Neutral Citation Number: [2025] EWCA Civ 2

Case No: CA-2024-001106

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mrs. Justice Lieven
WR23Z00024 & WR2300025

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 January 2025

Before :

SIR ANDREW McFARLANE, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE PHILLIPS

- -

RE X and Y (CHILDREN: ADOPTION ORDER: SETTING ASIDE)

- -
- -

Deirdre Fottrell KC, Dorian Day, and Samantha Smith (instructed by **Boardman, Hawkins & Osborne LLP**) for the **Appellant Adoptive Mother**
Andrew Norton KC and Elisabeth Richards (instructed by **David J Foster & Co Solicitors**) for the **Respondent Birth Mother**
Timothy Bowe KC and Mark Cooper-Hall (instructed by **Whatley Recordon Solicitors**) for the **Respondent Child Y**
Nick Brown (instructed by **the County Council**) for the **Respondent Local Authority**
The Children's Guardian did not participate in the appeal
Louise MacLynn KC and Tom Wilson (instructed by the **Treasury Solicitor**) for the **Respondent Intervener, Secretary of State for Education**

Hearing dates : 19-20 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR ANDREW McFARLANE P:

1. This is the judgment of the Court, to which all three members have contributed.

2. The single question of law at the centre of this appeal is whether the court has any jurisdiction to set aside a validly made order for the adoption of a child, other than by way of an appeal. If the central question is answered in the affirmative, then subsidiary issues will arise as to the manner and basis upon which that jurisdiction should be exercised.

3. The issue is one of importance. It is plainly important to the children at the centre of this appeal, their adopter and their natural mother. They, in common, sadly, with a cohort of adoptive families, have experienced adoption breakdown with the result that it is now said to be in the interests of the children for the adoption order to be set aside. It is, however, an issue that is also important in policy terms. The unique attribute of an adoption order, in contrast to any other order that may be made for the welfare of a child, is that it is 'for life' and, in common with the legal relationship established at birth, can only be extinguished by the making of a subsequent adoption order. If the court does have jurisdiction to set aside a validly made adoption order where, subsequently, it is held to be in the child's best interests to do so, then the ability to achieve permanence, security and stability for all adopted children may be compromised.

4. The appeal is from an order of Mrs Justice Lieven (*Re X and Y (Revocation of Adoption Orders)* [2024] EWHC 1059 (Fam)). The applicant ['AM'], who is the single adoptive mother of two children, X and Y, aged 17 and 16 at the time of the hearing before the judge, had applied to revoke the adoption orders, which had been made in 2013. The revocation application was supported by both children, who were held to be *Gillick* competent, and by their natural mother ['BM']. Lieven J held that the court lacked jurisdiction to set aside an adoption order solely on grounds relating to the adopted child's welfare. She therefore concluded that she had no power to revoke the adoption orders on welfare grounds, and must, therefore, refuse the application.

5. The adoptive mother's appeal is supported by the children and their natural mother. As originally constituted, there was, thus, no voice to be heard in opposition. For that reason, and because part of the appellant's case sought a declaration of incompatibility under Human Rights Act 1998, s 3 and, further, because of the clear policy implications raised by the issue, the court invited the Secretary of State for Education ['the SoS'] (as the government department responsible for adoption policy) to intervene. We are very grateful to the SoS for taking up that invitation and contributing fully to the appeal proceedings.

6. Adoption in England and Wales is entirely a creature of statute. The statutory scheme contained within the Adoption and Children Act 2002 ['ACA 2002'] does not include an express provision permitting a court to revoke an adoption order on welfare grounds. The law reports contain a number of instances where the Court of Appeal has set aside an adoption order on appeal, on some occasions a very significant time after the order had been made. Since 2013, there have also been a small number of first instance decisions in the High Court where an application to set aside an adoption order has been granted on solely welfare grounds. It will be necessary to look at each of these decisions

in some detail to determine whether they do establish the existence of the jurisdiction that the appellant and those supporting the appeal now rely upon.

The Factual Context

7. The factual background to this application was set out in some detail by Lieven J at paragraphs 5 to 25 of her judgment. In summary the essential factual elements are:

i) X and Y were placed with AM in August 2012. They were then just over 5 and 4 years old. They had previously spent a prolonged period in foster care, during which they had had significant contact with their birth mother, BM;

ii) The children did not settle well and asked for continuing contact with BM. AM agreed to them spending time with BM and her extended family and the children became more settled;

iii) In 2017-19, X expressed a wish to live with BM, whereas Y was clear that she wanted to remain with AM;

iv) BM had a third child who, after a period with his maternal grandmother, went to live with BM. BM then had two more children, whom she has cared for throughout their lives;

v) In 2020, during the Covid lockdown, AM allowed BM and her youngest children to move in for a period to live with her, X and Y in the adoptive home to help BM to escape from an abusive relationship;

vi) In August 2021, X and Y left AM's home and eventually moved to live with BM;

vii) In May 2022, X, who had by then been introduced to her birth father, moved to live with him;

viii) In February 2023, the local authority issued care proceedings. Y told the children's guardian that she wanted to stay with BM and did not want AM to continue to have parental responsibility for her. X wanted to live with her birth father, but to maintain a relationship with AM;

ix) In April 2023, AM made the present application to revoke the adoption orders;

x) In May 2023, child arrangement orders were made for Y to live with BM and for X to live with her birth father under CA 1989, s 8. A one year supervision order was made to the local authority;

xi) X's placement with her birth father subsequently broke down and she spent time living with BM and then AM before settling back with BM.

8. Before Lieven J, in April 2024, X's position, which had been that she no longer wanted to be 'unadopted', changed to supporting the application and wanting to remain with BM. Y maintained the position that she had consistently held for some time, which was to support AM's application and to be 'unadopted'.

9. Although, following a thorough review of the relevant authorities, Lieven J held that the court lacked jurisdiction to revoke an adoption on purely welfare grounds, she went on to record her assessment in terms of the welfare of X and Y at paragraph 94:

> "I do however wish to note, that I accept, certainly in the case of Y, it would be in her best interests to revoke the order. She plainly finds the present legal fiction distressing and the fact that it reflects neither reality nor her own sense of self, deeply upsetting. This has been her position consistently for a long period. The position is less clear cut in respect of X. I do not intend to carry out a detailed analysis of her welfare interests given that I have found I have no power to revoke."

The statutory scheme

10. In order to understand the statutory structure, and the legislative force, that lies behind an adoption order, it is necessary to consider the key provisions of ACA 2002.

11. X and Y, in common with many children who are adopted from the care system, were made subject to orders under CA 1989, s 31 placing them in the care of another local authority. By a separate order, that local authority was authorised to place them for adoption under ACA 2002, s 21:

> '**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).

> (4) A placement order continues in force until—
>
> (a) it is revoked under section 24,
>
> (b) an adoption order is made in respect of the child, or
>
> (c) the child marries, forms a civil partnership or attains the age of 18 years.'

12. ACA 2002, s 21 provides that a placement order may only be made where the 'significant harm' threshold criteria in CA 1989, s 31 for the making of a care order are satisfied (or the child has no parent or guardian), and where each parent or guardian with parental responsibility consents or where that parent's consent should be dispensed with under ACA 2002, s 52.

13. ACA 2002, s 52(1) provides:

> '**52 Parental etc. consent**
>
> (1) The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that—
>
> (a) the parent or guardian cannot be found or lacks capacity (within the meaning of the Mental Capacity Act 2005) to give consent, or
>
> (b) the welfare of the child requires the consent to be dispensed with.'

14. ACA 2002, s 52 is subject to s 1 which requires the court to afford paramount consideration to the welfare of the child 'throughout his life' [s 1(2)]:

> '**1 Considerations applying to the exercise of powers**
>
> (1) Subsections (2) to (4) apply whenever a court or adoption agency is coming to a decision relating to the adoption of a child.
>
> (2) The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.
>
> (3) The court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare.
>
> (4) The court or adoption agency must have regard to the following matters (among others)—
>
> (a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),

> (b) the child's particular needs,
>
> (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
>
> (d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
>
> (e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,
>
> (f) the relationship which the child has with relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—
>
> (i) the likelihood of any such relationship continuing and the value to the child of its doing so,
>
> (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
>
> (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.
>
> (5) …
>
> (6) In coming to a decision relating to the adoption of a child, a court or adoption agency must always consider the whole range of powers available to it in the child's case (whether under this Act or the Children Act 1989); and the court must not make any order under this Act unless it considers that making the order would be better for the child than not doing so.'

15. There is a deal of authority on the meaning of the phrase in s 52(1)(a): 'the welfare of the child requires the consent to be dispensed with'. In particular:

    - *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] All ER (D) 265 (May), [2008] 2 FLR 625;

    - *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] All ER (D) 103 (Jun), [2013] 2 FLR 1075;

    - *Re B-S (Adoption: Application of s 47(5))* [2013] EWCA Civ 1146, [2013] All ER (D) 145 (Sep), [2014] 1 FLR 1035;

    - *Re R* [2014] EWCA Civ 1625, [2014] All ER (D) 179 (Dec), [2015] 1 FLR 715.

It is not necessary to rehearse those matters here, save to record that the test for dispensing with consent is not undertaken by applying an ordinary welfare balance. The court must be satisfied that the child's welfare requires adoption, as opposed to any other lesser arrangement. After a full welfare evaluation of all of the pros and cons, undertaken in a holistic rather than linear manner, the court must consider that the highest level of intervention, namely adoption, is proportionate and necessary to meet the particular child's welfare needs.

