



Neutral Citation Number: [2021] EWCA Civ 1222

Case No: B4/2021/0070

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**  
**The Hon Mr Justice Peel**  
**FD20P00432**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10 August 2021

Before :

**LORD JUSTICE BEAN**  
**LORD JUSTICE BAKER**  
and  
**SIR STEPHEN IRWIN**

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**IN THE MATTER OF THE SENIOR COURTS ACT 1981**  
**AND IN THE MATTER OF THE ADOPTION AND CHILDREN ACT 2002**  
**AND IN THE MATTER OF I-A (CHILDREN) (REVOCATION OF ADOPTION**  
**ORDER)**

Between :

HT  
- and -  
A LOCAL AUTHORITY (1)  
THE I-A CHILDREN  
(by their children's guardian) (2) to (4)

**Appellant**

**Respondents**

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**Chinonso Ijezie** (solicitor advocate of **Sky Solicitors Ltd**) for the **Appellant**  
**Julia Cheetham QC and Jack Harrison** (instructed by **Local Authority Solicitor**) for the  
**First Respondent**  
**Joanna Moody** (instructed by **Forbes Solicitors**) for the **Second to Fourth Respondents**

Hearing date : 17 June 2021  
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## **Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Tuesday 10 August 2021.

## **LORD JUSTICE BAKER :**

1. On 17 June 2021, we heard an appeal against an order by Peel J dismissing an application by the birth mother of three children to revoke an adoption order made in respect of the children. At the conclusion of the hearing, we announced our decision, namely that, although there had been a procedural irregularity in the making of the adoption order, it was not such as to justify revoking the order and that the appeal would be dismissed. We indicated that we would hand down our reasons at a later date. This judgment sets out my reasons for agreeing with the decision.
2. The issue arising on this appeal, although important, is narrow and the relevant facts can be summarised shortly.
3. The two older children were born in October 2016 and February 2018. In May 2018, care proceedings were started in respect of the two children following the discovery that the younger child had sustained a series of fractures. The children were removed from their parents under interim care orders and placed in foster care. In April 2019, the mother gave birth to her third child who was also placed in foster care under an interim care order. On 14 June 2019, following a finding that the injuries had been inflicted by one of the parents, all three children were made the subject of final care and placement orders by HHJ Booth. On 24 September 2019, permission to appeal against the making of the orders was refused by Peter Jackson LJ. On 15 October, an adoption application was filed in respect of the youngest child. On 28 October, the birth parents applied for leave to oppose the adoption. On 28 January 2020, adoption applications were filed in respect of the two older children. The parents again sought leave to oppose the adoptions. On 18 February, the three adoption applications were consolidated. On 21 February, Judge Booth heard and dismissed the parents' applications for leave to oppose the adoptions. On 26 March, permission to appeal against that order was refused by King LJ.
4. The adoption application was listed for hearing on 6 April 2020. The mother was given notice of the hearing. By that date, the country was in the middle of the first lockdown of the Covid 19 pandemic. The mother's application by email from her solicitor for an adjournment of the final hearing to allow more time to investigate options for family placements abroad was refused. At 14.14 on 1 April, the adoption social worker sent a text message to the birth mother informing her that "due to the coronavirus outbreak this hearing will now take place remotely by telephone" and giving instructions for attendance by telephone. At 15.17 the same afternoon, however, the adoption social worker sent a further text message to the mother stating "I have been informed by the court that HHJ Booth is excusing all parties from attending the hearing on Monday. There will be no telephone hearing as previously directed."
5. On 6 April, the following order was issued and sealed by the court:

"Before His Honour Judge Booth sitting in private on 6<sup>th</sup> April 2020

The Court has made this order in the following circumstances:

  1. There has been no attendance at Court by the adoption social worker or the birth parents due to the impact of the Covid 19 virus.

2. The parents have been refused permission to oppose the adoption. They had appealed to the Court of Appeal but had been refused permission to appeal.
3. The court had an email from the adoption social worker [name] describing attempts made to engage with the birth parents which had not been successful. The children were described as making tremendous progress in their adoptive placement.
4. The Court received an email from solicitors on behalf of the mother asking for the case to be adjourned on the basis that "...she believes that if she had more time her family abroad may be able to intervene and successfully oppose the adoption."
5. The Court is satisfied that the children's welfare needs should be paramount, that there is no realistic alternative to adoption that would meet their needs and that nothing else will do.

