

## **Adoption decisions in England: *Re B (A Child) (Care Proceedings: Appeal)* and beyond**

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### **Abstract**

In *Re B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33 the Supreme Court President emphasised that ‘adoption of a child against her parents’ wishes should only be contemplated as a last resort – when all else fails’ because of adoption’s draconian nature. *Re B* has been cited dozens of times by the lower courts in the short time since it was decided. The aim of this article is to assess whether the influence of *Re B* is a matter of substance or mere rhetoric. Keywords: Child protection, judiciary, law reform, children’s rights

### **Introduction**

In *Re B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33 the UK Supreme Court emphasised that non-consensual adoption, governed by the Adoption and Children Act 2002 in England, must be a last resort, and such remarks have been cited in dozens of cases in the period since *Re B* was decided. In supporting his conclusion, the Supreme Court’s President, Lord Neuberger, made relatively rare references to the UN Convention on the Rights of the Child (‘UNCRC’) (which has not been directly incorporated into English Law as a whole [HM Government, 2014]) and cited my earlier work questioning the compatibility of the then prevailing English approach to adoption with the Convention (Sloan, 2013). The aim of this article is to assess the true influence and impact of *Re B* on subsequent case law, and whether its influence is a matter of substance or mere rhetoric.

Having analysed *Re B* itself, the article proceeds to consider its influence on two particular areas. The first area concerns decisions whether to make a full care order permitting the removal of a child from his or her parents by a local authority (often with a

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view to adoption) and/or a placement order (usually the first stage in a non-consensual adoption). The second area concerns decisions whether to grant the required permission for a birth parent to oppose the final adoption order.

## ***Re B* and its implications**

### ***Re B* itself**

*Re B* concerned ‘Amelia’ (see Sloan, 2014a and Doughty, 2013 for further discussion), who was placed in foster care effectively at birth, and at the age of two was the subject of a care order with a plan for adoption (although further adoption proceedings would have been necessary). The Court of Appeal ([2012] EWCA Civ 1475) dismissed her mother, M’s, appeal against Judge Cryan’s order. Her Supreme Court appeal failed in June 2013, with only Baroness Hale dissenting as to outcome.

The care order required a finding that Amelia was ‘suffering or...likely to suffer significant harm’, attributable to the care or likely care ‘not being what it would be reasonable to expect a parent to give’ (Children Act 1989, s. 31(2)). This finding crossed the ‘threshold’ and provided jurisdiction to make the order, after which the court still had to treat Amelia’s welfare as the ‘paramount’ consideration (s. 1) and act compatibly with the relevant parties’ right (in particular) to respect for their family life under Article 8 of the European Convention on Human Rights (‘ECHR’).

The basis for the care order had centred around the personality of Amelia’s parents. When aged 15, M, whom Lord Wilson understatedly described as a victim of ‘grave misfortune’ (para. 7), began sexual relations with her abusive step-father, Mr. E. M was imprisoned for frauds perpetrated under Mr. E’s influence as well as for perverting the course of justice and perjury. She was diagnosed with disorders causing her ‘to misuse physical symptoms in order to elicit care from others or for other purposes’ (para. 12), and ‘repeatedly to exaggerate ...or...fabricate [symptoms] and to offer false histories’ (para. 17). The appeal was supported by Amelia’s father, F, whom M had met after leaving Mr. E, and who as well as being a drug user also had a criminal record containing offences of dishonesty.

The cohabiting parents had been having regular supervised contact with Amelia since her premature birth. Notwithstanding their difficult histories, the judge found that her parents had a very loving relationship with Amelia, had put enormous effort into their contact, and

had a strong view that she should return to them. Judge Cryan nevertheless made the care order. While part of the justification was a risk that Amelia might be presented for, or receive, unnecessary medical treatment due to M's disorders, or that she might model her behaviour on M, Lord Wilson emphasised the main concern that both parents were 'fundamentally dishonest, manipulative and antagonistic towards professionals' (para. 20). Despite the parents' positive relationship with Amelia and the fact that they had not harmed her, the Supreme Court unanimously upheld the finding that the threshold was met.

On the proportionality of the care order, Lord Wilson (with unanimous agreement) emphasised 'the high degree of justification which article 8 [of the ECHR] demands of a determination that a child should be adopted or placed in care with a view to adoption' (para. 34). In the light of this, he and three other Justices held that an appellate court evaluating such a decision should ask whether the decision was either 'wrong' or 'unjust because of a serious procedural or other irregularity' (para. 46; cf. *G v G (Minors: Custody Appeal)*[1985] 1 WLR 647).

More unusually, Lord Neuberger also emphasised the requirements of the UNCRC in this area. Notwithstanding the Convention's status in English Law, he said explicitly that the Adoption and Children Act 2002 'must be construed and applied bearing in mind the provisions' of the UNCRC (para. 73). The President also quoted Hodgkin and Newell (2007, p. 296) on the Convention's presumption that children should be with their parents where possible. He later noted my own 'concerns' (para. 103) about the then prevailing English approach to adoption (Sloan, 2013) in two respects. The first was that, 'whereas [the] UNCRC is "neutral about the desirability of adoption"' (quoting Hodgkin & Newell, [2007, p. 294]), the 2002 Act "unashamedly aimed to bring about 'more adoptions more quickly' for children in care" (quoting Harris-Short, [2001, p. 407])'. The second respect in which he highlighted my concerns was the 'suggested inconsistency' (para. 103) between the assertion in *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206, para. 15 that the 2002 Act 'does not privilege the birth family over the adoptive parents simply because they are the birth family', and the views in *Re A (A child) (Disclosure of Child's Existence to Paternal Grandparents)* [2006] EWHC 3065 (Fam), paras. 73 and 76 (which I considered to be more compatible with the UNCRC) that adoption was 'a last resort for any child' to be used only 'when neither of the parents nor the wider family and friends can reasonably be considered as potential carers', and that a child has a 'right to be brought up by her own family'. Lord Neuberger did not appear to disagree with my analysis. Echoing Baroness Hale's conclusion that 'severing the relationship between parent and child is [permissible]

only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do' (para. 198), he was anxious to assert that 'adoption of a child against her parents' wishes should only be contemplated as a last resort – when all else fails' (para. 104), meaning that 'before making an adoption order in such a case, the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support' (para. 105). In his view, '[a]lthough the child's interests in an adoption case are "paramount" (in the UK legislation and under article 21 of UNCRC), a court must never lose sight of the fact that those interests include being brought up by her natural family, ideally [at least one of] her natural parents' (para. 104).

Nevertheless, all except Baroness Hale held that Judge Cryan had not been 'wrong' in making the order, because (in Lord Wilson's formulation) 'the characters of the parents disabled them from offering the elementary co-operation with professionals which Amelia's safety in their home would require' (para. 48). Lord Neuberger opined that Judge Cryan had complied with his obligations by concluding that adoption was 'the only viable option' for Amelia (para. 79). Baroness Hale, by contrast, held that the judge was wrong to regard the care order as a proportionate response to the risks identified, since he had not demonstrated that it was necessary effectively to end the relationship between Amelia and her parents when nothing else had been tried and the feared harm was 'subtle and long term' (para. 223). Even she, however, felt that 'the safest solution for Amelia now is almost certainly adoption' (para. 224).

Whatever the conclusion on its difficult facts, *Re B* was a highly significant decision in the history of English adoption law. The next section begins the task of assessing the true extent of its influence.

### **Adoption-related care and placement decisions**

A local authority is under a statutory duty to apply for a 'placement order' in respect of a child, effectively beginning the adoption process, if it is 'satisfied that the child ought to be placed for adoption' (Adoption and Children Act 2002, s. 22(1)(d), s. 22(2)) and, *inter alia*, the child is accommodated by a local authority that considers the threshold to be met (s. 22(1)), the child is already subject to a care order (s. 22(2)(b)) or a care order might result from an application that has been made (s. 22(2)(a); *Surrey CC v S* [2014] EWCA Civ 601, paras. 26–31). When deciding whether to make the order, the court must treat as its

paramount consideration the child's welfare (distinctively as compared to the Children Act) 'throughout his life' (Adoption and Children Act 2002, s. 1), having regard to, *inter alia*, 'the likely effect on the child (throughout his life) of having ceased to be a member of the original family' (s. 1(4)(c)) and the child's relationship with relatives (s. 1(4)(f)).

