Neutral Citation Number: [2022] EWFC 31

Case No: FD21P00367

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 13th April 2022

Before :

President of the Family Division – Sir Andrew McFarlane

- -

Between :

Somerset County Council	**Applicant**
- and -	
NHS Somerset Clinical Commissioning Group	**Respondent**
And Others	

- -
- -

Nick Goodwin QC (instructed by instructed by Somerset County Council Legal Services) for the **Applicant**
Damian Garrido QC (instructed by instructed by Bevan Brittan LLP) for the **CCG**
Cleo Parry QC and Elizabeth Willsteed on behalf of the Children's Guardians
Hannah Slarks for The Secretary of State
Alev Giz and Jamie Niven-Phillips on behalf of CAFCASS Legal acting as Advocate to the Court
Alexandra Conroy Harris on behalf of CoramBAAF

Hearing dates: 4 March 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment)

in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir Andrew McFarlane P:

Introduction

1. In May 2021, in the course of proceedings before the Court of Appeal (*Re N (Children)* [2021] EWCA Civ 785), it became clear that there had been a breach of the Adoption Agencies Regulations 2005 ['AAR 2005'] with respect to a decision made by a local authority, acting as an adoption agency, to apply for an order authorising a child's placement for adoption. The local authority was Somerset County Council ['SCC']. The breach involved a failure to obtain a report on the child's health, or have advice from the agency medical adviser that such a report was unnecessary, as required by AAR 2005, reg 15. In addition the 'child permanence report' did not include a medical summary written by the agency medical adviser, as required by AAR 2005, r 17(1)(b). Once it was understood that these breaches had occurred it became apparent that, rather than being a one-off, the circumstances in *Re N* were, in fact, indicative of a systemic failure by SCC to adhere to the medical requirements of the AAR 2005 over the course of some years and involving adoption decisions made with respect to many children.

2. Following an extensive internal review, SCC identified some 12 children, who were each the subject of a placement for adoption order made under the Adoption and Children Act 2002, s 21 ['ACA 2002'], but whose further progress towards full adoption had been placed on hold pending clarification of their position, as a matter of law, because of an acknowledged breach of the medical elements of AAR 2005. SCC applied to the Family Division under Part 18 of the Family Procedure Rules 2010 ['FPR 2010'] seeking a declaration that 'the placement order made with respect to' each child 'was lawfully made'. The application was heard by Mrs Justice Roberts, who, following an extensive judgment handed down on 10 November 2021 [[2021] EWHC 3004 (Fam)], granted the declarations that were sought with respect to ten of the children (two children having been removed from this 'primary cohort' prior to the hearing due to the failure of their prospective adoptive placement). In addition to the primary cohort, SCC had identified some 200 to 300 other children ('the wider cohort'), where similar breaches of the AAR 2005 had occurred, and where the children were either at an earlier stage in the adoption process, prior to the making of a placement order, or had actually been adopted. Again, SCC intended to use the procedure under FPR 2010, Part 18 to seek a declaration from the court concerning the validity either of its internal decisions as to the child's suitability for adoption or, where adoption had already occurred, of the relevant adoption order.

3. Publication of Roberts J's judgment had, however, caused other local authorities to review their own position with the result that a number identified the same, or similar, breaches of the medical elements of the AAR 2005. Whilst the prospect of the court, in the person of Roberts J, reviewing individual decisions made in up to 300 SCC cases was itself a daunting one, the idea that this process might now need to be undertaken in courts up and down England and Wales for a large number of children, many of whom will have been in their adoptive homes for some years, led to the case being transferred to me, as President of the Family Division, for further consideration.

4. The proceedings before the court remain those issued by SCC, who are represented by Mr Nicholas Goodwin QC. The other parties are the Clinical Commissioning Group ['CCG'] for Somerset, represented by Mr Damian Garrido QC, the various children's

guardians who had been appointed in the substantive proceedings relating to the primary cohort, represented by Ms Cleo Perry QC and Ms Elizabeth Willsteed, and CAFCASS Legal acting as an Advocate to the Court, represented by Ms Alev Giz and Mr Jamie Niven-Phillips. At an early directions hearing the court invited the Secretary of State for Education to intervene, and I am most grateful that this invitation has been taken up and that the Secretary of State ['S of S'] has been represented by Ms Hannah Slarks. Finally, the court has been assisted by written and oral submissions on behalf of CoramBAAF, by Ms Alexandra Conroy Harris.

5. By the time of the final hearing before this court on 4 March 2022, it had become clear that many, if not a majority, of local authorities in England had realised that they, too, were likely to have been acting in breach of some aspect of the medical requirements of AAR 2005. The number of children that are potentially affected by this unfortunate situation is therefore likely to be very significant indeed.

Summary of conclusion

6. Having considered the matter in the light of the helpful submissions from each party, and noting that there is now a broad consensus as to the way forward, as a matter of law, I have concluded that an application for a declaration as to the validity of existing placement orders or adoption orders is neither appropriate nor required. The outstanding FPR 2010, Part 18 applications for a declaration made by SCC will be dismissed. There is no basis for other local authorities or adoption agencies to issue similar applications with respect to breaches of the medical requirements of AAR 2005 that may have been discovered in cases where placement orders or adoption orders have been made. Where, on the facts of any particular case, a party to the original proceedings is concerned that a breach of the AAR 2005 may go to the validity of a placement order or an adoption order, then the route to challenge that order is by application for permission to appeal out of time. It is, however, difficult to contemplate a case where a health issue is so significant that it may lead to a successful appeal, yet where that issue was not fully known to the court (notwithstanding any breach of the medical requirements of AAR 2005).

7. The reasoning that supports that conclusion now follows.

The Legal Context

8. In the course of her judgment, Roberts J undertook the valuable task of setting out all of the relevant statutory provisions and guidance [paragraphs 22 to 33]. It is not, therefore, necessary in this judgment to do more than to focus upon the relevant requirements of the AAR 2005, set within a description of the overall decision making process that leads to a child being put forward by a local authority adoption agency for adoption.