#### **THE COURT ORDERS THAT:**

1. Adoption orders made."
6. On 21 July 2020, the mother applied under the inherent jurisdiction for revocation of the care and placement orders made on 14 June 2019 and/or the adoption orders made on 6 April 2021. A number of grounds were relied on under the general heading of serious procedural irregularity and unfairness. It is unnecessary for the purposes of this appeal to refer to any of those allegations, save for one. Amongst the matters raised was that:

"the adoption order was, arguably, made in breach of the principle of fair hearing (under common law and Article 6 ECHR and Article 47 of the EU's Charter of Fundamental Rights), Rule 14.16 of the Family Procedure Rules 2010, and the applicable Coronavirus Guidance (the President's *Covid 19: National Guidance for the Family Court and Mr Justice MacDonald's The Remote Access Family Court* document). In particular, the final hearing was conducted without a physical, remote or hybrid oral hearing. HHJ Booth wrongly refused the written request of the Applicant's solicitors for an adjournment to allow the (extended) family members to intervene and oppose the adoption at the final adoption hearing. The circuit judge did not give an (good or sufficient) reason for refusing the adjournment request and for holding, albeit wrongly, that "*there is no realistic alternative to adoption that would meet [the welfare needs of the children] and that nothing else will do.*" Justice, fairness and due process were sacrificed at the altar of expediency and/or speed in the adoption proceedings."

7. In addition, the mother alleged that the orders represented a disproportionate interference with her Article 8 rights, that the possibility of vitamin D deficiency as a likely cause of the fractures was inadequately considered at trial, that the court had not paid sufficient attention to case law, and that the judge had given insufficient attention

and/or weight to the ability of wider family members to care for the children. Again, it is unnecessary for the purposes of this appeal to consider those additional issues in any further detail.

8. At a preliminary hearing on 28 July 2020 before Cohen J, directions were given for the filing of evidence. The directions were duly complied with. On 12 November 2020, some members of the wider family applied to be joined to the proceedings to argue for a further assessment by an independent social worker of the prospect of kinship placement.
9. The hearing took place before Peel J on 18 December 2021. At the conclusion of the hearing, the judge dismissed the mother's applications to revoke the care and placement orders and to revoke the adoption order and the applications by members of the wider family to be joined as parties and for reassessment.
10. On 8 January 2021, the mother filed a notice of appeal against the judge's order, identifying eight grounds of appeal. On 9 April 2021, I refused the mother permission to appeal against the dismissal of the mother's application to revoke the care and placement orders and against the dismissal of the applications by wider family members, but granted her permission to appeal on two grounds only against the dismissal of the application to revoke the adoption order. Those grounds were, in short, that the judge had misdirected himself and/or erred in law in holding that (1) FPR 14.16 provided a "knock out blow" to the mother's application and (2) HHJ Booth was entitled to excuse her attendance at the final adoption hearing.

## **The law**

11. S.46(6) of the Adoption and Children Act 2002 provides:

"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 arrangements and obtain any views of the parties to the proceedings."

S.51A of the Act provides, so far as relevant to this appeal:

- "(1) This section applies where
  - (a) where an adoption agency has placed ... a child for adoption, and
  - (b) the court is making or has made an adoption order in respect of the child.
- (2) When making the adoption order or at any time afterwards, the court may make an order under this section
  - (a) requiring the person in whose favour the adoption order is or has been made to allow the child to visit or stay with the person named in the order under this section,

or for the person named in that order and the child otherwise to have contact with each other ....

(3) The following people may be named in an order under this section

(a) any person who (but for the child's adoption) would be related to the child by blood ....

(4) An application for an order under this section may be made by ...

(c) any person who has obtained the court's leave.

(5) In deciding whether to grant leave under subsection (4)(c), the court must consider

(a) any risk there might be of the proposed application disrupting the child's life to such an extent that he or she might be harmed by it ....

(b) the applicant's connection with the child;

(c) any representations made to the court by

(i) the child, or

(ii) a person who has applied for the adoption order or in whose favour the adoption order is or has been made."

12. S.141 of the Act provides, so far as relevant to this appeal:

"(1) Family Procedure Rules may make provision in respect of any matter to be prescribed by rules made by virtue of this Act ...."

(2) [repealed]

(3) In the case of an application ... for an adoption order, the rules must require any person mentioned in subsection (4) to be notified

(a) of the date and place where the application will be heard;

(b) of the fact that, unless the person wishes or the court requires, the person need not attend.

(4) The persons referred to in subsection (3) are ...

(c) in the case of an adoption order ...

- (iii) every person who, if leave were given under section 47(5), would be entitled to oppose the making of the order.”