16. Reference to adoption being the highest level of intervention is justified by reference to the statutory definition of an adoption order in ACA 2002, s 47:

> **'46 Adoption orders**
>
> (1) An adoption order is an order made by the court on an application under section 50 or 51 giving parental responsibility for a child to the adopters or adopter.
>
> (2) The making of an adoption order operates to extinguish—
>
> (a) the parental responsibility which any person other than the adopters or adopter has for the adopted child immediately before the making of the order,
>
> (b) any order under the 1989 Act or the Children (Northern Ireland) Order 1995,
>
> (c) any order under the Children (Scotland) Act 1995 (c. 36) other than an excepted order, and
>
> (ca) any child assessment order or child protection order within the meaning given in section 202(1) of the Children's Hearing (Scotland) Act 2011,
>
> (d) any duty arising by virtue of an agreement or an order of a court to make payments, so far as the payments are in respect of the adopted child's maintenance or upbringing for any period after the making of the adoption order.
>
> "Excepted order" means an order under section 9, 11(1)(d) or 13 of the Children (Scotland) Act 1995 or an exclusion order within the meaning of section 76(1) of that Act.
>
> (3) An adoption order—
>
> (a) does not affect parental responsibility so far as it relates to any period before the making of the order, and
>
> (b) in the case of an order made on an application under section 51(2) by the partner of a parent of the adopted child, does not affect the parental responsibility of that parent or any duties of that parent within subsection (2)(d).

> (4) Subsection (2)(d) does not apply to a duty arising by virtue of an agreement—
>
> (a) which constitutes a trust, or
>
> (b) which expressly provides that the duty is not to be extinguished by the making of an adoption order.
>
> (5) An adoption order may be made even if the child to be adopted is already an adopted child.
>
> (6) Before making an adoption order, the court must consider whether there should be arrangements for allowing any person contact with the child; and for that purpose the court must consider any existing or proposed arrangements and obtain any views of the parties to the proceedings.'

17. The status conferred by an adoption order is established by ACA 2002, s 67:

> '**67 Status conferred by adoption**
>
> (1) An adopted person is to be treated in law as if born as the child of the adopters or adopter.
>
> (2) An adopted person is the legitimate child of the adopters or adopter and, if adopted by—
>
> (a) a couple, or
>
> (b) one of a couple under section 51(2),
>
> is to be treated as the child of the relationship of the couple in question.
>
> (3) An adopted person—
>
> (a) if adopted by one of a couple under section 51(2), is to be treated in law as not being the child of any person other than the adopter and the other one of the couple, and
>
> (b) in any other case, is to be treated in law, subject to subsection (4), as not being the child of any person other than the adopters or adopter;
>
> but this subsection does not affect any reference in this Act to a person's natural parent or to any other natural relationship.
>
> (4) In the case of a person adopted by one of the person's natural parents as sole adoptive parent, subsection (3)(b) has no effect as respects entitlement to property depending on relationship to that parent, or as respects anything else depending on that relationship.

> (5) This section has effect from the date of the adoption.
>
> (6) Subject to the provisions of this Chapter and Schedule 4, this section—
>
> (a) applies for the interpretation of enactments or instruments passed or made before as well as after the adoption, and so applies subject to any contrary indication, and
>
> (b) has effect as respects things done, or events occurring, on or after the adoption.

18. In contrast to a placement order, which may be revoked under ACA 2002, s 24, the 2002 Act does not make any provision for the revocation of an adoption order save in the rare circumstances where a child adopted by one natural parent as sole adoptive parent subsequently becomes a legitimated person on the marriage of, or formation of a civil partnership by, the natural parents [ACA 2002, s 55] or where the child is subsequently made the subject of a further adoption order [s 46(5)].

19. The following integral elements in the statutory scheme make it plain that adoption is to be reserved for cases where the welfare of the child requires intervention so as to remove the child from their birth family, but that, where such intervention is necessary then the removal, as a matter of law, is intended to be life-long and intended to extinguish, in legal terms, natural family relationships so that it is as if the adopted child had been born to their adopter:

    i) The court's determination is to be based on 'the child's welfare throughout his life' [s 1(1)];

    ii) The court must have regard to 'the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person' [s 1(4)(c)];

    iii) A child may only be placed by a local authority under a placement order where the circumstances would justify the making of a care order and where the requirements regarding parental consent are satisfied [s 21(2)+(3)];

    iv) Parental consent may only be dispensed with where the welfare of the child 'requires' adoption (as opposed to any lesser intervention), applying s 1 and considering welfare 'throughout his life' [s 52];

    v) An adopted person 'is to be treated in law as if born as the child of the adopters or adopter' [s 67(1)], 'is the legitimate child of the adopters or adopter' [s 67(2)] and 'is to be treated in law … as not being the child of any person other than the adopters or adopter' [s 67(3)(b)];

    vi) Parliament has made no provision for the revocation of an adoption order, other than following legitimation or the making of a subsequent adoption order [s 55 and s 46(5) (see below)].

20. In cases that do not involve adoption, there is no legal mechanism by which natural parents or children can extinguish the parental bond between them, however much they

may wish to do so. The statutory scheme replicates this state of affairs in respect of adoptive parents and adopted children. The only gateway out of a legal parent/child relationship is adoption. In this context, it is to be noted that in ACA s 46(5) Parliament has made express provision for an adoption order to be made even if the child to be adopted is already an adopted child.

21. For completeness, it has long been recognised that there is a significant, qualitative, difference between adoption and any other arrangements by which a child may be looked after by those other than his/her parents. Some 40 years ago, in *Re H (Adoption: Parental Agreement)* (1982) 3 FLR 386, Ormrod LJ answered the question 'What do the adoptive parents gain by an adoption order over and above what they have already got on a long-term [fostering] basis?'. He said:

> "To that the answer is always the same – and it is always a good one – adoption gives us total security and makes the child part of our family and places us in parental control of the child; long-term fostering leaves us exposed to changes of view of the local authority, it leaves us exposed to applications, and so on by the natural parent. That is a perfectly sensible and reasonable approach; it is far from being only an emotive one."

That passage was quoted with approval by Lord Ackner in the House of Lords in *Re C (A Minor) (Adoption Order: Conditions)* [1988] 2 FLR 159 at 168G.

22. More recently, in *Re V (Long-Term Fostering or Adoption)* [2013] EWCA Civ 913, Black LJ offered a non-exhaustive list of the material differences between long-term fostering and adoption, drawing particular attention to the contrasting degree of security that the two models offer. The list [at paragraph 96] included:

> "(i) Adoption makes the child a permanent part of the adoptive family to which he or she fully belongs. To the child, it is likely, therefore, to 'feel' different from fostering. Adoptions do, of course, fail but the commitment of the adoptive family is of a different nature to that of a local authority foster carer whose circumstances may change, however devoted he or she is, and who is free to determine the caring arrangement.
>
> (ii) Whereas the parents may apply for the discharge of a care order with a view to getting the child back to live with them, once an adoption order is made, it is made for all time."

Lieven J's Judgment

23. The legal case on jurisdiction was fully argued before this court and we will, shortly, turn to our analysis of the decided cases. In those circumstances, and whilst paying full respect to the judge for her careful review of the law, it is not necessary to do more than summarise the approach taken to the issues of law by Lieven J.

24. The primary submission on behalf of the appellant at first instance was that the court had a power under its inherent jurisdiction to revoke the orders. Reliance was placed upon a number of High Court decisions, commencing with that of Bodey J in *Re W (Inherent Jurisdiction: Permission Application: Revocation and Adoption Order)* [2013] EWHC 1957 (Fam). An alternative ground was also advanced that a power to revoke existed under Matrimonial and Family Proceedings Act 1984, s 31F(6):

> '**31F Proceedings and decisions**
>
> (6) The family court has power to vary, suspend, rescind or revive any order made by it, including—
>
> (a) power to rescind an order and re-list the application on which it was made,
>
> (b) power to replace an order which for any reason appears to be invalid by another which the court has power to make, and
>
> (c) power to vary an order with effect from when it was originally made.'

25. Lieven J was not satisfied that the court had the power to revoke an adoption order on the sole basis of the adopted person's welfare. She concluded that the statute clearly only permits revocation in one circumstance, namely legitimation. The judge did, however, accept that there is a power to revoke or set aside an adoption order under the inherent jurisdiction, but she distinguished the circumstances of the present application, which was based solely on welfare interests, as opposed to other cases that have been based on procedural irregularity. Lieven J held that the inherent jurisdiction cannot be used to "cut across" the statutory scheme to achieve an outcome which was clearly contrary to Parliament's intention to restrict the very narrow circumstances in which an adoption order can be revoked.

26. The parties had submitted that the present case was of an exceptional nature sufficient to justify the court intervening. Lieven J did not consider that that argument was made out in the light of the increase in breakdown of adoption placements in recent years, with some basic statistics indicating that between 4% and 9% breakdown each year.

27. Finally, Lieven J decidedly rejected the applicant's alternative submission based on MFPA 1984, s 31F(6) as being applicable to adoption orders stating (at paragraph 90) that:

> "It would have been little short of extraordinary for Parliament to have introduced a power to revoke adoption orders, with no limitations or process, without including any further provisions."

28. On that basis, Lieven J refused the application to revoke the adoption orders.

The Appeal

29. We are extremely grateful to counsel for the clarity of their written and oral submissions. Those submissions have formed the basis of our in-depth review of each

of the relevant cases. It is not necessary, and would be potentially confusing, to take space here in summarising what each counsel submitted with respect to each of these authorities. Without any disrespect to the thoroughness of the submissions, we will do no more at this stage than summarise the key points that were made.

