposes of steps which it takes.

4.7 Section 12(1) of the Act permits the Secretary of State to make regulations providing for the imposition of extra conditions in certain cases. The Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008 constitute the first exercise of that power.

5. Territorial Extent and Application

5.1 These instruments apply to England, Wales and Northern Ireland.

6. European Convention on Human Rights

6.1 As these instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy Background

7.1 The Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008 set out (i) the procedure to be followed by the 'relevant authority' when a request from a prospective adopter to be treated as an exception to a general suspension is being considered and (ii) the 'matters' to be taken into account in determining whether a case merits an exception to a suspension. The 'relevant authority' is: the Secretary of State for all English cases and for non-Hague Convention Welsh and Northern Ireland cases; the Welsh Ministers for Welsh Hague Convention cases; and the Department of Health, Social Services and Public Safety in Northern Ireland for Northern Ireland Hague Convention cases.

7.1.2 The procedure requires the relevant authority to seek information from the prospective adopters to enable them to determine whether a case is 'exceptional'. The relevant authority may also make any further enquiries it considers appropriate, for example, seeking information from the British Embassy in the restricted country.

7.1.3 The list of 'matters' is non-exhaustive – matters listed in the Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008 must be taken into account but matters other than those listed may also be taken into account depending on the circumstances of the case. The matters to be taken into account in cases where a specific child has been identified are more extensive that the matters to be taken into account in cases where no specific child has been identified because the additional matters are likely only to be relevant where a specific child has been identified.

7.1.4 The Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008 also enable the Secretary of State to impose extra conditions in certain cases by specifying a 'step' in the process of dealing with applications from a restricted country after which applications will be allowed to continue and imposing extra conditions in relation to that country. As processes vary for different countries, the 'step' may be different for different countries and will need to be specified for each individual country when it is placed on the restricted list, rather than specified in regulations. The step should be one that is normally taken in the processing of a case, though not one which is provided for by virtue of legislation, and is likely to be the last point at which the Secretary of State (or other authority) has

any dealings with authorities in the restricted country, but before a child has been placed with the adopter. For example, the step might be the forwarding of an 'Invitation to Travel' to the prospective adopters in a country where that document is normally sent to the appropriate authority in the United Kingdom for onward transmission. The regulations are intended to catch cases which are 'live' when a suspension is introduced (i.e. cases where a certificate of eligibility has been issued but further steps remain). Given that suspensions in respect of Guatemala and Cambodia have been in place for some time the Secretary of State does not consider it necessary to prescribe a 'step' in relation to those countries in making these orders at the present time.

Cambodia

7.2 The Special Restrictions on Adoptions from Abroad (Cambodia) Order 2008 provides that special restrictions are to apply for the time being in relation to the bringing of children into the United Kingdom from Cambodia in the cases mentioned in section 9(2) of the Act (see 4.1 above) and places on a statutory basis the suspension of adoptions from Cambodia that is currently in place. On 22 June 2004, the Minister for Children (Margaret Hodge) announced a temporary suspension of adoptions of Cambodian children by United Kingdom residents. The suspension was introduced in response to evidence that the safeguards in the Cambodian adoption system were insufficient to prevent children being adopted without proper consents being given by their birth parents and improper financial gain being made by individuals involved in the adoption process. The specific areas of concern included:

- evidence relating to the systematic falsification of Cambodian official documents related to the adoption of children;
- evidence relating to the extensive involvement of adoption facilitators in the adoption procedure in Cambodia even though Cambodian law expressly forbids facilitators participating in the adoption process;
- evidence relating to the procurement of children for intercountry adoption by facilitators, including by coercion and by paying birth mothers to give up their children; and
- concern about the prevalence of children trafficking and corruption generally in Cambodia.

7.2.2 On 27 September 2007 the Parliamentary Under-Secretary of State for Children, Schools and Families (Kevin Brennan) announced a review of the suspension introduced in 2004, the purpose of which was to update the information on which the suspension was based, to find out what concerns, if any, remain valid and whether there are any other concerns about practices taking place.

7.2.3 On 2 April 2008 following that review, the Parliamentary Under-Secretary of State announced that the suspension remained in place. Evidence from the review demonstrated that:

- adoption legislation, practice and procedure in Cambodia remain insufficient to ensure the proper protection of children and their families;
- lifting the suspension would expose Cambodian children and their families to an increased risk of improper practices that are contrary to the principles of the

Hague Convention and of the United Nations Convention on the Rights of the Child.

7.2.4 There is no evidence to demonstrate that there have been substantive changes to practice on the ground since the announcement of the outcome of the review.