In these proceedings, the mother was a person who, if leave were given under s.47(5), would be entitled to oppose the order.

13. FPR rules 14.15 and 14.16 provide (so far as relevant to this appeal):

“14.15 Notice of final hearing

A court officer will give notice to the parties ...

- (a) of the date and place where the application will be heard; and
- (b) of the fact that, unless the person wishes or the court requires, the person need not attend.

14.16 The final hearing

(1) Any person who has been given notice in accordance with rule 14.15 may attend the final hearing and, subject to paragraph (2), be heard on the question of whether an order should be made.

(2) A person whose application for the permission of the court to oppose the making of an adoption order under section 47(3) or (5) of the 2002 Act has been refused is not entitled to be heard on the question of whether an order should be made.

....”

Under FPR 14.3, the mother was a party to the adoption application and therefore entitled to notice of the hearing under FPR 14.15. Under FPR 14.16(1), she was entitled to attend the hearing but under rule 14.16(2), as her application for leave to oppose the adoption had been refused, she was not entitled to be heard on the question of whether an order should be made.

14. Paragraph 10 of the President’s Guidance: *Listing Final Hearings in Adoption Cases* dated 10 April 2018 states that the requirement to give notice of the final hearing in rule 14.15 is mandatory and that, under rule 14.16, any person who has been given notice under rule 14.15 has the right to attend and, except where rule 14.16(2) applies, to be heard on the question whether an adoption order should be made. Paragraph 22 of the Guidance states that:

“The application for an adoption order should be determined at the hearing of which notice has been given under rule 14.15. If the application is not determined at that hearing, notice of any adjourned application should be given under rule 14.15 and this Guidance shall apply equally to the adjourned hearing.”

15. The power of the High Court to revoke an adoption order under its inherent jurisdiction has been considered by this Court in *Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam 239, *Re K (Adoption and Wardship)* [1997] 2 FLR 228, and *Webster v Norfolk County Council and others* [2009] EWCA Civ 59, [2009] 1 FLR 1378, and more recently in a series of judgments delivered by High Court judges, including *In re O (A Child) (Human Fertilisation and Embryology Act: Adoption Revocation)* [2016] EWHC 2273, [2016] 4 WLR 148 (Sir James Munby P), *Re J (A Minor) (Revocation of Adoption Order)* [2017] EWHC 2704 (Hayden J), *Re J (Adoption: Appeal)* [2018] EWFC 8 (Cobb J), *HX v A Local Authority and others (Application to Revoke Adoption Order)* [2020] EWHC 1287 (Fam), [2021] 1 FLR 82 (MacDonald J) and *AX v BX and others (Revocation of Adoption Order)* [2021] EWHC 1121 (Theis J). The principles were summarised by MacDonald J in *HX v A Local Authority* at paragraph 38:

“i) An adoption order effects a change that is, and is intended to be legally permanent. 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.

ii) There are strong public policy reasons for not permitting the revocation of adoption orders once made, grounded in the nature and intended effect of an adoption order but also in the grave damage that would be done to the lifelong commitment of adopters to their adoptive children if there was a possibility of the child, or indeed the parents, subsequently challenging the validity of the order and in the dramatic adverse effect on the number of prospective adopters available if prospective adopters thought that the natural parents could, even in limited circumstances, secure the return of the child after the adoption order was made.

iii) Within this context, the courts 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.”

16. In *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583, [2020] 2 FLR 297, this Court (Sir Andrew McFarlane P, Peter Jackson LJ and Nicola Davies LJ) gave guidance as to the conduct of family proceedings, including adoption applications, by remote hearing during the Covid 19 pandemic. Giving the judgment of the Court, the President stated (at paragraph 3(i)):

“The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong.”

Having referred to the President’s *Covid 19: National Guidance for the Family Court* and Mr Justice MacDonald’s *The Remote Access Family Court*, including the guidance that “live court-based hearings should now be confined only to *exceptional* circumstances where a remote hearing is not possible”, the Court continued (at paragraph 8):

“It follows, applying the principles set out above and the guidance that has been given, that

(i) Final hearings in contested public law care or placement for adoption applications are not hearings which are *as a category* deemed to be suitable for remote hearing; it is, however, possible that a particular final care or placement for adoption case may be heard remotely;

(ii) The task of determining whether or not a particular remote hearing should take place is one for the judge or magistrate to whom the case has been allocated, but regard should be had to the above principles and guidance, as amplified below;

(iii) The requirement for 'exceptional circumstances' applies to live, attended hearings while the current 'lockdown' continues.”