9. In Wales, regulation of adoption is devolved to Welsh Ministers. The governing regulations are the Adoption Agencies (Wales) Regulations 2005 (as amended by the Adoption Agencies (Wales) (Amendment) Regulations 2020). For present purposes the relevant Welsh regulations (regs 15 and 17) are effectively in like terms to their English counterparts. The court has not heard bespoke submissions as to the position in Wales, but this judgment proceeds on the basis that, with respect to the issues that have been raised, the requirements laid upon a local authority adoption agency are the

same in England and in Wales. Without intending any disrespect, reference in this judgment to AAR 2005 is intended to include reference to AA(W)R 2005.

10. ACA 2002, s 2(1) provides that a local authority, when providing adoption services, and any registered adoption society, may be referred to as 'an adoption agency'. Under ACA 2002, ss 9 to 12, regulations may be made concerning the operation and management of adoption agencies. The current regulations are the AAR 2005, as amended.

11. Where an adoption agency is considering adoption as the plan for a child it must comply with the requirements of AAR 2005, Part 3 [regs 11 to 17], which include the need to obtain information about the child under reg 15:

> **"Requirement to obtain information about the child**
>
> 15 (1) The adoption agency must obtain, so far as is reasonably practicable, the information about the child which is specified in Part 1 of Schedule 1.
>
> (2) Subject to paragraph (4), the adoption agency must—
>
> (a) make arrangements for the child to be examined by a registered medical practitioner; and
>
> (b) obtain from that practitioner a written report ("the child's health report") on the state of the child's health which shall include any treatment which the child is receiving, any need for health care and the matters specified in Part 2 of Schedule 1, unless the agency has received advice from the medical adviser that such an examination and report is unnecessary.
>
> (3) Subject to paragraph (4), the adoption agency must make arrangements—
>
> (a) for such other medical and psychiatric examinations of, and other tests on, the child to be carried out as are recommended by the agency's medical adviser; and
>
> (b) for written reports of such examinations and tests to be obtained.
>
> (4) Paragraphs (2) and (3) do not apply if the child is of sufficient understanding to make an informed decision and refuses to submit to the examinations or other tests."

12. AAR 2005, reg 15(2)(b) specifies that the content of the child's medical report must include the matters set out in Schedule 1, Part 2:

> **"PART 2**
>
> **MATTERS TO BE INCLUDED IN THE CHILD'S HEALTH REPORT**
>
> 1. Name, date of birth, sex, weight and height.
>
> 2. A neo-natal report on the child, including—

(a) details of his birth and any complications;

(b) the results of a physical examination and screening tests;

(c) details of any treatment given;

(d) details of any problem in management and feeding;

(e) any other relevant information which may assist the adoption panel and the adoption agency; and

(f) the name and address of any registered medical practitioner who may be able to provide further information about any of the above matters.

3. A full health history of the child, including—

(a) details of any serious illness, disability, accident, hospital admission or attendance at an out-patient department, and in each case any treatment given;

(b) details and dates of immunisations;

(c) a physical and developmental assessment according to age, including an assessment of vision and hearing and of neurological, speech and language development and any evidence of emotional disorder;

(d) for a child over five years of age, the school health history (if available);

(e) how his physical and mental health and medical history have affected his physical, intellectual, emotional, social or behavioural development; and

(f) any other relevant information which may assist the adoption panel and the adoption agency."

13. The adoption agency must then prepare a written 'child's permanence report', which must include the wide range of matters listed at AAR 2005, reg 17 and, in particular, 'a summary, written by the agency's medical adviser, of the state of the child's health, his health history and any need for health care which might arise in the future' [reg 17(1)(b)].

14. Where the adoption agency is a local authority, the decision whether a child ought to be placed for adoption is taken by an 'agency decision maker', and is not referred to the agency's adoption panel if the child is the subject of care proceedings [reg 17(2)].. When making a decision as to placement for adoption, reg 17(2D) requires the decision maker to take account of the following reports:

i) the child's permanence report;

ii) the child's health report and any other reports referred to in reg 15; and

iii) information concerning the health of each of the child's natural parents.

15. Reference to an adoption agency's 'medical adviser' means the person appointed as the medical adviser by the agency in accordance with reg 8; that person must be a 'registered medical practitioner'.

16. The decision of the agency decision maker that a child should be placed for adoption is an important step. It will, in cases where the statutory threshold criteria for making a care or supervision order under Children Act 1989, s 31 are met, or there is a pending application for a care order, trigger a requirement on the local authority to issue an application for a placement order [ACA 2002, s 22].

17. To put the general assertion that there have been breaches of the medical requirements of AAR 2005 into some context, this court has been told that the specific breaches that have been discovered in the work of SCC are not necessarily replicated elsewhere, and that in other local authorities different breaches may have occurred. In SCC the primary error has been for the adoption agency to rely upon the Initial Health Assessment, which is a standard report that is completed for all looked after children. It is not a report commissioned by the adoption agency for the purposes of AAR 2005, reg 15. In breach of the regulations, no further advice was sought from the agency medical adviser and that adviser was not required to sign off that a further report was unnecessary. In addition there is concern that the agency medical adviser may not have been validly appointed although there is nothing in the regulatory scheme to require a formal appointments process. In other local authorities, other errors have been reported, for example reliance upon reports prepared by a specialist nurse, rather than a doctor.

18. The conditions that a court must find to be established before a placement order is made are set out in ACA 2002, s 21(1)-(3):

"21 Placement orders

(1) A placement order is an order made by the court authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the authority.

(2) The court may not make a placement order in respect of a child unless—

(a) the child is subject to a care order,

(b) the court is satisfied that the conditions in section 31(2) of the 1989 Act (conditions for making a care order) are met, or

(c) the child has no parent or guardian.

(3) The court may only make a placement order if, in the case of each parent or guardian of the child, the court is satisfied—

> (a) that the parent or guardian has consented to the child being placed for adoption with any prospective adopters who may be chosen by the local authority and has not withdrawn the consent, or
>
> (b) that the parent's or guardian's consent should be dispensed with.
>
> This subsection is subject to section 52 (parental etc. consent)."

19. When a placement order has been made for a child, the decision making process moves on to matching the child with prospective adoptive parent(s). Once a potential match is identified, the case is referred to the adoption agency's 'adoption panel' which must consider the case and make a recommendation to the agency as to whether the child should be placed with particular adopters for adoption [AAR 2005, reg 18(1)]. When considering the case, the panel must, under reg 32, review and take into account the child's permanence report prepared under reg 17 (which will include a summary of the medical information). The case will then pass to the agency decision maker who will make the actual placement decision but, in doing so, must take into account the adoption panel's recommendation [reg 19].