If a parent with parental responsibility (who can be found and is capable of consenting) does not consent to the placement order, the *prima facie* need for that consent can be dispensed with where 'the welfare of the child requires' such dispensation (s. 52(1)(b)). In *Re P (Placement Orders: Parental Consent)*[2008] EWCA Civ 535, para. 125 the Court of Appeal held that the word 'requires' has a 'connotation of the imperative', and while the same court in *Re SH (Children)* denied that dispensation involves 'a straightforward enquiry into best interests' ([2010] EWCA Civ 1184, para. 32), in *Re P* it had somewhat undermined its own approach by rejecting the idea that there is 'some enhanced welfare test to be applied in cases of adoption' (para. 127). Writing before *Re B*, I suggested that given the uncertainty on the point, it was unclear whether the courts' approach to placement orders was consistent with the UNCRC (Sloan, 2013, p. 56). The aim of this section is to assess the impact that *Re B* has had on this situation in the subsequent case law.

#### From *Re B* to *Re B-S*

The Court of Appeal handed down a number of important decisions on care and placement orders within weeks of the Supreme Court's *Re B* judgment, to some extent culminating in *Re B-S (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146 in September 2013. It is first necessary to consider the earlier judgments. In *Re P (Care Proceedings: Balancing Exercise)* [2013] EWCA Civ 963, the local authority's initial involvement was triggered by concerns that a child, L, was being mistreated by her mother, M, and that L had witnessed violence between M and the father, F, although the parents later separated. Nevertheless, F improved his home and had very positive contact sessions with L. M then moved with L to pursue a relationship with a new man, who perpetrated non-accidental injuries on L. In care proceedings prompted by the injuries, F accepted that the threshold was met but not in relation to himself. The judge found that F's aggression carried a risk of emotional harm to L. She made a care order with a plan for adoption and later a placement order.

On appeal, Black LJ (with reference to *Re B*) remitted the case for re-hearing on the basis that the judge 'failed to carry out a proper balancing exercise in order to determine whether it was necessary to make [the orders] or, if she did...it is not apparent from her

judgments’ (para. 107). Without wanting to imply that the judge’s actual conclusion was wrong, Black LJ was ‘left unsure as to the factual basis upon which the court proceeded insofar as it concerned the central issue of F’s aggressive behaviour’ (para. 118), seeing ‘force in the submission that the positive features of F’s care of L...were not recognised sufficiently or at all by the judge’ (para. 119). Black LJ also found ‘little acknowledgement...of the fact that adoption is a last resort and little consideration of what...justified it in this case’ (para. 124). While Black LJ was conscious of Lord Neuberger’s caution about imposing unrealistic burdens on judges in relation to the giving of reasons (*Re B*, para. 70), she observed that the note of one judgment extended to only two pages.

*Re G (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965 demonstrated early on that the impact of *Re B* is not confined to adoption cases *per se*. Although the plan in the present case was for long-term fostering, McFarlane LJ held that it must ‘be considered in like manner with the difference in the level of intervention being reflected in the application of the yardstick of proportionality and thus the evaluation of whether the proposed order and care plan are “necessary”’ (para. 28; see also, e.g., *Re A (Care Proceedings)* [2014] EWFC B147, para. 165; cf., e.g., *A Local Authority v YZ & Ors* [2014] EWFC B161). In *Re DE* [2014] EWFC 6, Baker J later held that *Re B inter alia* applies even where a child was already living at home under a care order and a local authority merely sought to change the care plan and permanently remove the child ([2014] EWFC B77, [2014] EWFC 39 and [2015] EWFC 2 were later judgments in the same case; see also *Re M (Children)* [2014] EWCA Civ 1753 for *Re B-S*-inspired scrutiny of a decision to make special guardianship orders in favour of foster carers).

McFarlane LJ formulated the question in *Re G* as whether the child should be rehabilitated to the mother’s care or subject to a care order with a long-term fostering plan. On his analysis ‘[a] single holistic question of this type is, in structural terms, distinct from a series of isolated linear questions where, at no stage, are the pros and cons of each option balanced against each other in a single process’ (para. 45). Later, he said:

The judicial exercise should not be a linear process whereby each option, other than the most Draconian, is looked at in isolation and then rejected because of internal deficits..., with the result that, at the end of the line, the only option left standing is the most Draconian and that is, therefore, chosen without any particular consideration of whether there are internal deficits within that option (para. 49).

He emphasised that the outcome in such a process depended on where one started in the line. He was concerned that using the phrase ‘the most Draconian option’ when describing adoption, without detailed consideration of the features that *make* it draconian, ‘may inadvertently become little more than formulaic judicial window-dressing if...not backed up with a substantive consideration of what lies behind [it] and the impact of that on the individual child’s welfare’ (para. 53).

McFarlane LJ held that the district judge’s judgment in *Re G* failed to indicate that she had taken the holistic approach described. She had taken little account of the countervailing factors (such as a strong bond and a favourable parenting assessment) and her analysis was entirely focused on the mother. In the linear analysis, the mother was ruled out and the only remaining option endorsed. It was also noted that the judgment failed to state why permanent separation of mother and child was “necessary” on the basis that it is the “last resort” and “nothing else will do” (para. 61), and had made very little reference to the care plan. In addition, it was significant that the judge had given no consideration to a less intrusive supervision order despite Lord Neuberger’s conclusion that there had to be no other way of providing the requisite assistance and support. A fresh hearing was ordered with no pre-judgment.

It has also been known, however, for adherence to the rigorous approach following *Re B* to produce a *more* interventionist decision than the original defective judgment. In *Re V (Long-Term Fostering or Adoption)* [2013] EWCA Civ 913, the judge (before *Re B*) had made care orders but refused placement orders on the basis that the two children’s interests were best served by long-term fostering with continuing parental contact. Black LJ described *Re V* as ‘a sort of mirror image’ of *Re B* because ‘the appellant’s argument is that the judge’s interference with existing family life was too modest rather than unjustifiably extreme’ (para. 7). She held that the judge was wrong, criticising the fact that she had ‘searched without success...for any written analysis by local authority witnesses or the guardian of the arguments for and against adoption and long-term fostering’ (para. 88). The judge had failed to give adequate weight, *inter alia*, to the detrimental aspects of the children’s contact with their mother, and the relative security of adoption and fostering should not be equated. This view was later echoed by Pauffley J in *Re LRP (Care Proceedings: Placement Order)* [2013] EWHC 3974 (Fam), where the independent social worker had described long-term foster care as a ‘means by which permanency can be

achieved’, offering ‘commitment, security and stability within a new family’ (para. 39). Pauffley J strikingly stated:

I profoundly disagree with those contentions. Long-term foster care is an extraordinarily precarious legal framework...Foster placements...do not provide legal security...Children in long-term care may find themselves moved...sometimes for seemingly inexplicable reasons...Most importantly..., a long-term foster child does not have the same and enduring sense of belonging within a family as does a child who has been adopted (para. 39).

The judge concluded that the only sensible options were a return to parental care or adoption. There was a tone of pre-judgement in her decision, as she fairly cursorily dispatched with the disadvantages of a placement order. Pauffley J later refused leave the mother leave to oppose the adoption order ([2014] EWHC 3311 (Fam)). *Re V* and *Re LRP* are certainly demonstrations that the judiciary have not forgotten about the advantages of adoption or the disadvantages of long-term foster care in the aftermath of *Re B* (cf., e.g., *X, Y and Z* [2014] EWFC B123 (Fam), para. 13; *Re P, Q, R and S (Children)* [2014] EWFC B166, paras. 124–126).