30. There was a degree of common ground between all parties upon the policy considerations identified by Ms Louise MacLynn KC and Mr Tom Wilson for the SoS:

    i) A central tenet of the legislative scheme for adoption is that the making of an adoption order, unlike any other order in Family proceedings relating to children, is 'definitive and final';

    ii) It has a 'transformative effect' which is quite different to almost any other order and treats the child as if born to the adopter in circumstances where the order may only be revoked under s 55 or by subsequent adoption [s 46(5)];

    iii) Powerful policy considerations militate away from any measure which dilutes or undermines the finality and certainty of an adoption order, which is intended to be final and for life;

    iv) The purpose of an adoption order is to effect a permanent transfer of parental status, regardless of subsequent events.

31. For the appellant, Ms Deirdre Fottrell KC (who did not appear below), leading Mr Dorian Day and Ms Samantha Smith (who did), focussed the appeal upon the following basis:

    i) Despite the strong policy context identified by the SoS, the High Court has accepted that the court does have power to revoke an adoption order under the inherent jurisdiction, albeit that the law sets a very high bar for doing so;

    ii) Central to AM's case is the 'necessity' for the court to correct the legal fiction which is said to exist where the de facto parent of these two young people is, once again, their birth mother. Lieven J was wrong in her analysis of when and how the power under the inherent jurisdiction should be exercised;

    iii) The circumstances in which the power may be exercised are narrow and fact-dependent. Their existence does not of itself offend the compelling public policy considerations as to the transformative nature of adoption;

    iv) Neither the High Court nor the Court of Appeal has excluded 'welfare' as a consideration to be taken into account when determining an application to revoke adoption, albeit that welfare will not be the paramount consideration.

    v) The approach taken by Lieven J in holding that it would only be in an 'exceptional' case that the court might exercise jurisdiction to set aside was in error. Where, as here, there is, it is said, 'a legal contrivance' (namely the continuing adoption order) which runs contrary to the child's welfare, this should not be tolerated.

32. At the hearing, the appellant no longer pursued the claim that the relevant provisions of ACA 2002 are not compatible with ECHR, Art 8.

33. For the local authority, Mr Nick Brown (who appeared below), supported the appeal and argued that the ACA 2002 did not establish a comprehensive statutory scheme regarding revocation. The courts had been justified in developing a jurisdiction to revoke orders under the High Court's inherent jurisdiction. That development had been principled and legitimate. Mr Brown submitted that there was a pressing and developing social need not to see young people 'trapped in a legal fiction', which he submitted was the position of Y in this case.

34. By a Respondent's Notice the local authority sought to uphold the judge's decision not to revoke the adoption order with respect to X, but for reasons other than those of the judge (lack of jurisdiction), namely on welfare grounds.

35. For BM, Mr Andrew Norton KC (who did not appear below), leading Ms Elisabeth Richards (who did), fully supported the submissions made by Ms Fottrell and, on paper, by the SoS. He submitted that this court had sufficient information to make the welfare evaluation necessary to support revocation of Y's adoption order, but might have to remit the case of X for further consideration.

36. In her skeleton argument for the SoS, Ms MacLynn summarised what she described, on instructions, as 'a continuing public policy imperative of the utmost importance that the finality and integrity of a properly made adoption order be protected'. We regard the propositions underpinning the SoS's position as important and therefore repeat them in full:

> "a. Adoption legislation, including that which preceded the ACA 2002, has been drafted in clear and unequivocal terms to ensure that an adoption order creates a complete, life-long, and irreversible transfer of parental status.
>
> b. The Secretary of State considers that it remains the case that it will '*gravely damage the lifelong commitment of adopters to their adoptive children*' if there is a possibility of the child or the birth parents seeking to challenge the finality of an adoption order. That could lead to a public perception that adoption is reversible and a less serious undertaking than biological parenting and risks diminishing the value and importance of adoption as a means of providing a permanent family to children in care.
>
> c. The research is consistent that one of the central factors relevant to the success of an adoptive placement is the stability of the adoptive family relationships and the commitment of the adoptive parents to the child.
>
> d. The Secretary of State also considers that any measure which weakens or undermines the finality and certainty of an adoption order risks deterring potential prospective adopters from seeking to adopt a child.
>
> e. The long-established public policy considerations must be viewed through a modern lens. Open adoptions, involving

> post-adoption contact between the child and their birth family, are increasingly common and are largely considered to be in a child's best interests. However, such arrangements inevitably rely on adoptive parents having the confidence in the stability of their legal and familial relationship with the child, which may be undermined if the finality of adoption is weakened.
>
> f. Similarly, in the era of social media, it is increasingly likely that an adopted child, whether in the context of an adoption breakdown or not, will be able to make contact with their birth family. Again, the finality and certainty of the adoptive family relationships will be central to managing any such contact."

37. The SoS's written position had been that she did not seek to argue that a power to revoke under the inherent jurisdiction does not, or should not, exist to be exercised in 'highly exceptional and very particular circumstances'. It was submitted that, by excluding even exceptional circumstances, Lieven J had adopted an improperly narrow interpretation of the caselaw, in particular *Webster v Norfolk County Council* (see below).

38. By the time that Ms MacLynn addressed the court, as the final advocate to do so, a line of distinction had begun to be identified during the hearing between cases where an adoption order had been set aside on appeal, and other cases where revocation had been ordered at first instance. She told the court that the SoS would not argue against the jurisdiction being limited to cases on appeal.

39. For Y, Mr Timothy Bowe KC and Mr Mark Cooper-Hall (who both appeared below) strongly submitted that Y was trapped in an identity that she totally rejected. Unless the adoption order were revoked, her status now and in the future would be wholly out of kilter with all of those around her in her family. Y had considered the prospect of being 'readopted' by BM, under s 46(5) and, Mr Bowe reported, she was fundamentally opposed to such an outcome.

40. In her reply, Ms Fottrell submitted that this case was 'highly exceptional' because of the operation of law placing AM back as the children's carer with parental responsibility under the CA 1989, s 8 orders that had been made, yet not being recognised in law as their mother. These facts therefore place the case in the very small category of cases justifying revocation.

The decided cases

41. By the close of the hearing, it was clear to all three members of the court that it was necessary to look at each of the previously decided cases in turn in order to unpick the basis on which they had been determined and to identify the origin and development of the jurisprudence in favour of there being a free-standing jurisdiction to revoke an adoption order under the inherent jurisdiction of the High Court, rather than upon appeal.

42. The parties to the appeal agreed that two principal propositions can be extracted from the decided cases. The first is that the High Court has the inherent power (sometimes described as an inherent jurisdiction) to revoke an adoption order, but only in "exceptional and very particular circumstances" (*Webster v Norfolk County Council* [2009] EWCA Civ 59, [2009] 2 All ER 1156, [2009] 1 FLR 1378 at §149). The second is that neither the High Court, nor this court, has excluded the child's welfare as a consideration which can be taken into account when determining an application for revocation.

43. These propositions, although they are agreed and have been accepted in a number of cases, are not correct. In order to explain, it is necessary to revisit the decided cases in some detail. We were referred to six decisions of this court, eleven later decisions of the High Court, and one more recent decision of this court.

Decisions of the Court of Appeal

44. *Re F (R) (An Infant)* [1970] 1 QB 385, [1969] 3 All ER 1101 – CA

   i) An adoption order was made in February 1969 on the basis that the child's mother could not be found. When she learned of the order in April 1969, she applied to this court for permission to appeal out of time and for the adoption order to be set aside. She produced evidence to support her case that all reasonable steps to find her had not been taken. The court (Salmon, Edmond Davies and Karminski LJJ) extended the time for appealing. As to that, Salmon LJ stated at 1103B:

   > "I would like to point out that, in cases of this kind, an extension is not granted lightly. The infant's interest has to be taken into account, and particularly what has happened since the date when the order was made and the date of the application. I am not laying down any general principle, but if some years had gone by, I think a very exceptional case would have to be made out for the court in its discretion to extend the time; but here we are dealing with a delay of only a few months. So I would grant leave…"

   ii) The court then set aside the adoption order and remitted the matter for rehearing. In doing so, Salmon LJ said at 1103H:

   > "Counsel for the respondents during the course of the argument has contended very persuasively that this court has no power, having regard to the language of the Adoption Act 1958 and the County Court Rules, to do anything except dismiss this appeal. I am afraid that I do not agree with him. As Edmund Davies LJ pointed out to counsel in the course of the argument, it would follow, if he were right, that even though the mother was on her way to the court to protest on the morning when the proceedings were held and had the misfortune to meet with a motor car accident or a train accident which prevented her from arriving and she came the next day, however strong her case was for keeping the

> infant, she would be debarred for ever. For my part, I am not prepared to accede to that argument. I think that this court has an inherent jurisdiction to remit a case of this kind when the mother has come forward in circumstances such as these, so that the whole of the matter may be reconsidered. We are here dealing with the future of a little child, and that is much too important to depend on any esoteric points of law or practice."

iii) Concurring, Edmund Davies LJ described this court as having "the inherent power" to rectify the situation that had arisen, while Karminski LJ observed at 1106B:

> "The power of this court to hear an appeal on a matter of this kind must depend on its inherent jurisdiction. It would be, in my view, wholly wrong to say that, in a case of this kind, where we are dealing with an infant, this court has no jurisdiction to correct a mishap – I do not say an error – of the kind that has happened here."

iv) *Re F* was an appeal out of time. It shows that this court may use its power to extend time for appealing from an adoption order in an exceptional case. It also shows that this court has the power (which it referred to as an inherent jurisdiction) to set aside an adoption order, in that case on the basis of an irregularity in the process by which it was obtained. The decision concerns the powers of this court. It does not relate to the question of whether the High Court has an inherent jurisdiction to revoke an adoption order.