20. In due course, once a placement has taken place, the prospective adopters will apply for an adoption order. In preparation for the hearing of an adoption application, the adoption agency must file a report in compliance with FPR 2010, r 14.11 which must contain the information specified in FPR 2010, PD14C including 'a summary, written by the agency's medical adviser' of 'the child's health, his current state of health and any need for health care which is anticipated and the date of his most recent medical examination' [PD14C]. Separately, FPR 2010, r 14.12 requires that reports (made not more than 3 months earlier) on the health of the child and each applicant must be attached to the adoption application where the child was not placed for adoption by an adoption agency. Such a health report must contain the wide range of matters set out in FPR 2010, PD14D.

21. Although not an issue for SCC, the court was told that in some other local authorities there has been a breach of the requirement to obtain a written report from a registered medical practitioner on the health of each prospective adopter [reg 26(b)] and for the agency to prepare a report that includes a summary, written by the agency's medical adviser, of the state of each adopter's health [reg 30(2)(b)]. The court was told that, where breaches have occurred, this has been due to reports being written by specialist nurses, rather than by a doctor or the agency medical adviser. The statutory guidance, at paragraphs 3.33 to 3.35 stresses the importance of there being a full assessment of the health of each adopter by a doctor. Given the long-term consequences of adoption, the firmness of the wording of this guidance is important with agencies being said to have a 'duty to satisfy themselves that prospective adopters have a reasonable expectation of continuing to enjoy good health' is both proportionate and fully understandable.

22. Thereafter, it will be a matter for the court to determine whether or not to grant an adoption order.

Dismissal of FPR 2010, Part 18 applications

23. At the final hearing, all those appearing before the court were essentially in agreement that the issue should no longer be addressed within proceedings under FPR 2010, Part 18 seeking bespoke declarations with respect to the validity of previous court orders made for each individual child. SCC therefore conceded that its applications for declaratory relief with respect to the wider cohort should be dismissed. The court was greatly assisted by the clarity of Ms Slarks' submissions on behalf of the S of S which, in my view, accurately described the correct position in law. These are not adversarial proceedings between competing parties and, in circumstances where it is conceded that the applications should be dismissed, it is not necessary to take time in summarising the competing submissions of each party. I shall therefore turn to set out my reasons for dismissing the Part 18 applications, which, as I have indicated, are in large part based upon Ms Slarks' submissions.

The validity of a placement order or an adoption order

24. Ms Slarks' central premise, and one which I fully accept, is that all court orders are valid and enforceable unless and until a court sets them aside. There is, therefore, no need for an application to be made under FPR 2010, Part 18 seeking a declaration that existing orders are valid. The position has recently been confirmed by the Supreme Court in *R (Majera (formerly SM (Rwanda)) v Secretary of State for the Home Department* [2021] UKSC 46, as explained by Lord Reed PSC at paragraphs 44 and 45:

> "44. It is a well established principle of our constitutional law that a court order must be obeyed unless and until it has been set aside or varied by the court (or, conceivably, overruled by legislation). The principle was authoritatively stated in *Chuck v Cremer* (1846) 1 Coop temp Cott 338; 47 ER 884, in terms which have been repeated time and again in later authorities. The case was one where the plaintiff's solicitor obtained an attachment against the defendant in default of a pleaded defence, disregarding a court order extending the period for filing the defence, which he considered to be a nullity. The order in question had been intended to give effect to an agreement between the parties, but had mistakenly allowed the defendant longer to file a defence than had been agreed. The Lord Chancellor, Lord Cottenham, set aside the attachment, and stated at pp 342-343:
>
> > "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it … It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed."
>
> 45. Three important points can be taken from this passage. First, there is a legal duty to obey a court order which has not been set aside: "it must not be disobeyed". As the mandatory language makes clear, this is a rule of law, not merely a matter of good practice. Secondly, the rationale of according such authority to court orders, as explained in the second and third sentences, is what would now be described as the rule of law. As was said in *R (Evans) v Attorney*

> *General (Campaign for Freedom of Information intervening)* [2015] UKSC 21; [2015] AC 1787, para 52, "subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive". This principle was described (ibid) as "fundamental to the rule of law". Thirdly, as the Lord Chancellor made clear in *Chuck v Cremer*, the rule applies to orders which are "null", as well as to orders which are merely irregular. Notwithstanding the paradox involved in this use of language, a court order which is "null" must be obeyed unless and until it is set aside."

25. Placement orders or adoption orders that have been made, but have not been set aside or varied by the court, are therefore valid and do not require further validation by a declaration or other means.

Are existing placement or adoption orders vulnerable to challenge?

26. Ms Slarks correctly draws a distinction between a local authority's decision as an adoption agency to apply for a placement order or to place a child with prospective adopters, which may be defective if taken in breach of one or more requirement in the AAR 2005, and any subsequent decision of a court to grant a placement or adoption order. Whilst the former may be a target for challenge by judicial review, the latter is not.

27. Ms Slarks submits, and the other parties accept, that the well-established constitutional theory of 'the second actor' must apply. The theory provides that any unlawfulness by a first actor may invalidate their own acts, but will not directly invalidate the act of a second actor. Another recent decision of the Supreme Court describes, with apparent approval, the application of this principle. In *R (DN (Rwanda)) v Secretary of State for the Home Department* [2020] UKSC 7, at paragraph 40, Lord Carnwath said:

> 40. Secondly, I note Pill LJ's observation that Sullivan LJ's analysis was not invalidated because "the same actor" (the Secretary of State) made both orders. This I take to be a reference to the so-called "Theory of the second actor", developed by Professor Forsyth among others "to explain how an unlawful and void administrative act may none the less have legal effect":
>
> > "It is built on the perception that while unlawful administrative acts (the first acts) do not exist in law, they clearly exist in fact. Those unaware of their invalidity (the second actors) may take decisions and act on the assumption that these (first) acts are valid ..." (*Wade and Forsyth Administrative Law* 11th ed, pp 251-252; see also footnote 145 for a list of judicial citations.)
>
> The best known example (though not at the time explained in those terms) is *Percy v Hall* [1997] QB 924, in which the Court of Appeal rejected a claim against police officers for wrongful arrest, where the byelaws on which they had relied were later found to have been invalid."