This takes us to *Re B-S*, which has arguably become at least as important in practice as *Re B* itself. In it, Sir James Munby P approved the Court of Appeal’s July 2013 decisions in *Re V, Re S* [2013] EWCA Civ 926 (which did not cite *Re B*), *Re P* and *Re G* and set out to ‘draw the threads together and...spell out what good practice, the 2002 Act and the [ECHR] all demand’ (para. 32). Giving the judgment of the Court of Appeal, he said that ‘lurking’ behind the case and a number of others were ‘serious concerns and misgivings about how courts are approaching...“non-consensual...adoption”’ (para. 15). He identified the ‘stringent and demanding test’ that the welfare of the child must ‘require’ that consent be dispensed with (albeit citing *Re P* [2008] EWCA Civ 535) (para. 20). He described the language of *Re B* as ‘striking’ (para. 22), emphasising the local authority’s obligation to make the court’s (proportionate) order ‘work’, and that the authority ‘cannot press for a more drastic form of order, least of all...adoption, because it is unable or unwilling to support a less interventionist...order’ (para. 29).

Using language that he admitted was ‘plain, even strong’ (para. 17), Munby P expressed ‘real concerns’ about ‘the recurrent inadequacy of the analysis and reasoning put forward in support of the case for adoption, both in the materials put before the court by local



authorities and guardians and also in too many judgments’ (para. 30). While this was ‘nothing new’, it was ‘time to call a halt’ (para 30).

The Court of Appeal identified two ‘essential’ elements in adoption-related judgments (para. 33). The first is that there should be ‘proper evidence’ that ‘must address all the options which are realistically possible and...contain an analysis of the arguments for and against each option’ (para. 34). The Court recommended a ‘balance sheet approach’ (para. 36). It was adamant that ‘sloppy practice must stop’ and that ‘[i]t is simply unacceptable in a forensic context where the issues are so grave and the stakes, for both child and parent, so high’ (para. 40).

Equally essential is an adequately reasoned judgment that ‘evaluate[s] all the options, undertaking a global, holistic and...multi-faceted evaluation of the child’s welfare which takes into account all the negatives and the positives...of each option’ (para. 44; cf. Masson, 2014), strongly approving *Re G*. The Court expressed concern that the matters it considered so essential were ‘[t]oo often...given scant attention or afforded little more than lip service’ (para. 46).

Finally, while the Court of Appeal in *Re B-S* warned against ‘rigorous adherence to an inflexible timetable’ (para. 49), it was of the view that its approach would not conflict with the new statutory *prima facie* requirement to complete care proceedings (though not necessarily placement order decisions) within 26 weeks (Children and Families Act, s. 14; see also *Re S* [2014] EWCC B44 (Fam); *Re L (A Child) (Family Proceedings: Practice and Procedure)* [2014] EWHC 270 (Fam), cf. *Re S-W (Children)* [2015] EWCA Civ 27).

#### Criticism of lower courts

The Court of Appeal has been notably critical of some lower court judgments in light of *Re B* and *Re B-S* (cf., e.g., *Re W (Children)* [2014] EWCA Civ 1303), and the Family Court has behaved similarly when deciding appeals (see, e.g., *Re S* [2014] EWFC B154). In *Re S (a child) (care and placement orders: proportionality)* [2013] EWCA Civ 1073, Black LJ held that Judge Oliver’s judgment ‘does not convey any real sense of’ the considerations emphasised in *Re B* on the nature of adoption (para. 36). He had failed to give ‘sufficient recognition that the orders that [he] was proposing to make were of huge consequence for [the mother] and [the child] and were only to be made as a last resort’ (para. 38), and had to be reminded by counsel, after giving judgment, of the need to dispense with consent (cf., e.g., *London Borough of Barnet v The Father* [2014] EWFC B144, para. 30). The case was

remitted. In *Re Y* [2013] EWCA Civ 1337, criticism of the judge was similarly upheld as regards ‘inadequate identification of risk and consequent evaluation of likelihood of that risk in...analysis of measures which mitigate that risk, that is articulation of the proportionality of the order sought’ (para. 7).

In *Re E (A Child) (Adoption Order: Proportionality of Outcome to Circumstances)* [2013] EWCA Civ 1614, the judge found that a father had perpetrated serious brain injuries on seven-month-old S, exonerating S’s mother from involvement or knowledge of the risk posed by the father. S was nevertheless made the subject of a placement order, against which the mother appealed. McFarlane LJ admitted that the judge had ‘not helped herself or this court by identifying the legal structure that she has applied to the analysis’ (para. 26). While declining to endorse the suggestion that there had to be a reference to the welfare principle in every judgment, he did stress the importance of demonstrating that the judge has the relevant factors in mind and has produced an analysis compatible with the law. Where there was no criticism of the mother’s parenting other than her relationship with the father and a true balance had to be struck, he thought it ‘unwise for a judge to avoid grounding her conclusions by reference to the factors in the welfare checklist’, particularly sections 1(4)(c) and (f) (para. 27). He also thought it wise for her to set out the test for dispensing with parental consent, since it ‘pinpoints the tipping point at which it is justified for the state to intervene...to the extent of removing a child and sending that child off for adoption’ (para. 29). Although the judge had summarised the effect of section 52, McFarlane LJ opined that she had failed to engage in the necessary process to ‘identify quite why a case does or does not move past that tipping point so as to justify the order’ (para. 29). On the evidence available, McFarlane LJ considered the order disproportionate and the result of a focus on a few pieces of evidence, and therefore the decision was wrong. An interim care order was substituted and the case remitted.

In *KS v Neath Port Talbot County Borough Council* [2014] EWCA Civ 941 Ryder LJ similarly agreed that ‘the judge failed to address that which is required by...*Re B*...in analysing whether “nothing else will do” and the [numerous] subsequent Court of Appeal cases’ (para. 24). Ryder LJ also held that there was ‘no overt analysis of the child’s welfare throughout her life nor the likely effect on her of having ceased to be a member of her original family in accordance with section[s] 1(2) and 1(4)(c) of the 2002 Act’, that ‘[t]he distinctions between the factors in the welfare checklists in the 1989 Act and the 2002 Act were not explored’, and that therefore ‘the essence of the recent case law and of the statutory tests was not sufficiently demonstrated’ (para. 24).

In *Re S (Children)* [2014] EWCA Civ 135, Macur LJ held that the judge had erred in failing to seek a further assessment of the father as a potential carer for his daughter. She noted that the judge had ‘ruled out the mother and father and...“anxiously considered” long term fostering, but without further discussion of the advantages and disadvantages of adoption, she conclude[d] with [an] almost bald assertion’ (para. 27). The judge had used ‘formulaic phraseology in the absence of a reasoned consideration of the welfare check list whether explicitly referenced or capable of recognition throughout the evaluations stated within...the judgment’, such that again ‘the judgment read as a whole does not and cannot engage the essence of *Re B-S*’ (para. 28).

A lack of availability of the Court of Appeal’s judgment in *Re B-S* at the time a first-instance decision was handed down has not rendered such lower-court judgments immune from attack. In *Re T* [2014] EWCA Civ 929, McFarlane LJ noted that, while the judgment below had been given after *Re B*, the Court of Appeal must be ‘extremely careful in evaluating [it] against what is now clearly stated to be the required standards described...in...*Re B-S*’ (para. 15). Even so, McFarlane LJ found that the judge ‘failed...to grapple with and engage upon a proper analysis of the issues’ (para. 17). Again, he ‘did not help himself by failing to have regard to the statutory structure’ (para. 17), and ‘[i]n particular...failed...to make any reference at all...to the fact that he was making a lifetime decision’ for the child (para. 17). McFarlane LJ drew his conclusion despite the difficulties that the child would face while awaiting completion of his parents’ prison sentences for violent offences, and the risk that they would engage in similar activity in the future, which could have been addressed by the judge in a more explicit and systematic analysis of the factors in section 1 of the 2002 Act. While the judge did use the language of necessity, proportionality, unavailability and the absence of an alternative, McFarlane LJ was clear, as he was in *Re G*, that ‘those [words] are labels and are only going to indicate that the judge actually has grappled with the factual circumstances that underlie them if he has demonstrated, at least shortly in these pre-*Re B-S* days, that he has in fact undertaken that exercise’ (para. 19). The placement order was set aside and the case remitted.