### **The judgment under appeal**

17. The judgment of Peel J is reported at [2020] EWHC 3411 (Fam). The majority of it deals with the other issues raised by the mother for which permission to appeal has not been granted. Those parts relevant to this appeal are as follows:

“26. ... her primary submission is that the failure to hold a full hearing on 6 April 2020, when the Adoption Order was made, was in breach of Article 6 and so unjust as to nullify the entire process. She submits that "the Adoption Order is null and void and of no legal effect whatsoever having been made without the mandatory face to face, remote or hybrid Final Hearing". This is a startling proposition ....



27. I am wholly unpersuaded by the Mother's case. Rule 14.16 of the Family Procedure Rules 2010 provides a knockout blow to the submission ....”

The judge set out FPR 14.16(1) and (2) and continued:

“The rule could not be clearer. The Mother's application for permission to oppose had been refused. Under rule 14.16(2) she therefore had no right to be heard on the final adoption order. The judge was perfectly entitled to excuse her attendance. If the Mother was dissatisfied, she should have appealed.”

### **Submissions to this Court**

18. On behalf of the mother, Mr Chinonso Ijezie, in succinct and clear submissions, argued that the adoption order had not been made in accordance with ss.141(3) and 46(6) of the 2002 Act or FPR 14.15 and 14.16. A judge does not have the jurisdiction or power to make a final adoption order on paper without a hearing, either face-to-face or via video or telephone link. The adoption order was made in the absence of the mother who had been given notice of the final hearing in accordance with FPR 14.15. Having given her notice, it was procedurally irregular to circumvent the mandatory requirement by excusing her attendance. No reason was given by the circuit judge why the hearing could not proceed by telephone. The mother was entitled to be heard on the question of contact irrespective of the fact that she had been refused leave to oppose the making of the adoption order. The requirement to obtain the mother's views was a condition precedent for the making of the adoption order. Failure to obtain her views renders the order null and void and of no effect whatsoever because there is no foundation upon which it can stand. Mr Ijezie cites the dictum of Lord Denning in *MacFoy v UAC* [1961] UKPC 49:

“If an act is void then it is in law a nullity. It is not only bad, but incurably bad ....And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse ....”

Mr Ijezie submitted that the circumstances amounted to a fundamental breach of natural justice so as to require the adoption order to be revoked.

19. In reply, Ms Julia Cheetham QC leading Mr Jack Harrison submitted that no procedural irregularity had taken place. There was no absolute right of a parent to be present at the final hearing of an adoption hearing. Ms Cheetham characterised the terms of FPR 14.16(1) as permissive. She relied on the terms of FPR 27.3:

“Unless the court directs otherwise, a party shall attend a hearing or directions appointment of which the party has been given notice.”

Ms Cheetham invited us to interpret Judge Booth's action in excusing the mother's attendance from the hearing as falling within that provision. In addition, she cited FPR 1.4(2)(k) in which the court's powers of active case management in furtherance of the overriding objective include “dealing with the case without the parties needing to attend

court". She also submitted that the court must have power to proceed in the absence of a parent because otherwise that parent would be able to delay or even prevent the making of the order.

20. Ms Cheetham also drew attention to the circumstances which existed at the time the order was made, when the country was in the middle of the first lockdown. At that stage, the children had been involved in proceedings for nearly two years, the parents had been refused permission to oppose the adoption, and the mother's attempted appeal against that order had been refused. Furthermore, the mother had not indicated that she had any wish to apply for contact. No application had been made for post adoption contact under s.51A. In the circumstances, it had been critical to avoid unnecessary delay which might have caused further harm to the children. The judge was therefore entitled to proceed in the way he chose.
21. In the alternative, Ms Cheetham submitted that, if the judge's actions amounted to a procedural irregularity, it did not give rise to a fundamental breach of natural justice so as to lead to the revocation of the adoption order. The mother had no right to oppose the adoption and it was inevitable that the adoption order was going to be made. In reality, the mother's position was not affected as a result of the decision to dispense with a hearing because she could not have applied for contact under s.51A without first obtaining the court's leave. In deciding whether to revoke the order, the court would be bound to take into account the children's welfare and the impact on them if the adoption was revoked. Such an outcome would be wholly disproportionate in the circumstances. Ms Cheetham further argued that, in the event of a procedural irregularity, the proper course would have been to apply for permission to appeal. The mother was well aware of what had happened and, if she wished to challenge it on such grounds, she should have filed an appeal notice within the 21 day period prescribed in the rules rather than delay for several months before filing the application to revoke. Ms Cheetham cited the observation of Cobb J in *Re J (Adoption: Appeal)* to the effect that, where it was claimed that there had been a material irregularity, the right course was to bring an appeal rather than an application to revoke under the inherent jurisdiction.
22. On behalf of the guardian, Ms Joanna Moody submitted that, given that there were no further issues to be heard, the balance fell in favour of dealing with the case expeditiously and proportionately and there were no adverse consequences of the judge's decision to excuse the mother's attendance. Accordingly, Peel J had not been wrong to endorse Judge Booth's approach. In the alternative, she submitted that, if this Court concluded that there was a procedural irregularity, the adoption order should not be revoked because there was no fundamental breach of natural justice. Revoking the adoption order would not have led to the re-opening of the fact-finding or welfare analysis conducted in the care proceedings. The effect of revocation would simply be to restore the *status quo ante*. The children would revert to being under placement orders pending a re-listing of the adoption application which the mother would be unable to oppose having been refused permission to do so. Revocation would give rise to a risk of harm to the children through being unsettled without giving any benefit to the mother.