28. In the present context, the court, as the second actor, was unaware that the local authority, as first actor, had failed to abide by the regulations when deciding to apply for a placement order, even if the local authority decision to apply was potentially void, the court was, nevertheless, entitled to make its own decision and grant a placement order. Where, subsequently, an adoption order is made, the court making that order is, in effect, a third actor and is one step further removed from any defect in the original decision to apply for a placement order.

29. Ms Slarks further submits that a court would only be bound to declare that an existing order was void in these circumstances if the error made by a local authority went to the court's jurisdiction to make the order. That issue was considered by Sir James Munby in *M v P* [2019] EWFC 14, a case relating to the validity of decrees of divorce, which had been made on the basis of two years' separation, notwithstanding the fact that the relevant petition had been issued less than two years after the alleged separation date. At paragraphs 94 to 98, Sir James analysed the existing caselaw and concluded that the courts had drawn a clear distinction between those cases where the court did not have jurisdiction to grant a decree, and those where the court did have jurisdiction but the process had been infected by an error on the part of one of the parties. In the former category resulting court orders were void, but in the latter category they were merely voidable.

30. At paragraph 100, Sir James described how an approach which sought to uphold the validity of orders relating to an individual's status (in that case whether they were married or divorced) was compatible with the approach of the courts and of Parliament:

> "100. That apart, there are, I think, three general conclusions to be drawn from this survey of the jurisprudence:
>
> > i) First, a general lack of appetite to find that the consequence of 'irregularity' – I use the word in a loose general sense and not as a term of art – is that a decree is void rather than voidable. That is something one finds sometimes stated in terms – as by Phillimore LJ in *P v P* [1971] P 217, page 225, by Sir George Baker P in *Dryden v Dryden* [1973] Fam 217, page 236, by Rees J in *Wright v Wright* [1976] Fam 114, page 124, and by Holman J (who, as we have seen, knows a lot about these things) in *Krenge v Krenge* [1999] 1 FLR 969, page 978 – and it is, in truth, implicit in much of the analysis which underpins all these cases. And the language used is typically robust. If Phillimore LJ confined himself to the proposition that a court "ought not lightly to treat a decree absolute as void", Sir George Baker P, followed by Holman J, said that the court "should strive to hold that a decree absolute is voidable rather than void", while Rees J said that the court "should only hold a decree absolute to be void if driven by the terms of the relevant statute so to hold."
> >
> > ii) Secondly, a general recognition that only if the decree is held to be voidable, and not void, will the court be able to do justice to all those whose interests are affected and having regard to the particular circumstances of the case.

> iii) Thirdly, recognition of the public interest, where matters of personal status are concerned, in not disturbing the apparent status quo flowing from the decree and the certainty which normally attaches to it. This, as Ms Bazley points out, is a general principle extending across matrimonial law and including such matters as the recognition in this jurisdiction of foreign divorces. In addition to the authorities I have already cited, Ms Bazley helpfully referred me to others, including, for example, the dicta of Scott LJ in *Meier v Meier* [1948] P 89, page 93, quoted by Sir Jocelyn Simon P in *F v F* [1971] P 1, page 13; of Sir Jocelyn himself on the same page ("the importance that Parliament attaches to the certainty of the change of status arising out of a decree absolute"); of Hughes J in *El Fadl v El Fadl* [2000] 1 FLR 175, page 191; of Stephen Wildblood QC in *H v H (The Queen's Proctor Intervening) (Validity of Japanese Divorce)* [2006] EWHC 2989 (Fam), [2007] 1 FLR 1318, para 183; and of Parker J in *NP v KRP (Recognition of Foreign Divorce)* [2013] EWHC 694 (Fam), [2014] 2 FLR 1, para 131."

31. Whilst the need to draw a distinction between an order that is void, and one that is voidable, will arise more frequently in relation to marriage and divorce, the Court of Appeal applied a similar approach in the context of adoption in *Re F (Infants) (Adoption Order: Validity)* [1977] Fam 165. The decision in *Re F* is instructive and plainly relevant to the issue before this court. Adoption orders had been made providing for a husband and wife to adopt two children of the wife's former marriage. Under the law at the time, an adoption order could only be made in favour of a married couple (or a single person). It was subsequently discovered that the applicants' marriage was void because, at the time of the marriage, the husband was still married to his former wife. The applicant wife obtained a decree of nullity and the couple married again once the husband was free to do so. Their application to the county court for a declaration as to the status of the adoption orders was dismissed. On appeal, the Court of Appeal held that the adoption orders were good on their face and valid until set aside by a competent court. In the circumstances of the case, the orders were voidable and not void, and the court was not obliged to set them aside. It had not been established that the interests of justice were served by setting them aside and leave to appeal was therefore refused. Giving the judgment of the court, Ormrod LJ, referring to errors of fact as to marital status or, in another case, country of residence said:

> "Such an error of fact would be a ground of appeal against the adoption order at the suit of an aggrieved party and, in a proper case were the interests of justice so required, for allowing the appeal out of time and setting aside the order."

32. Ms Slarks submits, and I accept, that the Court of Appeal decision in *Re F (Infants)* confirms the applicability in adoption law of the approach taken by Munby J, in the context of marriage some 40 years later, and is a strong ground for this court applying the same approach to the present litigation. Like marriage and divorce, adoption is primarily concerned with an individual's status, in terms of his or her legal, familial relationship with others. The policy impetus in favour of setting aside those orders which must be set aside because they are void, for want of jurisdiction, yet preserving those which need not be set aside and are merely voidable, is likely to apply to adoption just as it does with respect to marriage and divorce.

33. A more recent decision of the Court of Appeal, *Re F (Placement Order)* [2008] EWCA Civ 439; [2008] 2 FLR 550, is illustrative of the same approach. In *Re F (Placement Order)*, a father, who had been seriously ill and played no part at the time a court had made a placement order, on learning of the situation once he had recovered, applied for leave to apply to revoke the order. On hearing of the father's application, and during a 10 day gap before the court could consider the case, the local authority proceeded to place the child, thereby removing the court's jurisdiction to consider the father's application (ACA 2002, s 24(2((b)). The Court of Appeal condemned the local authority's actions in the strongest terms as being 'disgraceful' and an 'abuse of power', and Wall LJ repeatedly indicated that a local authority acting in this way was vulnerable to challenge by judicial review (paragraphs 36, 94, 95 and 102). Nevertheless the court did not entertain any suggestion that the first instance judge's dismissal of the father's application had been somehow rendered unlawful in consequence of the local authority's actions.