That said, some flexibility has been exhibited in the analytical requirements. In *M v Suffolk CC* [2014] EWCA Civ 942 Ryder LJ found that there had been ‘a sufficient analysis for the judge to be able to conclude’ that the grandparents would not ‘be capable of protecting the children from the risk of emotional harm’ or ‘be likely to offer the long term placement needed’ (para. 18), and the appeal was dismissed. Even though he had not undertaken ‘the neat balancing of welfare factors comparing one option with another that is

described in *Re B-S*' (para. 19), the judge approach was considered in substance to be holistic and non-linear and had referred to *Re B* (see also, e.g., *Re P (A Child)* [2014] EWCA Civ 1648). This emphasis on substance rather than form was confirmed in the December 2014 judgment in *Re R (A Child)* [2014] EWCA Civ 1625 (para. 18).

Moreover, problematic lower court judgments do not universally produce even remissions for re-hearing. In *Re C (A Child) (Placement for Adoption: Judicial Approach)* [2013] EWCA Civ 1257, J's grandmother, EB, appealed against the refusal to grant her a special guardianship order rather than the care and placement orders made. McFarlane LJ familiarly opined that the judge had '[a]s a matter of structure...made it difficult for readers of the judgment to see that he has in fact conducted a balancing exercise in order to make the crucial choice between a home with EB or adoption by strangers' (para. 28). He noted that the judgment was linear in form, and questioned whether approving a care plan for adoption with reference only to the 1989 Act was wise where there was also a placement order application before the court. While this was 'the practice of many family judges', McFarlane LJ expressed understandable concern that it 'may inadvertently lead the court away from engaging with a proper, holistic evaluation of the central welfare question...within the structure of section 1 of the 2002 Act' (para. 29). He noted that the judge had purported to give EB the 'benefit' of section 1(4) only *after* eliminating her as a potential carer, making the care order and approving the adoption plan. Despite his criticism, McFarlane LJ dismissed the appeal. The conclusion that 'a permanent, settled and secure home would not be attainable with [EB]' was not susceptible to being overturned (para. 33), and McFarlane LJ held that it would have been reached under section 1 of the 2002 Act and that the judge in fact had the appropriate factors in mind (see also *Re R (A Child)* [2014] EWCA Civ 1625, paras. 20, 51).

Conversely, despite criticism levelled at lower court decisions, in *Re C* [2013] EWCA Civ 1757 the Court of Appeal upheld the justices' original decision to make a supervision order where the local authority sought care and placement orders, overturning the first appellate decision to order a re-hearing. Somewhat similarly, in *Re H-C* [2014] EWCA Civ 536, the justices had made supervision orders. On the local authority's appeal, the judge overturned the decision but planned to determine care and placement at a later point, despite his view that the justices should have made care orders. The parents appealed against the setting aside of the supervision orders. Ryder LJ held that the justices' fact-finding was flawed, but also that the judge had misinterpreted their findings such as they were understandable. The judge had not followed *Re B* and *Re B-S* and made his own judgment on

proportionality. Because of the flawed procedure at both previous levels, Ryder LJ considered there to be no alternative but to order a re-hearing.

#### Criticism of local authorities and children's guardians

Post-*Re B* scrutiny has not been reserved for lower court judgments. Local authorities and children's guardians have also faced judicial criticism in case law following *Re B* and *Re B-S* (see *Re W(Children)* [2014] EWFC 22 and *Northamptonshire County Council v AS* [2015] EWHC 199 (Fam) for strong criticism of local authorities' approach to care proceedings, but cf., e.g., *Re W (Children)*[2014] EWCA Civ 1303, para. 11; *Re E (A Child)* [2014] EWFC B140, para. 27; *Re I (A Child)* [2015] EWFC B8, para. 14). In *Re S (a child) (care and placement orders: proportionality)* [2013] EWCA Civ 1073, the mother, M, had some learning difficulties. The judge had criticised the lack of co-operation between the local authority's adult services department, who sought to support M's parenting, and children's services, who did not consider M a suitable long-term carer for the child, K. Black LJ described a 'confusing' picture of available support (para. 23), noting the deficiencies in the evidence made available and the fact that the judge concluded despite insufficient input from adult services. It was therefore wrong to have made care and placement orders. The 'lamentable lack of evidence' was similarly noted in *Re Y* [2013] EWCA Civ 1337, and it was said that relevant evidence 'is not and should not be restricted to that supportive of the Local Authority's preferred outcome' (para. 7). In *Re E* [2013] EWCA Civ 1614, McFarlane LJ criticised the local authority's failure to offer the mother any support, which he regarded as key in the assessment of proportionality.

*Re IA (a child) (fact finding; welfare; single hearing; experts' reports)* [2013] EWHC 2499 (Fam) involved a change of mind by the local authority, who originally sought a care order with an adoption plan for the relevant child but were so impressed by the maternal grandmother that they later supported a supervision order and a placement in the grandmother's home with the mother. The judge made a joint residence order in favour of the mother and grandmother. She criticised the practice of the local authority with particular reference to *Re B*, to the point of accusing one social worker of 'operating in a parallel universe, intent on securing a placement order whatever the strengths within the natural family' (para. 104; see, somewhat similarly, *Manchester CC v JG*, Family Court, 13 August 2014).

In *Re Z (A Child: Independent Social Work Assessment)* [2014] EWHC 729 (Fam), Judge Bellamy was again critical of the absence of pre-hearing thought on the appropriate order by the local authority, such that there had ‘simply been an assumption that the appropriate order...is an adoption order’ (para. 95). Citing recent case law, he issued a helpful suggestion to the local authorities and guardians seeking to avoid the sort of criticism described in this sub-section, emphasising that in preparing evidence they should ‘have regard to [the] approach the judge must take in evaluating [it] and arriving at a properly reasoned judgment’ (para. 97). In the later judgment in *Re BM* [2014] EWFC B69, the judge was nevertheless ‘quite satisfied that the placement application...does not pass...the “*Re B-S test*”’ (para. 20). The lack of support for the application from either the guardian or the independent reviewing officer meant that Judge Carr QC had little hesitation in dismissing the placement application.

Such problems have continued. *Re R (a child) (inadequate welfare evidence)* [2014] EWFC B101 was described by Judge Wildblood QC as ‘an example of what happens where inadequate welfare evidence is filed and...case law and statutory authority are ignored’ (para. 1). The guardian’s report was said to involve a linear analysis, and the judge invited him ‘to consider overnight a more holistic approach...before he gave evidence’ (para. 3). By the time he gave evidence, the guardian admitted ‘that this case is finely balanced, that there would be no basis upon which rehabilitation to the mother could be refused if she maintains her current lifestyle and there is a realistic prospect of her doing so’ (para. 4). The judge also described the local authority’s report as giving ‘a scant and superficial consideration of the factors in section[s] 1(4)(c) and (f) of the 2002 Act’, with ‘[t]hat inadequate analysis [being] made even more deficient (and...indeed contradicted) by the subsequent analysis of those statutory factors in the same statement’ (para. 9). The case was therefore adjourned so that further evidence could be obtained (*Re Chd* [2014] EWFC B125 was a similar decision by the same judge, but cf. [2014] EWFC B158).