45. *Re M (Minors) (Adoption)* [1991] 1 FLR 458 – CA

i) A divorced father agreed to the adoption of his children by their mother and her husband, and adoption orders were made in February 1988. At the time of the orders, the mother had advanced cancer, from which she died in May 1988. The children, who were aged 12 and 11 by the time of the appeal in March 1990, wanted to live with their father. The father, with the support of the step-father, applied for permission to appeal out of time.

ii) This court allowed the appeals and set aside the orders. Glidewell LJ, with whom Stocker LJ and Butler-Sloss LJ agreed, stated at 459:

> "In my view this is, as Lady Justice Butler-Sloss said during the course of argument, a classic case of mistake. It is quite clear that the present appellant was wholly ignorant of his former wife's condition and, had he known of it, he obviously would not have consented to the adoption. That ignorance vitiates his consent and means that it was of no effect. In the absence of that consent it is very doubtful whether the adoption order would have been made. Since it is clearly in the best interests of the children that the adoption order should be set aside, for those reasons, I would

> extend the time for both these appeals because formally they are separate appeals, and allow both appeals.
>
> I should say as a postscript that this is, if not unique, at the very least a wholly exceptional case. I say that because I do not want the setting aside of this adoption order in these circumstances to be thought of as some precedent for any related set of facts in another case."

iii) *Re M* was, like *Re F*, an appeal out of time from adoption orders that were vitiated by irregularity, in that case a mistake of fact. In deciding whether to allow the appeal out of time, the court inevitably took account of the children's welfare, but it was not considering the position of the court of first instance. It was careful to emphasise that it did not intend to set a precedent for the revocation of adoption orders in other cases.

46. *Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam 239, [1995] 3 All ER 333, [1995] 3 WLR 40 – CA, affirming *Re B (Adoption: Setting Aside)* [1995] 1 FLR 1

i) This was an appeal from a decision of Sir Stephen Brown P. The appellant Mr R, who was born in 1959, was adopted in that year by a Jewish couple. In adulthood, he worked in the Middle East, where he encountered serious difficulties. In 1989, he traced his birth parents and discovered that his father was a Muslim Arab. He applied to set aside the adoption order. His application was refused by Sir Stephen Brown P, who held that the adoption order had been regularly made and had been acted upon throughout the appellant's minority. In those circumstances the court had no power to set it aside. His decision was affirmed by this court (Sir Thomas Bingham MR, Simon Brown LJ and Swinton Thomas LJ).

ii) On appeal, Mr R argued, relying on *Re F* and *Re M*, that the High Court had an inherent power to set aside the adoption order on the basis of a fundamental mistake.

iii) Swinton Thomas LJ rejected this submission. At 337e he stated:

> "In my judgment such an application faces insuperable hurdles. An adoption order has a quite different standing to almost every other order made by a court: it provides the status of the adopted child and of the adoptive parents. The effect of an adoption order is to extinguish any parental responsibility of the natural parents. Once an adoption order has been made, the adoptive parents stand to one another and the child in precisely the same relationship as if they were his legitimate parents, and the child stands in the same relationship to them as to legitimate parents. Once an adoption order has been made the adopted child ceases to be the child of his previous parent and becomes the child for all purposes of the adopters as though he were their legitimate child.

> There are certain specific statutory provisions for the revocation of an adoption order. Section 52 of the Adoption Act 1976 provides for the revocation of an adoption on legitimation. Section 53 provides for the annulment of overseas adoptions. Those exceptions provide for specific cases. Unlike certain other jurisdictions, there are no other statutory provisions for revoking a validly made adoption order. Parliament could have so provided if it had wished to do so. Accordingly Mr Levy QC is compelled to submit that the court has an inherent power to set aside an adoption order made in circumstances such as these where, as he puts it, the order was made under a fundamental mistake of fact."

Referring to earlier cases, he observed at 338a:

> "I would prefer myself to regard those cases not as cases where the order has been set aside by reason of a procedural irregularity, although that has certainly occurred, but as cases where natural justice has been denied because the natural parent who may wish to challenge the adoption has never been told that it is going to happen. Whether an adoption order can be set aside by reason of fraud which is unrelated to a natural parent's ignorance of the proceedings was not a subject which was relevant to the present appeal."

At 339d, he listed a number of distinctions between the present case and *Re M*, one being that that case was an appeal. Referring to the Scottish case of *J and J v C's Tutor* 1948 SC 636, where adopters believed that they were adopting a healthy child, when the child in fact had a grave disability, he remarked at 340g that:

> "There may be many reasons, indeed good reasons, for an adoptive parent or an adoptive child subsequently to regret the adoption order that had previously been made… To allow considerations such as those put forward in this case to invalidate an otherwise properly made adoption order would, in my view, undermine the whole basis on which adoption orders are made, namely that they are final and for life as regards the adopters, the natural parents and the child."

iv) Simon Brown LJ accepted that there had been a fundamental mistake that went to the very nature of the adoptive placement and that an appeal within a short time of the adoption order being made might well have succeeded. However, asking whether anything could be done 35 years later, he stated at 342b:

> "Tempting though it is to come to the aid of this appellant in his plight, I too have reached the clear conclusion that we cannot; that to do so would involve a radical and impermissible distortion of the long-established adoption regime in this country."

He held that the cases relied on provided no support for the appellant's case. In contrast to the present case, they were all appeals. At 342d he stated that the only ways of challenging adoption orders, save in the narrow circumstances provided for by sections 52 and 53 of the Adoption Act 1976, are by certiorari or appeal (if necessary, by leave to appeal out of time). At 342j he added that:

> "It is, in short, one thing to allow an appeal (even an appeal out of time) on the ground of mistake; quite another to recognise it as a broad general basis of challenge available on judicial review or upon such unique form of process as is now before us. And, indeed, even upon appeal, as this court made very plain in *Re M*, only rarely will an adoption order be set aside on the ground of mistake: there are, as Swinton Thomas LJ's judgment has made plain, compelling reasons for treating adoption orders as of peculiar finality. Had the appellant's mother discovered the nature of the placement and herself appealed within a short time of the order being made, then, particularly if her appeal was supported by Mr and Mrs R, it might well have succeeded. But today, even supposing (contrary to the fact) that the appellant himself had been a party to the order and thus was entitled to appeal against it, it is inconceivable that any court would now grant him leave to appeal out of time and proceed to discharge the order. Exceptional though this case undoubtedly is and strong though the appellant's grievance, more important still is the integrity of the adoption system: its inviolability must be the ultimate imperative."

v) Sir Thomas Bingham MR also emphasised the unique nature of adoption at 343d:

> "The act of adoption has always been regarded in this country as possessing a peculiar finality. This is partly because it affects the status of the person adopted, and indeed adoption modifies the most fundamental of human relationships, that of parent and child. It effects a change intended to be permanent and concerning three parties. The first of these are the natural parents of the adopted person, who by adoption divest themselves of all rights and responsibilities in relation to that person. The second party is the adoptive parents, who assume the rights and responsibilities of parents in relation to the adopted person. And the third party is the subject of the adoption, who ceases in law to be the child of his or her natural parents and becomes the child of the adoptive parents.
>
> The Adoption Act 1976, in ss 52 and 53, makes provision for revocation and annulment of adoption orders. It is, however, noticeable that these provisions are very narrowly drawn, and no general challenge is permitted to adoption orders (otherwise than by way of appeal in the usual way)."

At 343h he observed that the courts have been very strict in their refusal to allow adoption orders to be challenged otherwise than by way of appeal. As to that, he continued at 344b:

> "An adoption order is not immune from any challenge. A party to the proceedings can appeal against the order in the usual way. The authorities show, I am sure correctly, that where there has been a failure of natural justice, and a party with a right to be heard on the application for the adoption order has not been notified of the hearing or has not for some other reason been heard, the court has jurisdiction to set aside the order and so make good the failure of natural justice. I would also have little hesitation in holding that the court could set aside an adoption order which was shown to have been obtained by fraud.
>
> None of these situations pertains here. No party to the adoption proceedings has at any stage appealed against the order. The order was regularly made, and there was no procedural irregularity of any kind. It is not suggested that any party to the proceedings deliberately misled the court which made the adoption order."

Referring to *Re M*, he said at 344f:

> "… it does not appear that the members of the Court of Appeal were opening the door to a new and wide-ranging jurisdiction to set aside adoption orders, but were simply showing a measure of indulgence to an appellant seeking an extension of time. In granting that indulgence the court were no doubt alive to the interests of the children, which would in the circumstances described to the court be much better served by revocation of the adoption order. Even so, the court was at pains to emphasise the exceptional nature of the case which had led it to allow the application and the appeal and to discourage reliance on the decision as a precedent. I do not think this decision can properly be treated as modifying in any way the earlier authorities, which were not in any event cited, so far as one can tell from the report. In the end, and much as I would like to help the appellant, I feel that it is impossible to do so without creating a discrepancy between English and Scottish authority, which is in itself highly undesirable in a field such as this, and without a risk of disturbing in a potentially mischievous way the basic assumption upon which the adoption regime is founded in this country."

vi) This treatment of *Re B* is comprehensive because it is unquestionably the most relevant case to the present appeal, and because it is binding upon us. It is the only decision of this court to directly consider the question of whether the High Court had an inherent power to revoke an adoption order, and it is strong

authority for the proposition that the power did not exist, even in the special circumstances of that case.

vii) For completeness, it is right to note that *Re B* was decided before the passage of the Human Rights Act 1998. However, the Appellants rightly acknowledge that the European Court of Human Rights has not found the operation of the Adoption and Children Act 2002 to be incompatible with the Convention: see for example *Y.C. v. United Kingdom* (no. 4547/10), [2012] 2 FLR 332.