34. Moving on, Ms Slarks refers to ACA 2002, s 21 (see paragraph 18 above), which sets out the gateway criteria that must be met to establish a court's jurisdiction to make a placement order. None of the statutory criteria turn upon the local authority's adherence to the requirements of the AAR 2005. The significance of the AAR obligations is that they go to the local authority's capacity, and in some cases its duty, to make an application [under ACA 2002, ss 19 and 22], and not the court's jurisdiction to determine whether to make a placement order.

35. The position with respect to the court's jurisdiction to make an adoption order is in like terms. Under ACA 2002, s 47, before it may make an adoption order, a court must be satisfied that one of the three conditions set out in s 49 is met. Those conditions relate to parental consent or placement for adoption under a placement order (or similar order made in Scotland or N Ireland). The court's jurisdiction is further defined by ACA 2002, s 49 which relates to the marital status, or otherwise, of the adopter(s), their domicile or habitual residence and the age of the child. Yet further requirements are imposed by ss 50 and 51 regarding the age of the adopter(s) and the marital status of a single adopter. None of the statutory stipulations, which establish the court's jurisdiction to make an adoption order, relate to compliance, or otherwise, by a local authority with the requirements of the AAR 2005.

36. The analysis presented by the Secretary of State is not actively contested by any of the parties before the court and, as I have already indicated, I accept it as being a correct statement of the law. It follows that a placement order or adoption order made in circumstances where there has been a breach by the adoption agency of the medical requirements of AAR 2005 is not in consequence void. At its highest, it will, applying the approach of the Court of Appeal in *Re F (Infants)*, be voidable and subject to challenge by way of appeal on the facts of any specific case.

On what basis may a placement order be set aside or revoked?

37. A placement for adoption order may be set aside on appeal. Any appeal would be against the decision of a lower court to make the placement order; it is not an appeal against the applicant local authority's decision to make the application for that order. For the reasons that I have already explained, the challenge on appeal could not be on the basis that the court's order was void as a result of a breach of the AAR 2005 by the local authority. At its highest, any breach would render the court's order voidable

and subject to bespoke scrutiny on the individual facts of each case (*Re F (An Infant))*. Any prospective appellant would not only have to obtain permission to appeal, but also permission to appeal out of time. Permission to appeal may only be given where [Civil Procedure Rules 1998, r 52.6(1)]:

a) the court considers that the appeal would have a real prospect of success; or

b) there is some other compelling reason for the appeal to be heard.

An application for an extension of time to appeal would be considered under CPR 1998, r 3.9.

38. In the context of the present proceedings, it is difficult to contemplate a case where circumstances surrounding a child's health are so significant as to call into question the making of a placement order, which was otherwise justified, yet those health issues were not otherwise known of, and before the court, notwithstanding a local authority's failure to comply with the AAR 2005 requirements.

39. Separately, provision is made by ACA 2002, s 24 for the court to revoke a placement order. A person, other than the child or the relevant local authority, may only apply to revoke a placement order if granted leave to do so under s 24(2)(a) and if the child is not currently placed for adoption by the authority. Leave to apply to revoke will only be granted if there has been a 'change of circumstances' [s 24(3)] and the court considers that leave should be granted. In determining this latter question, the Court of Appeal in *M v Warwickshire County Council* [2007] EWCA Civ 1084 established that regard must be had to the prospects of success and to the welfare of the child, which will not be the paramount consideration in determining the leave application. The authority of *M v Warwickshire County Court* on this point was expressly accepted by the Court of Appeal in *Re C (Revocation of Placement Orders)* [2020] EWCA Civ 1598 (at paragraph 14). Where, later in the lead judgment in *Re C*, Baker LJ (paragraphs 16 to 24) appears to endorse the child's welfare as the paramount consideration in determining an application for leave to apply to revoke a placement order, the assumption must be that the court in *Re C* was nevertheless not intending to reverse its previous decision in *Re M* and welfare therefore remains an important factor, but not the paramount consideration, in such cases.

40. Again, it is difficult to contemplate a case where concern over a child's health was sufficiently serious to justify reopening the placement order determination by permitting an application for revocation to proceed, yet the health issue was unknown to the court at the time that the placement order was made. In such a case, on its own facts, if the health issue becomes apparent and the child has not yet been placed for adoption, it will be open to a parent or those acting for the child to apply for leave to apply to revoke, or the local authority may do so of its own accord without leave.

Re B (Placement Order) [2008] EWCA 835

41. For SCC, Mr Goodwin has understandably referred to *Re B (Placement Order)* [2008] EWCA 835 as being an example of the Court of Appeal [Thorpe, Arden and Wall LJJ] setting aside a placement order on the basis of an adoption agency's failure to follow the requirement under AAR 2005, as it was then, for all of the relevant papers

to be referred to its adoption panel prior to the decision to apply for a placement order.

42. Relying on *Re B*, Mr Goodwin submits that placement orders made where there has been an earlier non-compliance with the AAR 2005 will remain susceptible to challenge and such a challenge might result in a conclusion that the agency decision making was flawed. In turn, it is submitted, such a conclusion 'might compel the court to set aside the resulting placement order'.

43. There can be no doubt about the great emphasis that Wall LJ placed upon procedural propriety in the context of adoption in *Re B*. In his skeleton argument, Mr Goodwin extracted the following quotation from Wall LJ's judgment:

> "I do not think that the framework laid down by Parliament can be by-passed or short-circuited. … An application for a placement order cannot properly be made by an adoption agency unless the agency decision maker is satisfied that the child in question should be placed for adoption, and Parliament has laid down that the decision maker cannot be so satisfied unless he or she has properly considered the recommendation of the [agency adoption panel]. It must follow, in my judgment, that if the decision of the [panel] is flawed in any material respect then the decision maker cannot properly consider the recommendation, and thus cannot be satisfied – in accordance with the process laid down by Parliament – that the child in question should be placed for adoption."