A striking and even more recent example of scathing judicial criticism directed at local authorities is *Re A (A Child)* [2015] EWFC 11. There, the local authority’s case for care and placement orders related to concerns about the child’s father. Munby P, however, found that its evidence was lacking in rigour, unduly prejudicial towards and dismissive of the father, inappropriately founded on ‘morality’, inadequately linked to any risk to the child and insufficiently addressed towards changes in the father’s circumstances. He concluded (with reference to *Re B* and subsequent case law) that while the father ‘may not be the best of parents’, that is ‘not enough to justify a care order let alone adoption’ (para. 96). It is not

therefore clear that local authorities are universally heeding the warnings issued by judges in the light of *Re B* and *Re B-S*, and it seems likely that the cases will be used to scrutinise their activities for some time to come.

#### Limitations upon the impact of *Re B*

The Court of Appeal's exacting standards are not always evident in its own approach to reviewing lower court decisions, however. In *Re R (children) (care and placement orders: paternal grandparents)* [2013] EWCA Civ 1018, Ryder LJ accepted that the judge had used language suggesting an insufficient understanding of the requirements of section 52. He nevertheless held that 'when the judgment is read as a whole and having regard to the evidence which was before her I am satisfied that the judge had in mind the appropriate statutory test, that she applied it and that there was ample material upon which she could come to the conclusion that she did' (para. 22). *Re B* was cited only for its reiteration of the correct approach to section 52, and the appeal against care and placement orders was dismissed despite the apparent error on the law and the positive qualities of the grandparents, which were not judged to enable them to provide better than average care (cf. Hart, 2014). It can also be said that the legal analyses undertaken by the lower courts (see, e.g., *Re C and H (Minors) (care and placement orders)* [2014] EWFC B60; *Re F (Care)* [2014] EWFC B150; *Re A (Fact Finding)* [2014] EWFC B182; *The Local Authority v TQ & J B-W* [2014] EWFC B178; *Cornwall Council v M & Anor* [2014] EWFC B184; *OCC v M* [2015] EWFC B6; *XZ Council v DN* [2014] EWHC 4653 (Fam); *Re T (A Child)* [2014] EWFC 52) or by counsel (see, e.g., *R (Mother) v Milton Keynes Council* [2014] EWFC B66) are not universally detailed even following *Re B*.

The Court of Appeal has also placed important limitations upon its own approach as regards the range of alternatives to adoption that must be considered. In *Re S* [2013] EWCA Civ 1835 care and placement orders were made in relation to 14-month-old A (who was eventually adopted: *Re FP (A Child)* [2014] EWFC B137), whose mother had previously been imprisoned for arson targeted at social services offices. The 'tragedy' (para. 14), as McFarlane LJ put it, was that the mother's parenting assessments were very positive, and the proceedings were based on her reactions to professionals and difficulty in separating herself from the father of at least some of her children. One of the mother's grounds of appeal was that the judgment below was linear in its approach. But on McFarlane LJ's analysis, 'an holistic appraisal or welfare balance' is required where 'the court was weighing up two potentially viable options for immediate placement, for example...between a [relative] on the

one hand and adoption on the other’ (para. 46). By contrast, ‘[t]he reality here, sadly, but...accepted by the mother’s counsel, was that there was no option on the other side of the balance other than waiting for a significant period to see if therapy was achievable’ (para. 46). Similarly, in response to the submission that this needed to be a case where ‘nothing else will do’ following *Re B*’s proportionality requirements, McFarlane LJ said that ‘there was “nothing else” put forward other than the open ended wait for therapy’ (para. 47). The first instance decision was described as ‘a textbook judgment’ that was incapable of challenge (para. 49). It therefore seems that the Court of Appeal is reluctant, despite *Re B*, for long-term fostering to be considered unless it is specifically advanced as a viable option consistent with the child’s best interests (see also, e.g., *Hertfordshire CC v M* [2014] EWHC 2159 (Fam), para. 56; *Re M (A Child: Long-Term Foster Care)* [2014] EWCA Civ 1406, para. 32; *Re ER (Placement Order)* [2014] EWFC B146, para. 56). While there may have been doubts about *Re S*’s compatibility with *Re B*’s emphasis on adoption as the last resort and the importance of considering services, in *Re R (A Child)* [2014] EWCA Civ 1625, Munby P confirmed that ‘*Re B-S* does *not* require the further forensic pursuit of options which, having been properly evaluated, typically at an early stage,...can legitimately be discarded as not being realistic’ (para. 59).

In *Re M (A Child: Long-Term Foster Care)* [2014] EWCA Civ 1406, significantly, the local authority successfully appealed against the refusal of a placement order (although the case was remitted for re-hearing). Black LJ held that the Recorder’s ‘interpretation of the recent jurisprudence may have led him astray’ (para. 29), emphasising that ‘[t]he fact that speedy action will improve the prospects of a successful adoption for a particular child...must take its place in the overall appraisal of the case’, and would ‘[s]ometimes...dictate that the court approves a plan for adoption...even when full weight is given to the important reminders in recent cases’ (para. 31; see also *Re Z-O’C (Children)*, [2014] EWCA Civ 1808). In a somewhat similar vein, Macur LJ emphasised in *Re M-H (A Child)*[2014] EWCA Civ 1396 (see also, e.g., *Re T (Children)* [2014] EWCA Civ 1549) that the phrase ‘nothing else will do’ is subject to ‘overriding requirements pertaining to the child’s best interests’ (para. 8), and that ‘the fact that there is another credible option worthy of examination will not mean that the test of “nothing else will do” automatically bites’ (para. 9). Awareness of these considerations has not, however, prevented the Court of Appeal from continuing to allow appeals in more recent cases where appropriate. In *Re Y (Children)* [2014] EWCA Civ 1553, Ryder LJ asserted that ‘[i]t will be a relatively rare case where there is only one realistic option such that there is nothing to compare against it and



the proportionality evaluation is self evident’ (para. 25), and was confident enough to substitute a supervision order and a child arrangements order in favour of the mother of three children, in place of the order for long-term fostering made by the judge and upheld on a first appeal.

## Evaluation

Judges have varied in their own views on the true impact of *Re B* and *Re B-S*, at least before the Court of Appeal’s December 2014 decision in *Re R (A Child)*[2014] EWCA Civ 1625. At one end of the scale, Baker J in *Re DE* [2014] EWFC 6 said that *Re B* and the subsequent Court of Appeal decisions ‘have changed the landscape for decision[-]making about children who are the subject of care proceedings’ (para. 33; cf. *CM v Blackburn With Darwen Borough Council* [2014] EWCA Civ 1479, para. 32). In *Re G* [2013] EWCA Civ 965, McFarlane LJ was more cautious, saying that his concerns about process in the lower courts in that case reflected those he had had in a significant number of others, but that these concerns were given ‘sharper focus following the very clear wake-up call’ represented by *Re B* (para. 43). It has been said that *Re B* is of ‘central importance in providing guidance as to the correct approach of a court...consider[ing] a care plan for permanent removal of a child from the birth family’ (*Re A (A Child)* [2014] EWFC B107, para. 69), and that it ‘lies at the heart of the [relevant] jurisprudence...and is thus of fundamental importance’ (*Re R (Inadequate Welfare Evidence)* [2014] EWFC B101, para. 16). For her part, Judge Carr QC described the ‘clarification of the law in the recent past’ in *Re BM* [2014] EWFC B69 (para. 10), and Judge Wood noted in *Re E (A Child)* [2014] EWCC B1 that ‘[t]he Court of Appeal, following the Supreme Court in *Re B*...has had a great deal to say about [choosing the correct order in care proceedings] in a series of important cases’ (para. 48).

In something of a contrast, and despite the views he later expressed in *Re DE*, Baker J said in *Re HA (Capacity To Change)* [2013] EWHC 3634 (Fam) that while it had been ‘suggested in some quarters’ that recent case law ‘represents a radical change’, he did ‘not read it in this way’ (para. 28). In his view, the Court of Appeal was simply ‘emphasising the need for a rigorous analysis and comparison of the realistic options for the child’s future’, which was ‘not new law’ but required by the relevant legislation (para. 28). In particular, although courts had been reminded of ‘the need to identify the realistic options and submit them to a thorough analysis’, a court was not always required to ‘set out in tabular format the arguments for and against every conceivable option’ (para. 28).