47. *Re K (Adoption and Wardship)* [1997] 2 FLR 221 – CA

i) An adoption order was made in 1994 in relation to E, an orphaned baby who had been rescued from the conflict in Bosnia and brought to England. Notice of the proceedings was not given to the child's state-appointed guardian, or to surviving members of her family. The guardian and the grandfather appealed out of time from the adoption order. This court allowed the appeal and remitted the adoption application to the High Court.

ii) Having reviewed previous cases, Butler-Sloss LJ stated at 228:

> "The law seems to me to be clear that there are cases where a fundamental breach of natural justice will require a court to set an adoption order aside.
>
> I am satisfied that a fundamental injustice occurred to the guardian and, through him, to the natural family, and indeed to E herself since the wider considerations of her welfare were not considered. There was no proper hearing of the adoption application in January 1994, and in my judgment the order cannot stand. The delay, although unfortunate, cannot be laid at the door of those seeking to set the adoption order aside and, balancing the importance of the status of an adoption order against the plethora of procedural irregularities going to the root of the adoption process, the balance tips strongly in favour of setting the order aside. The procedure in this case displays all the characteristics of a fundamental breach of natural justice which, on the facts of this case, cannot be overlooked."

iii) *Re K* is another case where it was held on appeal that there had been procedural failings on such a scale as to amount to a fundamental breach of natural justice. It again concerns the powers of this court, and not those of the High Court.

48. *Webster v Norfolk County Council* [2009] EWCA Civ 59, [2009] 2 All ER 1156, [2009] 1 FLR 1378 – CA

i) Three young children were adopted in 2005 after the court found that one of them had suffered fractures and that they were caused by one or both of his parents. The parents then had a fourth child, and during proceedings about him they were permitted to obtain fresh expert evidence about the fractures. That report suggested a non-abusive explanation. In 2008, the parents applied for

permission to appeal out of time against the adoption orders and permission to file the report as fresh evidence. Although there had been no rehearing of the medical evidence, this court (Wall LJ, Moore-Bick LJ and Wilson LJ) considered the applications on the premise that the family had been victims of a serious injustice. Nevertheless, permission to appeal and to file fresh evidence was refused.

ii) Giving the leading judgment, Wall LJ emphasised at §18 that the court's role was limited to deciding the two applications before it. It was not suggested that there was any procedural irregularity or other defect in the adoption proceedings, and the applications proceeded on the basis that the adoption orders were properly and lawfully made (§132).

iii) In a section of his judgment between §145-164, Wall LJ considered whether it was open "to this court" (i.e. the Court of Appeal) to set aside the adoption orders some years after they were made. He reviewed *Re F*, *Re M*, *Re B* and *Re K*, and concluded at §161 that:

> "… they seem to me to reinforce the proposition that adoption orders, validly and regularly obtained, will not be disturbed even if, as in *Re B* they leave the adopted person denied of a proper ethnic identity."

He continued at §163 that:

> "The question, therefore, is whether or not a substantial miscarriage of justice, assuming that this is what has occurred, is or can be sufficient to enable the adoption orders in the present case to be set aside."

iv) He concluded that the applications should be dismissed for two reasons. The first, at §177, was that:

> "the adoption orders… were made in good faith on the evidence then available, and… those orders must stand."

The second was that the further evidence could have been obtained for use at the trial with reasonable diligence: §180.

v) In the course of his consideration, Wall LJ made these general observations:

> "[148] In my judgment,… 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."

vi) Wilson LJ, concurring, considered at §204 that it was far too late for the parents to bring appeals for two reasons. First, because of the interests of the children, who had been in their adoptive homes for almost four years. Second, because of:

> "the vast social importance of not undermining the irrevocability of adoption orders."

vii) *Webster* is another case in which this court was considering an application to extend time for appealing. It concerned the functions of the Court of Appeal, and is a further illustration of how reluctant this court has been to extend time for appealing from regularly-made adoption orders. The question of whether the High Court had a power to revoke an adoption order did not arise, and there is consequently no reference in the judgments to the question of whether or not there is an inherent jurisdiction. "The court" to which Wall LJ referred at §149, when speaking of judicial discretion being severely curtailed, and adoption orders only being set aside in highly exceptional and very particular circumstances, was this court, not the High Court. Unfortunately, as we will see below, that distinction has not been understood in a number of later decisions.

49. *Re W (A Child) (Adoption Order: Set Aside and Leave to Oppose)* [2010] EWCA Civ 1535, [2011] 1 FLR 2153, [2010] All ER (D) 264 (Nov) – CA

i) A child, born in 2005 to a mother afflicted by drugs, was removed from her care at the age of two. In 2008, a placement order was made in the Family Proceedings Court and he was placed for adoption in the following year. The mother apparently achieved abstinence and, some time after an adoption application was made, she expressed the wish to recover care of the child. However, notice of the adoption hearing was sent to the wrong address, and in March 2010 a circuit judge made an adoption order.

ii) In April 2010, the mother applied to revoke the placement order, which was not possible once the child had been placed for adoption. In May 2010, she learned of the adoption order and she applied to the circuit judge to set aside the order. In July 2010, that judge transferred the application to the High Court, where a hearing was listed "to determine whether the adoption Order should be set aside and if so whether the Mother should be given leave to oppose an adoption application".

iii) The hearing took place in September 2010 before Holman J, who had appeared as amicus curiae in *Re B*. He noted that he was sitting as a first instance judge, and not as an appeal court. He observed that there was no statutory provision for the extremely rare and exceptional situation where a valid adoption order may later be set aside. He considered it to be permissible, pragmatic and consistent with the purpose of the 2002 Act, to set aside the adoption order, with the consequence that the legal position would revert to what it was immediately before that, namely that the placement order would again be in force. He then considered section 47(5) of the 2002 Act and the question of whether leave

should be granted to oppose the making of the adoption order. He set aside the adoption order, granted the mother permission to oppose the making of an adoption order and gave directions for the future conduct of the adoption application.

iv) The adopters appealed, and this court (Thorpe LJ, Munby LJ and Coleridge J) allowed the appeal. No submissions were made about the propriety of a first instance judge setting aside an adoption order. Instead the court considered that the adoption order inevitably had to be set aside and focused on the question of whether the judge had been right to grant permission under section 47(5). One sees this in the extempore judgment of Thorpe LJ at §16:

> "[16] Standing back for a moment, it seems to me that there are a number of fundamentals that directed or guided the outcome of the case. The first is that the judge, sitting as he was in the county court, had two options. Manifestly the order of HHJ Hallon was so procedurally flawed that it could not stand. It was inevitable that it had to be set aside. If he set that aside and granted the application for permission, then he must have directed a retrial of the adoption application, not, as before, seemingly unopposed, but at the future hearing fully opposed. Alternatively, if he set aside the flawed order but refused the mother's application for permission, it fell to him, sitting as he was in the county court, to make the adoption order afresh, still an unopposed application. Of course we know that the judge took the first of those two courses."

At §17, he discusses the nature of section 47(5):

> "[17] The making of the adoption application in the county court gave the mother a new opportunity, namely to apply for permission to oppose the adoption application. However it cannot be too strongly emphasised that that is an absolute last ditch opportunity and it will only be in exceptionally rare circumstances that adoption orders will be set aside after the making of the care order, the making of the placement order, the placement of the child, and the issue of the adoption order application."

v) Thorpe LJ was there referring to the setting aside of adoption orders on appeal. Later, at §21, he described the mother's ground for setting aside the adoption order as being "of the greatest strength". In contrast, her application for permission to apply to set aside the placement order was "short on merit", and the judge had been wrong to grant it. In consequence, this court set aside his order and, exercising its own powers, set aside the original adoption order and remade it as at the date of the hearing before the judge.

vi) It is to be noted that the four experienced family judges who sat in *Re W* all appear to have accepted or assumed the existence of a power of a first instance court to set aside an adoption order on procedural grounds, some months after

it had been made. But the court heard no argument about that (the prevailing view being that the adoption order had to be set aside) and the preceding authorities were not cited: only those relating to section 47(5) were considered.

The decisions at first instance

50. <u>*Re PW (Adoption)*</u> [2013] 1 FLR 96 (Parker J)

i) PW was, by an order made by magistrates, adopted at the age of 17 by family friends, and she remained close to them throughout her life. However, at the age of 69, she applied to the High Court for the adoption order to be revoked, claiming that it should not have been made. At the hearing, she conceded that she instead needed to apply for permission to appeal out of time. Parker J conducted a careful review of the authorities, and held at §34 that:

> "I am satisfied that the only basis upon which I can undertake this application is by way of appeal. To that the question of delay is crucial. An appeal cannot proceed without an extension of time being given."

At §45 she continued:

> "It is obvious that PW's whole family, natural and adopted, wants to put things right as they see it but the reality is that this is retrospective and a wish to rewrite history… Unfortunately, it is not possible to put the clock back."

ii) She therefore refused to extend time for appealing and dismissed the application for permission to appeal.