44. Whilst those are undoubtedly Wall LJ's words, and he clearly, and rightly, placed significant importance upon adherence to the statutory scheme with respect to adoption, it is also important to understand the particular context of *Re B* before making any conclusions as to the general applicability of that decision to every case where a breach of the regulations may have occurred and a placement order has been made. Three particular points fall to be made about the context:

    a) the regulatory breach in failing to brief the adoption panel properly had been expressly made known to the court and the appeal was therefore against the judge's (a recorder in that case) decision, nevertheless, to make a placement order;

    b) the placement order was made in February 2008 and the appeal was heard just over 4 months later in July 2008, at a time when the children had not yet been placed for adoption;

    c) *Re B* followed relatively closely after *Re P-B (Placement Order)* [2006] EWCA Civ 1016 in which the Court of Appeal [Thorpe, Arden and Wilson LJJ] had also considered the adoption panel process, albeit in a different context. In *Re P-B* the court had expressly left open the question of the consequences of a court proceeding to make a placement order whilst ignorant of a regulatory breach by the adoption agency which might only come to light some time later.

I propose to expand each of these points briefly in turn.

45. The central focus of the appeal in *Re B* was that the recorder had made placement orders despite it being known that the adoption agency had failed to provide its adoption panel with the expert reports, or even an adequate summary of these reports and, further, that the social worker's summary wrongly ascribed views to one of the experts (as to splitting the siblings) which he had not expressed. Before the recorder, the local authority had conceded that there had been 'a serious error' in the agency's decision making process. Nevertheless, the court had proceeded to make placement orders, rather than adjourning the case for the decision to be retaken in accordance with the regulations. As with any appeal, the appeal was against the recorder's decision; it was not against the adoption agency's decision.

46. Dealing with point (b), whilst incurring a delay which was plainly most unwelcome to the court, the appeal in *Re B* was heard at a time and at a stage in the children's move through the care system at which it was possible to set aside the placement order and return the case for re-determination. That will not, as night follows day, be the situation in every case where a breach of the regulations has occurred. There are, therefore, dangers in holding that the decision in *Re B* has universal application.

47. Turning to the third point, the caveat contained in the judgment of Arden LJ in *Re P-B* (who, along with Thorpe LJ, was also part of the constitution in *Re B*) is important when considering the situation presented to this court. There is a clear distinction between a placement order, or an adoption order, made by a court with its eyes wide open to the fact that there has been a serious breach of the regulations, and, on the other hand, orders that are made where the court is in ignorance of any such breach. In this regard the characterisation of 'first actor' and 'second actor' is of relevance. On this point the following was said by Arden LJ in *Re P-B* at paragraph 37:

> "I say nothing about the case where the local authority commences proceedings without, for whatever reason, fulfilling or properly fulfilling their statutory obligations under this regulation. Indeed, the position about that might not come to light for some time and the court might have proceeded to make an order. The resolution of that situation will have to await until it arises."

48. In *Re B*, the recorder had directly quoted the obiter observations of Arden LJ in *Re P-B* as providing some support for there being jurisdiction for a court to make a placement order despite knowing of 'procedural difficulties' during the agency decision making process. In her judgment in *Re B*, Arden LJ dealt firmly with the point:

> "[102] The last sentence of this paragraph of the judgment of the Recorder speculates about whether my judgment in *P-B (a Child)* which he quotes, indicated that there was a residual jurisdiction in the court to approve an adoption in a case where there have been "procedural difficulties" (depending on their severity).
>
> [103] The position with which I was dealing was a situation where those involved in an adoption did not discover that there had been a failure by the local authority to fulfil its statutory obligation until a much later date and after the date when the court had in fact proceeded to make the order. That presupposes that the court that made the order was in ignorance of this failure at the time that it made its order. That is an altogether different situation from that contemplated by the

> Recorder, which was that the court, knowing of procedural difficulties, would nonetheless decide to continue with the proceedings. The passage that the Recorder cited from my judgment gave no support for proceeding in that situation."

49. Drawing these three strands together, it can be seen that the decision in *Re B*, important though it is in emphasising the priority that must attach to the scheme which Parliament has established for adoption agency decision making, should not be taken as being of universal application. Further, it is not authority for the proposition that in every case the court will be compelled to set aside an otherwise valid placement order on the grounds of internal procedural error by the agency. In fact a fuller reading of the opening sentences of the paragraph in Wall LJ's judgment quoted by Mr Goodwin makes this clear:

> "I have reached the conclusion that the Recorder was wrong for the simple reason that I do not think that the framework laid down by Parliament can be by-passed or short-circuited. In my judgment, the decision of this court in ***Re P-B*** accurately states the law. An application for a placement order cannot properly be made by an adoption agency unless …" [emphasis added]

The key point is that the error that led to the appeal being allowed in *Re B* was that of the recorder and not the local authority. It was the recorder who had become a 'first actor'. The Court of Appeal's concern was that, in so doing, the recorder had sought to by-pass or short-circuit the scheme laid down by Parliament. The reference by Wall LJ to *Re P-B* is also of note. In *Re B* the court gave reserved judgments and Wall LJ can thus be taken to be fully aware both of the obiter caveat in Arden LJ's judgment in *Re P-B* and of her commentary upon it in *Re B* itself, both of which expressly exclude consideration of a case where the court acts in ignorance of any procedural breach by the adoption agency.

On what basis may an adoption order be set aside or revoked?

50. It is well established that an adoption order, once made, will only be subsequently set aside or revoked in 'wholly' or 'highly' exceptional circumstances: see for example *Re M (Minors) (Adoption)* [1990] 1 FCR 785; [1990] 1 FLR 458 (CA), *Re K(Adoption: Foreign Child)* [1997] 2 FCR 389; [1997] 2 FLR 221 (CA) and *HX v A Local Authority (Application to Revoke Adoption Order)* [2020] EWHC 1287 (Fam); [2021] 1 FLR 82. The acknowledged authority on the point is the Court of Appeal decision in *Webster v Norfolk County Council* [2009] EWCA Civ 59; [2009] 1 FLR 1378.