Similarly, in *Salford CC v FR* [2014] EWFC B109, it was said that *Re B* and *Re B-S* ‘in line with the many other recent...cases...revisit and restate the key principles which underpin public law proceedings and provide a reminder that adoption...must be seen as being the last resort’ (para. 35; see also *Stockport MBC v LH*, Family Court, 17 September 2014, para. 42; Sprinz, 2014).

There may nevertheless have been some indications that the substantive law has become less amenable to adoption as a result of *Re B*. In *Re A (Children) (Adoption: Placement Order)* [2013] EWCA Civ 1611, for example, the judge purported to impose stringent conditions on placement orders regarding the characteristics of appropriate prospective adopters, in an attempt to meet the particular needs of the two relevant boys. The local authority appealed against the putative conditions, and the boys’ mother cross-appealed against the order *per se* in the event that the stipulations were removed. McFarlane LJ held that where it was found that welfare required adoption only where the adopters had specific attributes, but that otherwise long-term fostering would be best, ‘it was simply not open to the court...to conclude that...welfare...required adoption...: it was not possible to hold that “nothing else will do”’ (para. 40). Significantly, McFarlane LJ appeared to envisage the local authority reapplying for placement orders (only) if and when suitable adopters were found, which may not be consistent with the ‘dual planning’ approach endorsed in *Re P* [2008] EWCA Civ 535. That said, in *CM v Blackburn With Darwen Borough Council* [2014] EWCA Civ 1479 the Court of Appeal specifically rejected the submission that ‘dual planning’ was inconsistent with *Re B*.

*The Prospective Adopters v IA* is particularly interesting concerning whether the law has changed following *Re B*. It was held that a judge’s failure to conduct a ‘determination of the competing arguments between special guardianship and adoption’ (para. 45) when making a placement order coupled with the fact that this is now a clear requirement following *Re B* and *Re B-S* could itself amount to a ‘change of circumstance’ for the purposes of obtaining leave to oppose the adoption application (on which see the next section). While Moor J refused to ‘deal with arcane arguments as to whether or not the Supreme Court and the Court of Appeal were merely stating the law as it has always been’ (para. 42), his finding only increases the significance of *Re B* and *Re B-S*.

It is also possible that the Court of Appeal would, after *Re B*, now think differently about some judgments that it previously approved. In *Re M* [2011] EWCA Civ 317, whose transcript itself runs to only five pages, Thorpe LJ noted that:

The words of the judgment [below] are indeed brief, but they were stated to be deliberately brief and I have no doubt at all that [the judge] was anxious not to extend the distressing occasion for the mother...So he simply expressed his judgment that it was entirely appropriate to make the placement order. He did not specifically refer to dispensation with parental consent, but the judge's objective was a humane one (para. 3).

It is not clear that such a judgment would withstand appellate scrutiny today, albeit that this aspect of the judgment was not explicitly the subject of the appeal. The lower court judgment considered in *Re S-C* [2012] EWCA Civ 1800 might also be evaluated differently. The judge stated that section 1(4)(f) of the 2002 Act was 'not material' and Baron J accepted that this was an error but was content that 'in the context of the judgment as a whole it is clear that [the judge] had the children's relationship with their siblings and other relatives fully in mind' (para. 11) and dismissed the appeal.

In *Re E (Adoption Order: Proportionality of Outcome to Circumstances)*, however, it has been seen that McFarlane LJ specifically declined to endorse the suggestion that the welfare principle had to be mentioned in every judgment, which was made in the pre-*Re B* case of *EH v London Borough of Greenwich, AA and A (Children)* [2010] EWCA Civ 344. In the step-parent adoption case of *Re P* [2014] EWCA Civ 1174, para. 63 (see also *Re W (Adoption Order)* [2014] EWHC 1777 (Fam), para. 7), moreover, he reiterated the denial in *Re P* [2008] EWCA Civ 535 that there is 'some enhanced welfare test to be applied in cases of adoption' and opined that '[i]t is plain that there is no justification to be found in *Re P*, or elsewhere, for the stipulation... that "requires", in every case, necessitates finding that the child's "welfare would be prejudiced significantly if the [adoption] order were not made"' (para. 60).

It is certainly difficult to say categorically that any given case on care plans for adoption or placement orders has been or would be decided differently as regards ultimate conclusion as a result of *Re B* or *Re B-S*. This is true despite anecdotal evidence suggesting that practice has changed as a result of *Re B-S* (Tickle, 2014), the significant recent drop in the number of placement orders made (Department for Education, 2014, p. 3), and the Government's Adoption Leadership Board's publication of guidance aimed at correcting a perceived 'degree of misinterpretation of...judgments' beginning with *Re B* (National Adoption Leadership Board, 2014, para. 3; see also *Re R (A child)*[2014] EWCA Civ 1625, paras. 3, 43, but cf. Munby P's warning that the document's 'content has *not* been endorsed

by the judiciary’ (para. 70)). While the Court of Appeal in *Re E* opined that ‘absent any significant change of circumstances, it is not proportionate to consider adoption’ for S (para. 42) when remitting the case, it rarely suggests that adoption-related care orders or placement orders will ultimately turn out to be inappropriate even when it overturns them and remits. That said, in *London Borough of Harrow v Rasul* [2014] EWHC 3837 (Fam), Keenan J was conscious that ‘every child...necessarily has to suffer and endure the knocks and troubles that come with life, wherever they are placed and live [and] [a]doption does not always offer a risk free solution’ (para. 44), such that he was not convinced that adoption was a proportionate response to the circumstances (see also, e.g., *Baby H* [2014] EWCC B76 (Fam); [2014] EWFC B156). In *Re D (A Child)* [2014] EWHC 3388 (Fam), moreover, Mostyn J did hold that a special guardianship order for the current UK-based foster carers or foster care in the Czech Republic would be preferable to adoption for a boy with Czech Roma heritage. It is, however, significant that in *Rasul* the child was placed with maternal grandparents and in *Re D* the case ‘could very easily have been tried in the Czech Republic’, where non-consensual adoption is prohibited, such that ‘the unique irrevocability of the orders sought ha[d] to play a prominent part’ (para. 35). Moreover, given its negative view of Mostyn J’s earlier conclusions in *Re D* ([2014] EWCA Civ 152, overturning [2013] EWHC 4078 (Fam)), even this approach was open to further challenge by the Court of Appeal.

Some clarity was indeed provided in the December 2014 Court of Appeal judgment in *Re R (A Child)* [2014] EWCA Civ 1625, both on Mostyn J’s analysis and the general impact of *Re B* and *Re B-S*. In *Re R*, Munby P was anxious to ‘emphasise, with as much force as possible, that *Re B-S* was not intended to change and has not changed the law’ (para 44). He explicitly stated, moreover, that any differences between the English approach and that elsewhere in Europe were ‘neither here nor there’ (para. 45). He was adamant that ‘[w]here adoption is in the child’s *best* interests, local authorities must not shy away from seeking, nor courts from making, care orders with a plan for adoption, placement... and adoption orders’ (para. 44). Munby P did not, however, cast doubt on the ‘nothing else will do’ formulation, and in fact invoked it (para. 50).