51. <u>*G v G (Parental Order: Revocation)*</u> [2012] EWHC 1979 (Fam), [2013] 1 FLR 286 (Hedley J)

i) D was born by surrogacy in January 2011 and lived with the commissioning parents, Mr and Mrs G. In May 2011 a parental order was made after what was later found to be a gravely flawed process, with no parental reporter's report and no consideration of the statutory conditions. In September 2011 the parents separated and in November 2011, Mr G applied for the order to be set aside, both on procedural grounds and on the basis that Mrs G had been having an affair and had concealed her true intention to raise D as a single parent. Hedley J noted Mrs G's submission that the matter should have been dealt with by way of an appeal and not by an originating application. He found considerable merit in it, but exercised an original jurisdiction because it was necessary to investigate the evidence, and because the route of appeal and remission was not practicable now that the surrogate mother, SK, had withdrawn her consent: hence a fresh parental order could not be made.

ii) Hedley J reviewed the cases on revoking adoption orders and concluded, at §43-44:

> "[43] In the end I have concluded that I should refuse this application. I have done so for four principal reasons. First,

> given that the parental order is like an adoption order, an order conferring status, there should, so far as is possible, be certainty and clarity and, therefore, the court in considering such an application should be guided by the authorities on revoking adoption orders. There is no statutory power to do so nor any inherent power other than in the sort of circumstances raised in *Re M (Minors) (Adoption)* and *Re K (Adoption and Wardship).* The bar is set very high. Secondly, although the court, Mr G and SK, were undoubtedly misled by Mrs G in her silence, both as to the affair and her pessimistic perception of the marriage, that, in my judgment, comes nowhere near the circumstances that existed in *Re M (Minors) (Adoption)*, which in any event was said should not be used as a precedent on its facts, or in *Re K (Adoption and Wardship).* Thirdly, I do not believe that a revocation of this order is consistent with D's welfare, indeed if anything it conduces against it. This is in sharp contradistinction to *Re M (Minors) (Adoption)*. Mrs G is the only mother that he has known and his welfare will be undermined if she is deposed from that role. Fourthly, I am satisfied that the court would have reached the same decision as it did, even if all the matters revealed in the Cafcass report had been considered properly by the judge, and I think it more likely than not that such an order would have been made had all the information been disclosed, provided, of course, SK's consent and Mr G's application had continued.
>
> [44] I have also concluded that I should not set aside this order for the purposes of protecting the integrity of the court process. My reasons are essentially the third and fourth reasons above, namely welfare and the same outcome. I am also influenced by the fact that on the present position of SK there could not be an effective rehearing of this case on its merits. It follows that whilst I concluded that I have original jurisdiction to entertain this application to revoke a parental order, both on the basis of deception and the seriously flawed process, I have concluded, for the reasons given, that I should refuse the application."

iii) As can be seen, the circumstances in which Hedley J was prepared to exercise an original jurisdiction were specific to the legal framework for parental orders, under which the consent of the surrogate mother is indispensable. The decision does not support the proposition that the High Court has an original jurisdiction to revoke an adoption order.

52. Re W (Inherent Jurisdiction: Permission Application: Revocation and Adoption Order) [2013] EWHC 1957 (Fam), [2013] 2 FLR 1609 (Bodey J)

i) In 2004, an adoption order was made for a four-year-old girl. In 2012, it broke down and she was placed in foster care. The adopters wanted no more to do with her. The local authority took care proceedings and applied for permission to

invoke the inherent jurisdiction and for the adoption order to be revoked. At §6, Bodey J recorded that:

> "[6] It is common ground (a) that the only statutory ground for revocation of an adoption order under the Adoption and Children Act 2002 is inapplicable here and therefore (b) that the only possible vehicle for revocation would be the inherent jurisdiction of the High Court. It is also accepted that the inherent jurisdiction can be used for revocation, but only in exceptional circumstances."

ii) For the last two propositions, he relied on *Re B* at 340g and *Webster* at §149, but, as we have seen, those cases do not sustain these conclusions. Permission to invoke the inherent jurisdiction was at all events refused, see §12:

> "[12] Balancing the advantages and disadvantages, I have come to the clear conclusion that I should refuse leave to invoke the inherent jurisdiction. It is far less likely than likely that a revocation order would ultimately come to be made and the 'process' would stir up all the sorts of potential problems at the human level which I have tried to envisage. In short, it is a Pandora's box and the court should, in my view, only go there if it seems proportionate, necessary and reasonably likely to be ultimately successful. I do not think that the application fulfils those prerequisites."

53. <u>*PK v Mr and Mrs K*</u> [2015] EWHC 2316 (Fam), [2016] 2 FLR 576 (Pauffley J)

i) PK was adopted at the age of four by Mr and Mrs K. They sent her overseas to carers who abused her. She returned to England at the age of 14 and was reunited with her birth family. She applied for the adoption order to be revoked. The adoptive parents did not appear. Pauffley J applied the legal framework that had been adopted as common ground by Bodey J. She concluded, at §14-15 that:

> "[14] Whilst I altogether accept that public policy considerations ordinarily militate against revoking properly made adoption orders and rightly so, instances can and do arise where it is appropriate so to do. This case, it seems to me, falls well within the range of "highly exceptional and very particular" such that I can exercise my discretion to make the revocation order sought.
>
> [15] There are, it seems to me, powerful reasons in favour of revocation. The sole contraindication surrounds the public policy issue."

ii) She spelled out the welfare reasons at §25-26:

> "[25] If I were to decline to revoke the adoption order and refuse to allow PK to change her name back to that of her natural mother, it seems to me that there would be profound

> disadvantages in terms of her welfare needs. PK would continue to be, in law, the child of Mr and Mrs K. They would have parental responsibility and the legal rights to make decisions about and for her. But there would be considerable, maybe even insuperable, obstacles in the way of them exercising parental responsibility for PK given that they play no part in her life and she wishes to have nothing to do with them.
>
> [26] Moreover, against the background described, there would be emotionally harmful consequences for PK if she were to remain the adopted child of Mr and Mrs K."

54. *Re O (A Child) (Human Fertilisation and Embryology: Adoption Revocation)* [2016] EWHC 2273 (Fam), [2016] 4 WLR 148 (Sir James Munby P)

    i) C1 was born by IVF to a same-sex couple, X and Y. There was a paperwork error, and the couple were erroneously told by the clinic that they needed to adopt the child in order to achieve legal parentage. An adoption order was made by a district judge. Sir James Munby P's conclusion in this and a number of other cases was that, contrary to what the clinic had advised, the couple had as a matter of law been C1's legal parents from birth, and he so declared. He then asked at §25-31 whether the court (i.e. the High Court) had the power to revoke the adoption order, and found that it did. At §27, he stated:

    > "[27] There is no need for me to embark upon any detailed analysis of the case law. For present purposes it is enough to draw attention to a few key propositions: (i) Under the inherent jurisdiction, the High Court can, in an appropriate case, revoke an adoption order. In relation to this jurisdictional issue I unhesitatingly prefer the view shared by Bodey J in In re W *(Inherent Jurisdiction: Permission Application: Revocation and Adoption Order)*, para 6, and Pauffley J in *PK v K*, para 4, to the contrary view of Parker J in *In re PW (Adoption)*, para 1. (ii) The effect of revoking an adoption order is to restore the status quo ante: see *In re W (Adoption Order: Set Aside and Leave to Oppose)*, paras 11–12. (iii) However, "The law sets a very high bar against any challenge to an adoption order. An adoption order once lawfully and properly made can be set aside 'only in highly exceptional and very particular circumstances'": *In re C (A Child) (Adoption: Placement Order),* para 44, quoting *Webster v Norfolk County Council*, para 149. As Pauffley J said in *PK v K*, para 14: "public policy considerations ordinarily militate against revoking properly made adoption orders and rightly so." (iv) An adoption order regularly made, that is, an adoption order made in circumstances where there was no procedural irregularity, no breach of natural justice and no fraud, cannot be set aside either on the ground of mere mistake *(In re B (Adoption: Jurisdiction to Set Aside))* or even if there has been a miscarriage of justice

> *(Webster v Norfolk County Council)*. (v) The fact that the circumstances are highly exceptional does not of itself justify revoking an adoption order. After all, one would hope that the kind of miscarriage of justice exemplified by *Webster v Norfolk County Council* is highly exceptional, yet the attempt to have the adoption order set aside in that case failed."

ii) Finally, at §29 and §31:

> "[29] The present case is unprecedented, indeed far removed on its facts from any of the previously reported cases. The central fact, even if no one recognised it at the time, is that when Y applied for the adoption order she was already, not merely in fact but also in law, C1's mother. It follows that the entire adoption process was carried on while everyone, *including the District Judge*, was labouring under a fundamental mistake, not, as in *In re B (Adoption: Jurisdiction to Set Aside)*, a mistake of fact but a mistake of law, and, moreover, a mistake of law which went to the very root of the adoptive process; indeed, a mistake of law which went to the very root of the need for an adoption order at all. The entire adoption proceeded upon what, in law, was a fundamentally false basis.

…

> [31] To make an order revoking the adoption order, as I propose to do, will not merely right a wrong; it will recognise a legal and factual reality and put an end to a legal and factual fiction, what Ms Fottrell rightly described as a wholly contrived position. And it will avoid for the future—and this can only be for C1's welfare, now, into the future and, indeed throughout life—all the damaging consequences to which X, Y and the guardian have drawn attention. As Ms Fottrell put it, C1's welfare will be *better* served by restoring the status quo ante and setting aside the adoption order. I agree. I can detect no convincing argument of public policy pointing in the other direction; on the contrary, in this most unusual and highly exceptional case public policy marches in step with justice to X, Y and C1; public policy demands that I make the order which so manifestly is required in C1's best interests."

iii) *Re O* arose from a very specific situation in which the revocation of the adoption order was a formality, albeit an important one.