Guatemala

7.3 The Special Restrictions on Adoptions from Abroad (Guatemala) Order 2008 provides that special restrictions are to apply for the time being in relation to the bringing of children into the United Kingdom from Guatemala in the cases mentioned in section 9(2) of the Act (see 4.1 above) and places on a statutory basis the suspension of adoptions from Guatemala that is currently in place. On 6 December 2007, the Parliamentary Under Secretary of State announced an immediate suspension of adoptions of Guatemalan children by United Kingdom residents in response to concerns about adoption practice in Guatemala.

7.3.2 The suspension was introduced in response to evidence demonstrating that there are insufficient safeguards in the Guatemalan adoption system to prevent children being adopted without proper consents being given and improper financial gain being made by individuals in the adoption process, in particular that there is a trade in babies being sold for overseas adoption and mothers being paid, or otherwise encouraged, to give up children for adoption. Such practices are contrary to the principles of the Hague Convention and of the United Nations Convention on the Rights of the Child.

7.3.3 Guatemala has recently passed legislation implementing the Hague Convention, however there is no evidence to demonstrate this has resulted in substantive changes in practices in connection with the adoption of children or the eradication of improper practices.

Consultation

7.4 The Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008 relate to procedural matters relevant to the Secretary of State, the Welsh Ministers or the Department of Health, Social Services and Public Safety in Northern Ireland as the case may be and therefore impact primarily on central government rather than the public or businesses, charity or the voluntary sector.

7.4.2 Consultation on the draft regulations was therefore limited to key stakeholders, including adoption agencies specialising in intercountry adoptions and groups representing intercountry adopters. Consultation responses were limited but those received focused primarily on the procedure to be followed and the ‘matters to be taken into account’ when determining ‘exceptional cases’. The DCSF considered these responses carefully in finalising the procedure for handling exceptional cases.

7.4.3 Consultation responses suggested that it would be useful for guidance, setting out the process that will be followed when exceptions are being considered, to be

issued to prospective adopters. The DCSF plans to make information of this sort available on its intercountry adoption website.

7.4.4 The Welsh Ministers, the Department of Health, Social Services and Public Safety in Northern Ireland, the Scottish Executive, the Home Office and the Foreign and Commonwealth Office were consulted on the making of the Special Restrictions on Adoptions from Abroad (Cambodia) Order 2008, the Special Restrictions on Adoptions From Abroad (Guatemala) Order 2008 and the Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008.

7.4.5 The suspensions in respect of Cambodia and Guatemala that were announced in Ministerial statements to the House have been in place for some time. The DCSF has not received representations from members of either House in respect of the decisions to suspend adoptions from Cambodia and Guatemala. The declarations of special restrictions in respect of Cambodia and Guatemala are a continuation of existing policy.

8. Impact

8.1 An Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

9. Contact

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ANNEX A – DESCRIPTION OF INTERCOUNTRY ADOPTION PROCESS

1. Prospective intercountry adopters in England, Wales and Northern Ireland go through a very similar assessment and approval procedure as someone applying to adopt domestically. The assessment is carried out by a professional social worker of a local authority or Voluntary Adoption Agency (VAA). After the assessment is complete, an adoption panel considers the case and makes a recommendation as to whether or not the prospective adopter should be approved in respect of the adoption of a child from a named country. A senior manager at the local authority or VAA then makes a decision about the application, taking the panel's recommendation into account.

2. If the prospective adopter is approved, the papers are sent to the intercountry adoption casework team in the Department for Children, Schools and Families, or the relevant team in the Department of Health, Social Services and Public Safety in Northern Ireland or the Welsh Assembly Government. The casework team:

   - checks that the papers are complete, and that the prospective adopter has been assessed in accordance with regulations;
   - prints a certificate of eligibility to adopt and then arranges for the papers to be notarised, legalised and translated as per requirements of the country from which the prospective wants to adopt;
   - then issues the certificate of eligibility to adopt and sends this and other papers to the foreign authority (and notifies the prospective adopter that this has happened.)

3. The Secretary of State (or Welsh Ministers or Department of Health, Social Services and Public Safety in Northern Ireland as applicable) is then sometimes involved at further stages in the process, in an administrative function through the casework team. After the foreign authorities have matched the prospective adopters with a child, details of the proposed match are sometimes routed through the UK Government but not in all cases. Applicants would then travel to meet the child and decide whether they wish to proceed with the adoption.

4. Other administrative functions which the Secretary of State (or Welsh Ministers/ Department of Health, Social Services and Public Safety in Northern Ireland as applicable) and the casework team carry out later in the adoption process include, for some countries, forwarding an invitation to travel visa from the child's country of origin, or coordinating post-placement reports in the UK.

INTERCOUNTRY ADOPTION PROCESS