The approach that ultimately produces adoption in many cases is not necessarily undesirable, as many of the children in the cases to which I have referred were extremely damaged and it may genuinely be true that adoption is best for them. Notwithstanding the difficulties in pinpointing its exact impact, what *Re B* has clearly produced is a renewed emphasis on rigorous decision-making and a strong reminder for courts and local authorities that adoption really should be a last resort. It is particularly clear that the Court of Appeal

thought it was countering a worrying trend as regards rigour in *Re B-S*. The ‘last resort’ formulation was not unknown in adoption cases before *Re B*, and indeed Lord Neuberger was citing the earlier case of *Re A* when he uttered it (see also *Re D (A Child) (Care Order: Risk Assessment)* [2011] EWCA Civ 34, para. 29), but it has undoubtedly become more common. The value of rigour and detail, even in cases where adoption is thought inevitable, should not be underestimated. For adopted children, it may become particularly important in the future for them to know in detail the precise reasons why their links with their biological family were severed (see, e.g., O’Halloran, 2009, pp. 104–105; Hodgkin & Newell, 2007, p. 296 for discussion in the context of the UNCRC). As Judge Lynch put it when directing the release of the judgment to prospective adopters in *Re A, B and C (care and placement orders)* [2014] EWFC B71 (see also *Re X (care and placement order)* [2014] EWFC B86, para. 55; *Kirklees Metropolitan District Council v A Hungarian mother* [2014] EWHC 2496 (Fam), para. 42), ‘it is hugely important for children who are adopted that they have information available to them, through their adoptive parents, so they can make sense of their early life’ (para. 45).

### **Decisions on leave to oppose adoption**

However a child came to live with prospective adopters, a final court order is necessary to complete the adoption after the child has so lived for a prescribed period (Adoption and Children Act 2002, s. 42). The birth parents, meanwhile, require the leave of the court to oppose the making of this adoption order where the child has previously been placed with prospective adopters by an agency (Adoption and Children Act 2002, s. 47(3), s. 47(5)). While Wall LJ deemed these hurdles to be consistent with a good practice that ‘discourages parents and relatives from putting themselves forward at the last moment to care for a child’ in *Re F (Placement Order)* [2008] EWCA Civ 439, para. 72, they could cause problems with the procedural requirements in Article 9 of the UNCRC *inter alia*. Where leave to oppose an order is required and refused, the adoption is treated as being unopposed and there is no need even to dispense with consent (see, e.g., *X and Y v A Local Authority (Adoption: Procedure)* [2009] EWHC 47 (Fam), para. 14).

Leave will be given only where the court is ‘satisfied that there has been a change in circumstances’ since either the relevant parent originally gave consent or the placement order was made (s. 47(7)), and even where a relevant change has been demonstrated the court will decide whether to grant leave on the basis of welfare. While the Court of Appeal declined to impose a requirement of a ‘significant’ change in *Re P (a child) (adoption order: leave to*

*oppose making of adoption order*) [2007] EWCA Civ 616, in *Re W (A Child) (Adoption: Leave to Oppose)* [2010] EWCA Civ 1535 it was said that a ‘stringent’ approach to leave applications (para. 28) was necessary. Applying for leave to oppose, according to *Re W*, is ‘an absolute last ditch opportunity’, and it would be only in ‘exceptionally rare circumstances’ that adoption orders would be refused given the steps that had already been taken (para. 17).

The post-*Re B* cases on permission to oppose could be said to represent a more concrete change in legal approach than those on care and placement orders considered in the previous section. The judgment giving permission to appeal in *Re B-S* [2013] EWCA Civ 813 (which essentially concerned permission to oppose despite its broader implications) was delivered only around 48 hours after the Supreme Court handed down *Re B* (para. 9). McFarlane LJ presciently remarked that ‘there is a potential here for a fundamental review of the test to be applied’ (para. 10). He therefore granted permission partly in light of *Re B*, and thought that *Re W*’s suggestion that it should be ‘exceptionally rare’ for a parent to gain leave ‘may no longer be tenable’ (para. 18).

In *Re B-S*, a mother sought to oppose the adoption of her two children on the basis of what McFarlane LJ described as an ‘astonishing change of circumstances’ when giving permission to appeal (para. 7), although relatively few facts are discernible. In the substantive judgment, the Court shared McFarlane LJ’s concerns about *Re W*, holding that the phrase ‘exceptionally rare circumstances’ and the word ‘stringent’ applied to section 47(5) applications ‘are apt to mislead, with potentially serious adverse consequences’, ‘convey quite the wrong message’ and have no place in this context (para. 68). Section 47(5) was intended to afford a ‘meaningful remedy’ where appropriate for both parent and child (para. 70). The facts that a court has made care and placement orders and that a child is living with prospective adopters cannot themselves justify the refusal of leave without depriving section 47(5) of any practical effect.

The Court of Appeal in *Re B-S* regarded *Re P* [2007] EWCA Civ 616 as a correct statement of the law (except that the granting of leave should be considered evaluative rather than discretionary), albeit suggesting that ‘it may on occasions have been applied too narrowly and...harshly’ (para. 72). In making the evaluative judgment, the Court emphasised the necessity of keeping in mind the ‘last resort’ formulation, even though welfare is paramount. Despite all this, however, the Court of Appeal concluded that Parker J had not been ‘wrong’ to refuse leave. While the mother’s life had turned around, the judge had not

referred to the problematic aspect of *Re W* and was entitled to make the factual findings that she had.

Other attempts to secure leave to oppose itself have been more successful following *Re B-S. Re W (A Child) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1177 involved two cases, *Re W* and *Re H*. Munby P said the Court should make an ‘appropriate allowance’ where the first instance judgment had been given before *Re B-S*, and focus on substance rather than form (para. 16). References to the language in the discredited *Re W* [2010] EWCA Civ 1535 are not enough in themselves to ensure that an appeal succeeds; it is a matter of engaging with the ‘essence’ of *Re B-S* (para. 16). The crucial question is whether the prospects of success are ‘more than fanciful’ and have ‘solidity’ (para. 20) (although those words need not be used), since otherwise there will be wasted resources, ‘undue anxiety and concern’ for the prospective adopters and false hope for the parents (para. 20). Where there are such prospects, the question is then whether ‘the welfare of the child would be so adversely affected by an opposed...application that leave...should be refused’ (para. 22). This, Munby P said, is unlikely to be true in most cases given that the court has, ‘ex hypothesi, already concluded that the child’s welfare might ultimately best be served by refusing’ an adoption order (para. 22).

If a first instance judgment was found to be deficient, Munby P was willing for the Court of Appeal to grant leave itself if the matter was ‘clear on the papers’ (para. 27), but otherwise it should be remitted. Albeit ‘[r]ecognising that the law sets a very high bar against any challenge to an adoption order if lawfully and properly made’, Munby P understandably considered it a ‘necessary consequence’ of a successful appeal on leave to oppose that the adoption order should be set aside (para. 29), since ‘there has been “no proper hearing of the adoption application” and...if the...order stands, there will be “fundamental injustice”’ (para. 29, quoting *Re K (A Minor) (Adoption and Wardship)* [1997] 2 FLR 221, 228).

Munby P allowed both appeals against the first instance decisions, each of which had found a change in circumstance but nevertheless denied leave. In *Re H* it was not clear whether the judge decided on the basis of chances of success or welfare, but he also ‘twice described the issue as being whether it was “sensible” or “possible” to “unscramble” the arrangements’ (para. 40). This suggested that he was asking a question appropriate at the substantive final stage, and his language was inconsistent with the need for stringency following *Re B*. The Court of Appeal was not equipped to decide the case itself and the issue was remitted.

The Court was more impressed with the first instance judgment in *Re W*, but again it was unclear whether it was decided on the basis of success or welfare and the case was remitted. That said, Munby P emphasised that ‘the parents in both cases have a long way to go’ (para. 48). While they had ‘survived this battle and stand to fight another day’, ‘they may yet lose the war’ (para. 48).

The birth parents in *Re W* were eventually granted leave to oppose and, at the final hearing ([2014] EWHC 1777 (Fam)), Hedley J bore in mind that the last hurdle faced by them was ‘the highest’, but also that ‘the legal burden to establish adoption lies...on the prospective adopters’ (para. 18). Despite the clear changes of circumstance in the case, he had ‘real concerns about [the child’s] ability to survive the process of rehabilitation and the parents’ ability to sustain her care...when seen in the context of their fragility and of the consequences to [the child] of a failure of rehabilitation’ (para. 25). This required dispensation with the parents’ consent and adoption, and the parents did indeed ‘lose the war’. That said, it is interesting that in another final order case where the leave to oppose had been given (*Re N* [2014] EWHC 331 (Fam)), *Re N* [2014] EWFC 1491, the judge making the final adoption order said that ‘[i]f it were not an exceptional case’ for reasons including the child’s disabilities and the fact that ‘[t]he only home that she has ever known has been with the Applicants’, ‘I doubt whether an adoption order would have been appropriate’ (para. 48).