55. *Re J (A Minor) (Revocation of Adoption Order)* [2017] EWHC 2704 (Fam), [2018] 1 FLR 914 (Hayden J)

i) A child was placed for adoption and an adoption application was made. His mother applied for permission to oppose the making of the order. The matter came before a circuit judge at a first directions hearing, who dismissed the application in a written judgment, but then, inexplicably, went on to make the adoption order. The local authority immediately recognised the error and contacted the judge the next day, and she is described as 'purporting' to revoke the adoption order. The matter was referred administratively to Hayden J, apparently before the order was sealed. He revoked the judge's order, describing it as "a complete aberration", and observed, at §12-13:

> "[12] It strikes me that there are two equally legitimate alternatives here, either to refer the matter to the Court of Appeal or to address it myself in this Court. The latter course has the obvious attraction of avoiding delay. Primarily however, I have come to the conclusion that as [the judge's] purported Revocation Order was outside her powers, thus plainly void and as it was intercepted before being drawn or sealed, consideration of revocation may properly be addressed in the High Court. On the facts of this case, probably uniquely, I am also satisfied that the Court can and indeed should consider revoking the Order of its own motion.
>
> [13] For the reasons which are set out above, I consider the circumstances in which this adoption order was made are 'highly exceptional and very particular' to use Pauffley J's elegant and succinct phase. Whilst the Law Reports do not reveal this situation as having occurred before, there are some similarities with *Re. K (Adoption & Wardship)* [1997] 2 FLR 221. There the Court of Appeal indicated that where an adoption procedure had been fatally flawed, an application to revoke should be made to the High Court. Here there was, in short, a complete absence of due process and a wholesale abandonment of correct procedure and guidance. That is a clear basis upon which to consider whether the Order should be revoked."

ii) Again, the steps taken to remedy the errors in that case were clearly appropriate, though the decision in *Re K* does not in fact indicate that an application to revoke should be made to the High Court. The court in *Re J* did not consider the option of correcting the judgment or order under the slip rule (see below).

56. *Re J (Adoption: Appeal)* [2018] EWFC 8, [2018] 4 WLR 38, [2018] 2 FLR 519 (Cobb J)

i) J was the child of teenage parents. When he was five years old, by which time his father had largely dropped out of his life, his mother married an older man. They applied to adopt J, asserting untruthfully that the father's details and whereabouts were unknown. In 2013, an adoption order was made by magistrates. In 2016, the father tried to resume a relationship with J, and was shocked to learn that he had been adopted. In 2017, he appealed to the High

Court. The appeal was not opposed by the mother or step-father, who had by then separated. Cobb J granted permission to appeal out of time, allowed the appeal and set aside the adoption order. During a thorough review of the authorities, he stated, at §26:

> "[26] Adoption orders which have been lawfully and properly made will only be set aside in highly exceptional and very particular circumstances, (see Wall LJ in *Webster v Norfolk CC & Others* [2009] EWCA Civ 59 at [149]). This can be achieved in one of two ways, either by an appeal, or under the court's inherent jurisdiction (as to the latter, see for instance *Re W (Inherent Jurisdiction: Permission Application: Revocation and Adoption Order)* [2013] EWHC 1957 (Fam), and *PK v Mr and Mrs K* [2015] EWHC 2316 (Fam)). Given the procedural irregularity in the making of the decision under attack, the father rightly chose the appeal route."

ii) Cobb J set aside the adoption order because the integrity of the order had been materially undermined (§33). After separate consideration, he made an agreed contact order in favour of the father.

iii) *Re J* was therefore an appeal out of time based on an original procedural error.

57. _*ZH v HS (Application to Revoke Adoption Order: Procedure in Non-Agency Adoption Placement)*_ [2019] EWHC 2190 (Fam), [2020] 1 FLR 96 (Theis J)

i) In 2016, the High Court made an adoption order for T in favour of her aunt and uncle. T's mother, who had been overseas at the time of the order, arrived in the UK in 2018 and applied for revocation. All parties agreed that the order should be revoked and T should be placed in her care. Theis J found that the adoption order had been the result of a flawed process with numerous errors and omissions. She followed the approach taken in *Re O*, and summarised, at §43:

> "[43] In the context where the authorities have repeatedly made clear that it is only in exceptional and very particular circumstances that the court will permit the order to be revoked the critical considerations for the court are:
>
> (1) Was the adoption order lawfully and properly made?
>
> (2) The effect of revocation on the affected child."

ii) Reasons of convenience apart, it is not apparent why the application in that case was dealt with at first instance, rather than by way of an appeal out of time.

58. _*HX v A Local Authority and Others (Application to Revoke Adoption Order)*_ [2020] EWHC 1287 (Fam) [2020] All ER (D) 16 (Jun), [2021] 1 FLR 82 (MacDonald J)

i) A birth father without parental responsibility applied to revoke an adoption order made in 2019 in respect of a child who had been the subject of a placement order, on the basis that he had been unaware of the adoption proceedings.

MacDonald J found that the local authority had not taken reasonable steps to ascertain the father's identity and whereabouts. However, the failures did not represent the type of fundamental breach of natural justice sufficient to justify the revocation of the adoption order. In an extensive review of the authorities, he read *Re B* as limiting the inherent jurisdiction (by which he meant the jurisdiction of the High Court) to revoke an adoption order to those cases in which a failure of natural justice has occurred – see §33, and also 38(iii) and (iv):

> "38 (iii) Within this context, the court's discretion under the inherent jurisdiction to revoke a lawfully made adoption order is severely curtailed and can only be exercised in highly exceptional and very particular circumstances.
>
> (iv) Those highly exceptional circumstances must comprise more than mistake or misrepresentation or serious injustice and amount to a *fundamental* breach of natural justice."

ii) Basing himself on *Webster*, MacDonald J considered that he was exercising an original jurisdiction, albeit one that he framed narrowly with reference to *Re B*.

59. *CD v Blackburn and Darwen Borough Council* [2020] EWHC 3411 (Fam) (Peel J)

i) In April 2020, adoption orders were made by a circuit judge for three children who had been subject to placement orders. In July 2020, the birth mother applied to the High Court revoke the orders on the basis that she did not accept the outcome of the care proceedings. Peel J directed himself in accordance with *Re O* and *ZH v HS.* He dismissed the mother's application as being without merit.

ii) An appeal by the mother was dismissed by this court in *Re I-A (Children) (Revocation of Adoption Order)* [2021] EWCA Civ 1222. Applying the approach summarised in *HX* and *AX v BX*, it held that there had been a procedural irregularity when the adoption order was made, but in the circumstances of the case it did not meet the high hurdle of a fundamental breach of natural justice so as to require a court to revoke the order.

iii) Before Peel J, and on appeal, there was no argument about the powers of the High Court to have entertained the mother's application.

60. *AX v BX (Revocation of Adoption Order)* [2021] EWHC 1121 (Fam), [2021] 4 WLR 80, [2022] 1 FLR 759 (Theis J)

i) A and B, aged 18 and 16 at the time of the judge's decision, were adopted in 2011. In 2018 they made contact with their birth family and the adoptive placement broke down. They were subject to care proceedings and interim care orders were made. The adoptive parents did not seek their return. A and B applied to revoke the adoption order with the support of their children's guardian and without opposition from the adoptive parents. Theis J nevertheless carefully considered the court's powers:

> "[33] It is well established that the High Court has, by way of its inherent jurisdiction, power to revoke an adoption order. The circumstances in which a court may revoke a lawfully granted adoption order under the inherent jurisdiction is set out in a number of well-known authorities, both on appeal and at first instance. The authorities disclose no preference as between the use of the inherent jurisdiction or on appeal, save that Cobb J in *Re J (Adoption: Appeal)* [2018] 2 FLR 519 at paragraph 20 suggested an appeal may be the preferred route where procedural irregularity is the ground for revocation."

ii) Theis J took the relevant principles from the summary given by Sir James Munby P in *Re O* and reviewed a number of other authorities, leading to these observations at §77-78.

> "[77] The starting point in these applications is the lodestar provided in paragraph 149 in *Webster*. The position could not be set out more clearly. The court's discretion under the inherent jurisdiction to revoke a lawfully made adoption order is severely curtailed and can only be exercised in *'highly exceptional and very particular circumstances'*. The permanent and lifelong nature of adoption orders and the very powerful public policy reasons, as articulated in the cases, underpin this rationale. The cases, *Webster* included, have given examples of when, on the very particular facts of the case, the discretion has and has not been exercised. Obviously, each case is highly fact dependent. In my judgment, there is no exhaustive category of cases where the court may exercise its discretion, although *Webster* and other cases make it clear the very steep hill that has to be climbed and why.
>
> [78] I also reject the submission that welfare can play no part in the exercise of the court's discretion. The cases demonstrate it clearly has been to a greater or lesser extent, depending on the circumstances of the case (for example *Re M*, *PK* and *Re O*). That approach is not inconsistent with the provisions in s 1 (7) ACA 2002, which expressly includes welfare considerations in applications to revoke an adoption order. It is not necessary for me to determine whether welfare in the exercise of the court's inherent jurisdiction should specifically be guided by the statutory framework for welfare as set out in s 1 ACA 2002, although I agree with the submissions that it should not be inconsistent with it."

iii) Theis J then offered this summary at §80:

> "[80] (1) An adoption order is a transformative order that changes the child's status in a way that is intended to be legally permanent.