## **Discussion and conclusion**

23. The questions arising on this appeal were therefore (1) whether Judge Booth's decision to make the adoption order without a hearing in the absence of the mother was a

procedural irregularity and, if so, (2) whether that irregularity gave rise to a fundamental breach of natural justice.

24. As to the first point, I am entirely satisfied that the decision to make an adoption order without a hearing in the absence of the mother was indeed a procedural irregularity and Ms Cheetham's submissions on this issue are misconceived. The plain meaning of FPR 14.16(1) is that the mother was entitled to be present at the hearing and Ms Cheetham's submission to the contrary is simply wrong. It was not a matter of the mother being under an obligation to attend the hearing. She had a right to be present. In the circumstances, it was not a question of Judge Booth excusing the mother from attending, whether under FPR 27.3 or otherwise, and Peel J was wrong to say he was entitled to do so. In any event, the judge did not merely excuse the mother's attendance from the hearing. In effect, he cancelled the hearing altogether.
25. Adoption changes a child's status and identity. As Cobb J observed in *Re J (Adoption: Appeal)*, supra, at paragraph 29:

“The severance of a family's legal (and often actual) relationships, and the creation of a new set of legal family relationships, fundamentally impacts upon the life of the child.”

The process by which this happens is governed by rules which must be strictly followed. An adoption order must be made at a hearing, not merely by the stroke of the judge's pen. The decision of this Court in *Re A (Children) (Remote Hearing: Care and Placement Orders)* establishes that an unopposed adoption hearing can be conducted remotely but there is nothing in the guidance given in that case, or separately in the Guidance *Listing Final Hearings in Adoption Cases* issued by the President of the Family Division, to justify the course taken by Judge Booth in this case. On the contrary, the Guidance confirms that any person to whom notice under rule 14.15 has been given has the right to attend and that the application for the adoption order should be determined at the hearing of which notice under rule 14.15 has been given.

26. On the other hand, I am equally satisfied that the irregularity did not amount to a fundamental breach of natural justice so as to give the High Court a discretion under the inherent jurisdiction to revoke the order. On this point, Ms Cheetham's submissions are well founded. The reality was that the mother did not have permission to oppose the adoption. There was nothing she could have done to prevent the adoption going through. Although under s.46(6) the court was required to consider contact arrangements, the fact is that the mother was not having direct contact and had not sought leave to make an application under s.541A. In that regard, her position now is no different from how it was before the adoption order was made. She is still at liberty to apply for leave to bring an application for contact and in determining such an application the court would have regard to the relevant circumstances, including those matters set out in s.51A(5).
27. Furthermore, in my judgment the better course for the mother in these circumstances would have been to file a notice of appeal seeking permission to appeal within the time period prescribed in the rules rather than bring an application at a later date under the inherent jurisdiction to revoke the order. If an adoption order is to be set aside, the applicant should bring the necessary proceedings speedily once the fact of the irregularity is known. In this case, the mother knew about the irregularity before the

order was made. It was therefore incumbent on her to bring a challenge as soon as possible. I make it clear, however, that the approach to be followed by the court is to all intents and purposes the same whichever course is taken.

28. I therefore concluded that, whilst the judge's decision to proceed to make the adoption order without a hearing attended by the mother was a procedural irregularity which must not be repeated, in the circumstances of this 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 and that, in those circumstances, the appeal against Peel J's order should be dismissed.

**SIR STEPHEN IRWIN**

29. I agree.

**LORD JUSTICE BEAN**

30. I also agree.