*Re L (a child) (leave to oppose making of adoption order)* [2013] EWCA Civ 1481 was a successful challenge to a refusal of leave at first instance with ‘very unusual’ facts (para. 3). S’s prospective adopters (Mr. and Mrs. X) had separated after making the adoption application, and Mr. X became the sole applicant. It being agreed that there had been a change of circumstance in relation to S’s mother M, the case focused on the second stage of the section 47(5) process. Black LJ held that the judge had failed to take adequate account of ‘whether the uncertainty in the adoptive household might improve M’s prospects of success’ (para. 48). In Black LJ’s view, ‘the greater the uncertainty and the risk of delay and of moves...in connection with the present adoptive placement, the stronger the case for looking again at a placement with M and the more it might be appropriate to accommodate the delay and disruption involved...and...the imperfections in what she could offer’ (para. 52). She therefore had solid chances of success and leave was granted (cf., e.g., *Re CC (Adoption Application: Separated Applicants)* [2013] EWHC 4815 (Fam)).

The judiciary have nevertheless retained a distinct scepticism about leave decisions despite *Re B-S*. In *Re W (Children: application for permission to oppose)* [2014] EWFC B120, the parents repeatedly emphasised the injustice of the earlier proceedings where



difficulties had been found in their care of the children, and the judge found that the changes they relied upon were ‘very far short of [those] required to satisfy the test in *Re P*’ (para. 27), although it must be questioned whether the judiciary are following the literal words of the statute in this respect (cf. *Prospective Adopters v SA (Father)* [2015] EWHC 327 (Fam), para. 16). Even if the welfare stage had been reached in *Re W*, the judge found no solidity. Other cases have been dealt with even more straightforwardly. In *Re J and S (Children)* [2014] EWFC 4, for example, the parents unsuccessfully argued that an application to the European Court of Human Rights and the fact that the prospective adopters were a same-sex couple were relevant changes of circumstance within section 47(5). *Prospective Adopters v SA (Father)* [2015] EWHC 327 (Fam), meanwhile, is a reminder that even where a relevant ‘change’ is found (in this case the father’s being a secondary carer for the children of his new (polygamous) marriage), the ultimate apparent necessity for adoption will still defeat the application for leave.

*Re AW (a Child: Application to revoke Placement Order: Leave to oppose Adoption)* [2013] EWHC 2967 (Fam) concerned leave to revoke a placement order, which formally involves the same test as that to oppose an adoption order except that welfare is not paramount (Adoption and Children Act 2002, s. 1(7), s. 24(3); see also *Re F (A child) (Application for permission to revoke a Placement Order)* [2014] EWCC B13 (Fam)). Pauffley J was mindful of the requirements of *Re B*, and of the efforts that the parents had made to improve their situation. But she was particularly concerned about the mother’s intention to conceal her new pregnancy at the time of the hearing. Rather dramatically, the judge held that the concealment ‘represents in the clearest way possible...how in truth there has been no change at all in the parents’ ability to work openly, honestly and in a transparent way with the local authority’ (para. 55). She found that there had been no relevant change ‘by a very wide margin’ (para. 57). In *Re I (A Child)* [2015] EWFC B8, moreover, although Judge Wood accepted that it was ‘obviously enormously to the father’s credit’ that he had participated in a programme for perpetrators of domestic violence (para. 20), he had done so without accepting the full extent of his previous violent conduct, particularly towards his children. The father also cited his reconciliation with the child’s mother as a relevant change, but the judge considered it possible that this change was negative if anything such that section 24(3) was not satisfied.

By contrast, in *Re T (Application to Revoke a Placement Order: Change in Circumstances)* [2014] EWCA Civ 1369 a father successfully demonstrated a change of circumstance in seeking permission to apply for the revocation of a placement order relating

to his two sons. The Court of Appeal held that the judge had been wrong to focus on the father's circumstances (namely his apparent separation from the mother and new relationship with another woman, which the judge had also failed to set in the context of the fact that the principal concern had been the parents' continuing relationship) rather than taking due account of the children's unsettled behaviour within their proposed placement. It was found that the judge should have proceeded to the second stage of the inquiry. The mother in *Re G (A Child)* [2015] EWCA Civ 119 also demonstrated that the judge below had wrongly approached the decision on leave to revoke a placement order and secured a re-hearing, although this was due to a flawed treatment of both the original placement order decision and the evidence available at the leave stage, and Macur LJ did consider it 'unlikely for there to be many situations where the change in the child's circumstances alone' would amount to a sufficient change (para. 23). The outcomes of cases on 'change of circumstance' in the aftermath of *Re B* are not therefore uniform.

Some conclusions for this section would be appropriate. There has been a clear change in the judicial gloss on the test for leave to oppose an adoption order following *Re B*, and it is probably safe to say that a parent is in general more likely to acquire leave than was previously the case. That said, while it has been necessary in some cases to overturn original adoption orders in order to give substantive effect to appeals on permission (see in particular *Re W* [2013] EWCA Civ 1177), once again it cannot clearly be said that *Re B* would prevent an adoption from ultimately going ahead in any given case, and in *Re W* itself it demonstrably did not do so. Moreover, in *The Prospective Adopters v FB* [2015] EWHC 297 (Fam), the adoption order was made in spite of Moor J's conclusion that the relationship between the child who was the subject of the application and his two half-sisters should have been given greater consideration at the placement order stage, and the fact that the child's mother had been given permission to oppose the order.

While Holman J did decline to make an adoption order in *A and B v Rotherham Metropolitan Borough Council* [2014] EWFC 47 (Fam), that case involved unusual facts whereby the true genetic father of the relevant child came forward only after the adoption application had been issued and successfully argued that the child should be placed with the father's sister. As was concluded in the last section, however, the fact that *Re B* and subsequent cases will not necessarily prevent an adoption from proceeding may be a positive feature of the law and does not detract from the importance of rigour.

## Conclusion

This article has shown that *Re B* and its ‘descendant’ *Re B-S* are very significant cases that have had a considerable impact on the approach and attitude of the English judiciary towards adoption. While it is much more difficult to say that the decisions are having a real influence on the ultimate outcome of subsequent cases, despite Bainham and Markham (2014, p. 998)’s contention that recent cases give ‘new hope to parents where little existed before’, the rigour that they have encouraged is both highly significant and welcome. It also makes it more likely, in my view, that the English judiciary’s approach to adoption is compatible with the UNCRC (cf. *The Prospective Adopters v FB* [2015] EWHC 297 (Fam)), even if Masson (2014, p. 1283) questions whether the judiciary are best placed to impose such rigour, and even given the opacity of the UNCRC’s requirements identified in my previous work.

The unfortunate irony is that, just as the senior judiciary in England are emphasising the importance of rigour, there is the possibility of real tension with the UK Government’s policy of seeking to increase the number and speed of adoptions from foster care still further, ostensibly for the relevant children’s better protection (see, e.g., Bainham & Markham, 2014, pp. 1001–1002). Space precludes a detailed discussion of the reforms introduced by the Children and Families Act 2014 (see, e.g., Sloan, 2014b), although the Court of Appeal’s confidence that its approach is consistent with the Act’s 26-week provision has been noted. That may prove somewhat optimistic, and *Re Chd* [2014] EWFC B125 is a case where the judge expressly overrode the *prima facie* limit because the evidence was inadequate. This potential tension is a demonstration of the fact that, even when one element of a legal system sets out to comply with international obligations, those efforts could be undermined by another element.

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