51. In *Webster* a 2 year old child, one of three children, had been found to have six fractures. In contested care proceedings, the expert evidence was unanimous that the probable cause of the fractures was child abuse, rather than brittle bone disease. Care orders and freeing for adoption orders were made on all three children, who were later adopted. Subsequently a fourth child was born to the parents. In care proceedings relating to that child the previous fact-finding conclusion concerning the cause of the 2 year old's fractures was reopened. Fresh expert opinion was obtained from a number of experts, who all concluded that, rather than physical abuse, the probable cause of the original fractures was scurvy. The care proceedings were discontinued and the fourth child remained in the parents' care. About one year later, and 3 years

after the adoption orders had been made, the parents sought permission to appeal against the adoption orders.

52. The Court of Appeal [Wall, Moore-Bick and Wilson LJJ] dismissed the application for permission to appeal. Whilst there were other reasons supporting the court's refusal of permission, relating to the absence of a positive fact-finding that the injuries were caused by scurvy and the failure of the new evidence to pass the *Ladd v Marshall* [1954] 1 WLR 1489 test, the court separately stressed that, once made, an adoption order would only be set aside in highly exceptional circumstances. Giving the leading judgment, Wall LJ described the approach to be taken:

> ***"Is it open to this court in 2009 to set aside the adoption orders?***
>
> 145. This, in my judgment, is the critical question and the basis upon which the applications fall to be decided. Mr Peddie and Ms Hoyal sensibly acknowledged the difficulties which they face on this part of the case. They recognise that adoption is the process whereby a child becomes a permanent and full member of a new family, and is treated for all purposes as if born to the adopters – see section 67(1) of the 2002 Act, which, very properly, they cited to us.
>
> 146. Counsel further recognised that this court would be reluctant as a matter of public policy to set aside adoption orders. This, they accepted, was because if prospective adopters thought that natural parents could, even in limited circumstances, secure the return of a child after an adoption order had been made, this could have a dramatic effect on the number of people putting themselves forward as prospective adopters. Adoption orders have been perceived, counsel accepted, as final, and as putting the adoptive parents fully in control.
>
> 147. So Mr Peddie and Ms Hoyal are constrained to fall back on the facts. If the true facts had been known, A, B and C would not have been freed for adoption, and would not have been adopted. The injustice, therefore, remains.
>
> 148. In my judgment, however, the public policy considerations relating to adoption, and the authorities on the point – which are binding on this court - simply make it impossible for this court to set aside the adoption orders even if, as Mr and Mrs Webster argue, they have suffered a serious injustice.
>
> 149. This is a case in which the court has to go back to first principles. Adoption is a statutory process. The law relating to it is very clear. The scope for the exercise of judicial discretion is severely curtailed. Once orders for adoption have been lawfully and properly made, it is only in highly exceptional and very particular circumstances that the court will permit them to be set aside." [emphasis added]

That approach was endorsed by Moore-Bick LJ and further described by Wilson LJ at paragraph 204:

> "Unfortunately for them, it is far too late for the applicants to bring appeals in which to press that these orders be set aside and that the applications for them be reheard. It is far too late at each of two levels. The first is the level at which the interests of the three children fall to be considered: almost four years ago they moved into alternative homes which they were told would be permanent and of which they would be full, legal members; and at that time they ceased even to see the applicants. The second is the level which demands recognition of the vast social importance of not undermining the irrevocability of adoption orders."

53. The decision in *Webster* is important in the context of the issue now before the court. Wall LJ's conclusion at paragraph 148 to the effect that, even if Mr and Mrs Webster had proved that the original fractures were the result of scurvy, rather than physical abuse, and they had therefore suffered a serious injustice with the consequence that they have lost three of their children to adoption, the public policy considerations in favour of maintaining those adoption orders would 'simply make it impossible' for the court to set the orders aside. Whilst it is important 'never to say "never"', breach of the medical requirements of AAR 2005 would seem to fall a good deal further down the scale of injustice than an erroneous finding of causing fractures to a 2 year old child and it is extremely difficult to contemplate circumstances where breach of the AAR 2005 by an adoption agency could so impact upon the court's subsequent decision on adoption to justify setting validly made adoption orders aside.

54. An example of a case where an adoption order was set aside is the decision of Theis J in *ZH v HS (Application to Revoke Adoption Order: Procedure in Non-Agency Adoption Placement)* [2019] EWHC 2190 (Fam). In *ZH* a child of a Somalian mother, who was detained by immigration authorities in Holland, came to be in the care of a paternal aunt and uncle in England, with the agreement of the child's father. The aunt and uncle applied for and were granted an adoption order. Neither parent had given formal consent to adoption, or had been given notice of the court hearing. The child had not lived with the adopters for the required statutory period and notice of intention to adopt had not been given correctly to the local authority. The child was not a party to the adoption application and the applicants were not legally represented. No AAR 2005 medical assessments were provided and the local authority failed to evaluate the merits, and de-merits, of adoption. These and other failures led Theis J to hold that the adoption order had not been lawfully or properly made. In addition all parties, including the aunt and uncle, agreed that the adoption order should be set aside and the child returned to the care of the mother.

55. The extraordinary degree to which the ordinary requirements for a fair and valid process leading to an adoption order had been ignored mark *ZH* out as a wholly exceptional case. The errors went, as Theis J held, 'to the very root of the adoption process; in particular notice to the birth family and consent'. In addition, the fact that this was an intra-familial adoption, as opposed to an adoption agency placement within the context of public law child protection proceedings, and the fact that the adopters were in agreement that the order should be set aside, indicate that *ZH* is in a different category to the cases that are in focus in the present application.

FPR 2010, Part 18

56. These applications were brought before the court under FRP 2010, Part 18. Rule 18.1 describes the scope of Part 18:

> 18.1. (1) The Part 18 procedure is the procedure set out in this Part.
>
> (2) An applicant may use the Part 18 procedure if the application is made:
>
> (a) in the course of existing proceedings;
>
> (b) to start proceedings except where some other Part of these rules prescribes the procedure to start proceedings; or
>
> (c) in connection with proceedings which have been concluded.
>
> (3) Paragraph (2) does not apply:
>
> (a) to applications where any other rule in any other Part of these rules sets out the procedure for that type of application;
>
> (b) if a practice direction provides that the Part 18 procedure may not be used in relation to the type of application in question.