> (2) Once made the effect of an adoption order is to extinguish any parental responsibility of the natural parents and any continuing legal relationship between the natural parent and the child. By virtue of s 67 ACA 2002 the child is treated in law as if born as the child of the adoptive parent(s).
>
> (3) The only statutory ground for revocation is provided by s 55 ACA 2002 when, pursuant to s 1(7) ACA 2002, the court's paramount consideration is [the] child's welfare throughout his life.
>
> (4) There are strong public policy reasons for not permitting the revocation of adoption orders once made based on (i) the intended permanent and lifelong nature of such orders; (ii) the damage to the lifelong commitment of adopters if there was a possibility of challenge to the validity of the order, and (iii) the impact on the availability of prospective adopters if they thought the natural parents could, even in limited circumstances, secure the return of the child after the adoption order was made.
>
> (5) There is jurisdiction to revoke an adoption order under the inherent jurisdiction of the High Court. Any discretion is severely curtailed where an adoption order has been lawfully and properly made and can only be exercised 'in highly exceptional and very particular circumstances' (per *Webster* [149]).
>
> (6) Although each case will turn on its own facts, the highly exceptional circumstances must comprise more than mistake or misrepresentation or serious injustice and amount to matters such as a fundamental breach of natural justice.
>
> (7) Welfare can, in appropriate cases, be taken into account in deciding whether to exercise the court's discretion where the highly exceptional and particular circumstances of the case justify it (see *Re M*, *Re B*, *Re PK* and *Re O*). The extent to which it can, or should be taken into account will vary, depending on the circumstances of the particular case."

iv) The last three paragraphs are the culmination of the High Court's assertion of an inherent jurisdiction to set aside adoption orders by a process of balancing public policy and welfare considerations. Applying that approach, Theis J revoked the adoption orders. She recognised the strong public policy considerations that normally weighed against revoking properly made adoption orders, but found that there were "compelling highly exceptional and particular circumstances" that supported revocation. The adoption had not turned out as intended and the relationship between the children and the adopters had completely broken down. There would be an adverse psychological and emotional impact on A and B if they remained in a legal fiction, unrelated to

their day to day reality. The Article 8 identity rights of A, B, the mother and the adoptive parents were engaged. The balancing exercise came down firmly in favour of the orders being revoked.

v) The facts of *AX v BX* are notably similar to the facts in the present appeal.

Analysis of the authorities

61. The key authority remains the decision of this court in *Re B*, which stated that the courts should be strict in their refusal to allow adoption orders to be challenged otherwise than by way of appeal. Nevertheless, that is what had happened at first instance in the decision that came to this court on appeal in *Re W*, and in nine of the eleven first instance cases, the exceptions being *Re PW* (Parker J) and *Re J* (Cobb J). When entertaining applications to revoke adoption orders, the High Court has relied on the dicta of Wall LJ in *Webster* but, as seen above, those observations did not relate to the powers of the High Court at all. Parker J was therefore correct to hold that the only remedy available to the applicant in *Re PW* was an application for permission to appeal out of time. The misunderstanding that there is an inherent jurisdiction in the High Court to set aside an adoption order first appears in *Re W* (Bodey J) and became codified as received wisdom after that, in particular in *Re O* (Sir James Munby P).

62. Evidently, the child's welfare is to be taken into account in deciding whether to grant permission to appeal out of time, but there is no support in *Re B* for the proposition that adoption orders can be set aside on welfare grounds. On the contrary, the development of the law in that direction has been at odds with the insistence in *Re B* on the inviolability of regularly made adoption orders as being the ultimate imperative. The requirement for an extension of time for appealing is an important filter in protecting adoption orders from challenge, and it should not be circumvented by the assumption of an original jurisdiction at first instance.

63. There may nevertheless be very narrow and specific instances in which the High Court finds it necessary to entertain an application to revoke an adoption order, but they will only arise where for some reason an appeal, in or out of time, is not possible. That was the position in *G v G* (Hedley J), where the special statutory environment of surrogacy made it impracticable to bring an appeal.

64. There may also be cases, where the failure to serve a party has been so quickly identified that the court, whether the High Court or the Family Court, can correct the position by using its powers under the Family Procedure Rules 2010. FPR 27.5 provides:

> "*Application to set aside judgment or order following failure to attend*
>
> 27.5
>
> (1) Where a party does not attend a hearing or directions appointment and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.

> (2) An application under paragraph (1) must be supported by evidence.
>
> (3) Where an application is made under paragraph (1), the court may grant the application only if the applicant –
>
> (a) acted promptly on finding out that the court had exercised its power to enter judgment or make an order against the applicant;
>
> (b) had a good reason for not attending the hearing or directions appointment; and
>
> (c) has a reasonable prospect of success at the hearing or directions appointment."

65. The use of this statutory power does not amount to the exercise of an originating inherent jurisdiction. It is not clear why the power was not considered in *Re W* (Holman J and CA), where the mother had not been given notice of the adoption hearing. A recent unreported case provides a good example of its use in this context. A circuit judge made an adoption order in the absence of the birth mother, who had attended every hearing so far. She contacted the court the next day, saying that she had wanted to attend the hearing but had not had notice. The judge made a further order that day, giving the mother the chance to apply to set aside the order within 7 days. She did so, and he relisted the matter a week later. After hearing submissions and some evidence, he accepted that the mother had not had notice. He set aside the adoption order and made a new adoption order. That was an appropriate exercise of that court's powers and the mother's application for permission to appeal from the adoption order on other grounds was refused by this court.

66. The court (High Court or Family Court) may also be able to employ FPR 2010 29.16, known as the slip rule:

> "*Correction of errors in judgments and orders*
>
> 29.16
>
> (1) The court may at any time correct an accidental slip or omission in a judgment or order.
>
> (2) A party may apply for a correction without notice."

This power, and its equivalent in CPR 40.12, is most often used to correct minor blemishes or omissions in orders. However, it can be deployed wherever there has genuinely been an accidental error or omission, but not as a way for the court to have second or additional thoughts: *Santos-Albert v Ochi* [2018] EWHC 1277 (Ch), [2018] WLR (D) 315, [2018] 4 WLR 88 at §27. It is strongly arguable that the circuit judge's "obvious aberration" in making an adoption order in *Re J* (Hayden J) was an accidental error, as seen by her immediate attempt to set it aside the next day. That course was apparently open to her, but in view of the sensitivity once the prospective adopters had learned of the judgment, it was sensible for the matter to be resolved by the family

presiding judge. However, it was not seemingly necessary to rely on any inherent jurisdiction to achieve that outcome.

67. As to the decision in *Re O*, for strict correctness, Sir James Munby P could have sat in the Court of Appeal and set aside the adoption order unopposed under CPR PD52A 6.4-6.5. That would have been possible because the setting aside of the order was a formality, albeit an important one, being no more than a corollary to the declaration of parentage, and with no competing third party or public interest. The important point is that the temptations of convenience must not become a slippery slope towards the assumption of a legal power.

68. It follows from the above that the statements about the extent and nature of the powers of the High Court, originating in *Re W*, continuing in *Re O*, and culminating in the summary in *AX v BX* at §80(5)-(7), are not correct and should not be followed. It further follows that the two cases in which adoption orders were set aside for welfare reasons (*Re PK* and *AX v BX*) were wrongly decided, albeit from the best of motives. As was made clear in *Re B*, the fact that an adoption has turned out badly and that revocation would serve the interests of the adopted person, whether a child or an adult, is not a reason for the court to supply a remedy that Parliament has chosen not to provide.

69. The court is of course required to act within a human rights framework and it is possible to imagine such an extreme situation arising that the revocation of an adoption order becomes necessary if the court is to comply with its Convention obligations. However, the remedy in such a case would almost certainly be an appeal out of time, and not an originating application. Further, it is highly unlikely that the Article 8 right to respect for family life or for personal identity could ever be of such weight as to justify an outcome that is at odds with the statutory scheme of adoption that has prevailed in this country for a century. Such an outcome would (per *Re B* at 340g) "undermine the whole basis on which adoption orders are made, namely that they are final and for life as regards the adopters, the natural parents and the child". Any change in that state of affairs is a matter for Parliament.

Conclusions

70. The conclusion that we have reached on consideration of the previously decided cases, which holds firmly that there is no jurisdiction at first instance to set aside a validly made adoption order, is on all fours with the summary of the underlying policy considerations put forward by the SoS, which we accept [paragraph 36 above]. Those policy considerations are, in turn, plainly in line with the approach of Swinton Thomas LJ, Simon Brown LJ and Sir Thomas Bingham MR in *Re B*. These are matters of fundamental principle with respect to adoption. Adoption orders are transformative, have a peculiar finality and are intended to be irreversible, lasting throughout life, as if the child had been born to the adopter. That high degree of permanence, from which the benefits to the child of long-term security and stability should flow, is the unique feature that marks adoption out from all other orders made for children; it is, at its core, what adoption is all about. We agree with the SoS that it would gravely damage the lifelong commitment of adopters to their adoptive children if there were a possibility of the finality of the adoption order being challenged on welfare grounds.

71. In reaching our decision, we have been acutely aware that it will be profoundly unwelcome to each of the lay parties in this appeal. We have particularly heard what Y

has said so clearly to us through the well-placed submissions of Mr Bowe. In the circumstances of this case, where she and her sister have never fully left their birth family and committed to their adoptive home, despite the consistently child-centred efforts of AM, Y and, maybe to a lesser extent, X will be profoundly upset by this outcome. If the court did have a welfare based jurisdiction then the outcome, as Lieven J indicated, would probably have been different.

72. We are also very conscious that this is by no means an isolated case and that there will be other, possibly many other, adoptive relationships which have broken down and for whom the ability to resort to the court to revoke the adoption order would be earnestly welcomed. But, for the reasons we have given, both the law, as passed by Parliament and as previously interpreted by this court, and the policy underlying the statutory adoption regime have inevitably led us to hold as we have done.

73. For the reasons that we have given, the appeal must be dismissed. Rather than holding, as all parties submitted was the case, that Lieven J's interpretation of the extent of any inherent jurisdiction to revoke an adoption order was too narrow, we have concluded that the reality is that no such jurisdiction exists.