

## **Update briefing: *Somerset County Council v NHS Somerset Clinical Commissioning Group & Ors* [2022] EWFC 31**

*Alexandra Conroy Harris, CoramBAAF Legal Consultant*

### **Background**

The President of the Family Division has today (13 April 2022) handed down judgement in the latest, and final, instalment of the *Somerset* case. It is available here:

<https://www.bailii.org/ew/cases/EWFC/HCJ/2022/31.html>

In November 2021, Mrs Justice Roberts made declarations in respect of 10 children awaiting placement for adoption. She declared in each case that the placement orders were lawfully made, despite breaches of the Adoption Agencies Regulations 2005 relating to the medical adviser's role in providing (or approving) and summarising the child's health assessment in the Child's Permanence Report (CPR).

Somerset County Council brought further applications in respect of the next cohort of children, who were already in adoptive placements. It had become clear, not least from information gathered from CoramBAAF members, that the issue was not confined to Somerset, and that the placements of many hundreds of children across the country were potentially affected. The applications were therefore transferred to the President and heard on 4 March 2021.

### **Findings**

The President dismissed Somerset County Council's applications, finding that applications under the Family Proceedings Rules 2010, Part 18, were not appropriate and that no other local authorities would need to make applications if placement orders have been made in similar circumstances. Part 18 is no more than a "procedural gateway" through which the court may consider applications for which they otherwise have jurisdiction. It is a well-established principle that orders of the court, including placement orders, will be valid and enforceable unless and until a court sets them aside.

The President considered the court's position in relation to those cases that had been issued on the basis of a breach of the Regulations, and concluded that those errors by the local authority prior to the making of an application to the court did not render the court's decision on those applications void. None of the statutory criteria for the making of placement or adoption orders depend on the local authority's compliance with the Adoption Agencies Regulations 2005.

The President accepted that it is difficult to envisage a case where a child's health issues are significant factors in the decision to grant a placement order without the court being aware of them during the proceedings. It is therefore unlikely that an agency's failure to comply with the Regulations will have led to a decision by the court that is vulnerable on appeal. Similarly, an application to revoke a placement order is unlikely to be justified on health grounds, as any significant health issues would have been known to the court in the original proceedings. If there are any such cases, the route to challenge would be by appeal, and would need an application for leave to appeal out of time.

## Actions to be taken by agencies

The President notes that courts will be vigilant in examining applications to ensure that the medical requirements of the Regulations have been followed. He also observed that these breaches had not been picked up by Ofsted. Agencies might now expect Ofsted to ask questions about the process as part of their inspections. Local authorities should be prepared to explain if decisions have been made without full compliance with the Regulations, what steps have been taken to meet the requirements of the Regulations, and what, if any, impact the breach has had on the decision making for the agency.

1. **All agencies should review their procedures and determine whether they have been operating in breach of the AAR 2005.** Agencies will have been aware of this issue for the last six months since Roberts J's judgement, and should now have put in place procedures to ensure that the Regulations are properly followed. This should include ensuring that medical assessments are carried out by registered doctors, not by specialist nurses, and that if assessments from other doctors are used (for example, an Initial Health Assessment (IHA)), that the appointed agency medical adviser confirms it is adequate for the purposes of the agency decision-maker decision and provides a summary for inclusion in the Child's Permanence Report.
2. **If a breach has been identified before a placement application has been issued,** the agency should rectify the breach and the agency decision-maker should review and confirm their decision.
3. **If an application for a placement order has been made in a case where there has been a breach of the regulations,** the local authority should bring the breach to the attention of the court to which the application has been made.  
The court is likely to require the breach to be remedied and the required medical information to be provided before the final hearing, if that can be done without causing delay. If the final hearing is too close to allow that to be done, the court could proceed with the final hearing but postpone making a final order until all the medical information has been provided. The individual judge in each case will make the decision on how to proceed, bearing in mind the welfare of the child, the impact of delay and the need for a fair trial in the circumstances of each case.
4. **Where a placement order has been made,** the order remains valid and a child can be placed with prospective adopters without any further court involvement.  
If a breach of the Regulations has been identified, the local authority must update the Child's Permanence Report with relevant health information before the child is matched with prospective adopters. If a child has already been placed, the Child's Permanence Report or Annex A report (if different) must be updated before an adoption order can be made.
5. **Where an adoption order has been made,** the order will remain valid. As with any adoption order, any procedural breach in making the order will have had to be very significant before it can be considered fatal to the making of an order. Public policy weighs against the overturning of adoption orders in any but the most unusual and dramatic circumstances. Breaches of the Adoption Agencies Regulations 2005 are extremely unlikely to give grounds for appeal or revocation of adoption orders.
6. **If a local authority considers that the breach has real significance** and the lack of medical information has seriously misled the court making an order, they should consider whether it would be appropriate to appeal the making of the order. We suggest that discussions are held with the children's guardian and with the legal

representatives for the parents and child, with full disclosure of the missing information. Decisions about whether leave to appeal should be sought will need to take into account the likelihood of the appeal being successful, whether a compliant application for a placement order after appeal is likely to be granted, and the impact of the delay need by an appeal on the child.