57. A number of short points arise:

a) Part 18 is solely a procedural vehicle. It does not of itself establish any jurisdiction to make orders or declarations. Any application made under Part 18 must therefore be for relief that the court, in family proceedings, otherwise has jurisdiction to grant;

b) The limitations in r 18.2(a)-(c) make it plain that Part 18 is not available in cases where there are no existing, or concluded, proceedings and the application is not one to start proceedings.

58. The application made to this court by SCC is for the court to make general rulings under Part 18 that are applicable to all local authorities in the following terms:

a) Any extant placement orders will have been lawfully made and will not be susceptible to challenge on the basis of non-compliance with AAR 2005, regs 15 and 17 (subject to certain caveats);

b) Any adoption orders will have been lawfully made and will not be susceptible to challenge on the basis that the child's placement order was made following the agency's non-compliance with AAR 2005, regs 15 and 17;

c) Adoption agencies will be entitled to infer that an agency medical adviser has been appointed in compliance with AAR 2005, reg 8 from a variety of circumstantial facts. A formal letter of appointment not being necessary.

59. One only has to set out the requested declarations and rulings sought by SCC against the modest terms of the FPR rules to understand that, as a procedural vehicle, Part 18

is wholly inappropriate for the journey that was being contemplated by the local authority. In circumstances where these applications are to be dismissed by consent, it is not necessary to labour matters. The point must however be noted that Part 18 is no more than a procedural gateway to the court so that applications, which the court must otherwise have jurisdiction to grant in family proceedings, may be made.

Conclusion

60. These proceedings are now concluded and the Part 18 applications made by SCC will be dismissed. I have determined that, despite such procedural errors that may have occurred in the preparation of reports and other steps prior to the adoption agency decision maker deciding that an application for a placement for adoption order should be made, or that a child should be placed with specific adopters, any existing placement orders or existing adoption orders made by a court are fully valid, unless and until they are set aside or revoked by a subsequent court order.

61. For the reasons that I have given, and in the absence of some very significant evidence as to a child's health, which was not otherwise known to the court, it is unlikely that an application to revoke a placement order will be justified solely on the basis that the medical elements of the AAR 2005 had been breached. Where an adoption has taken place, the established authorities indicate that it will only be in wholly exceptional circumstances that an existing adoption order will be set aside. It is difficult, if not impossible, to contemplate circumstances relating to a child's health, which were not known to the court when the adoption order was made, being of sufficient weight to meet that very high test.

What needs to happen now?

62. The fact that these proceedings have concluded with the dismissal of the local authority's application for declarations does not in any manner indicate that the problem which gave rise to that application has been resolved or is not important.

63. The problem remains and it is now apparent that there has been widespread ignorance of, and non-compliance with, the health assessment requirements in AAR 2005. The court has not engaged at all with OFSTED, which has the responsibility for inspecting adoption agencies, but the extent of the apparent failure to abide by the regulations suggests that this is not an issue which has been picked up on inspection, amongst the many different requirements that OFSTED is responsible for regulating.

64. In her judgment, Roberts J described the framework of regulation and guidance relating to the medical assessment of children, family members and adopters [see paragraphs 29 to 33]. In addition to the AAR 2005, local authorities in England must act under the general guidance issued by the Department for Education under Local Authority Social Services Act 1970, s 7 in July 2013 [see Roberts J paragraphs 30 to 32]. Local authorities in Wales must follow the Adoption Agencies Regulations 2005 Statutory Guidance issued by the National Assembly for Wales in 2006.

65. In addition to the paragraphs of guidance cited by Roberts J [2.15 to 2.17], paragraphs 2.54 to 2.61 are also relevant. The importance of obtaining medical information on the child, in particular, is stressed at paragraph 2.59 of the English guidance:

> "Where the agency is seeking to obtain the parent's written consent, the agency should emphasise the importance of health information and the central role it plays in anticipating and providing for the child's current and future health needs."

The validity of that statement is obvious. Long-term, indeed life-long, plans are being made when a child is being considered for adoption. It is plainly crucial, both for those doing the planning and, in time, for those who are put forward as adopters, to know what, if any, specific health care needs a child may have now or in the future. The same point is made earlier at paragraph 2.35:

> "It is important to explain to the parent why it will be necessary to ask them for information about themselves and the child, including health and family health information. The social worker should emphasise how important this knowledge will be to provide current health care, and to enable plans to be made for the child now and in the future, and to satisfy the child's needs for information throughout their life."

So far as adopters are concerned, paragraph 3.35 states that:

> "Agencies have a duty to satisfy themselves that prospective adopters have a reasonable expectation of continuing to enjoy good health."

66. It is now a matter for each local authority and adoption agency to review its procedures and determine whether they have been operating in breach of the requirements of the AAR 2005.

67. If breach of the regulations is identified in cases in which a decision to apply for a placement order has been made, but the application has not yet been made to the court, then the adoption agency will no doubt decide to retake the decision once the correct procedure has been undertaken.

68. In cases where a breach is identified and an application for a placement order has been made but not determined, the local authority should consider itself under a duty to bring the breach to the notice of the court that is hearing the application. It will be for that court to make directions as to how matters should proceed, but, unless to do so would compromise the final hearing date, it is likely that the court will require the breach to be remedied before the final hearing so that all relevant information can be considered. To do otherwise would risk falling into the error of the recorder in *Re B.* Where a final hearing is imminent, it will be for the allocated judge to determine the way forward. In a case where no party, in particular the parents, is aware of any potential health issue that might conceivably impact upon the determination of the placement order application, it may be that the court will proceed with the final hearing but postpone making any final order pending receipt of the required medical information. I should stress that the decision in each case will be a matter for the individual judge, who will have the welfare of the child, the need to avoid delay and the need for a fair trial process fully in focus.

69. Where a placement order has been made and remains in force, that order, for the reasons that I have given, remains valid unless and until it is either revoked under the statutory scheme in ACA 2002, s 24 or otherwise set aside on appeal. An adoption

agency continues to be under a duty to comply with AAR 2005 and, in particular, before a decision is taken to place a child with prospective adopters both the agency's adoption panel and the agency decision maker must consider the child's permanence report. Where, by that stage, an earlier breach of the regulations has been identified, plainly the permanence report must be updated to include the required medical information.

70. In the light of the judgment of Roberts J and of this judgment, local authorities can, from now on, expect courts to be vigilant in order to be satisfied that the medical requirements of AAR 2005 have been complied with before any pending adoption application is decided.