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Neutral Citation Number: [2020] EWHC 2184 (Admin)

Case No: CO/2044/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2020

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE QUEEN ON THE APPLICATION OF ARTICLE 39

Claimant

and

SECRETARY OF STATE FOR EDUCATION

Defendant

- -
- -

Ms Jenni Richards QC, Mr Stephen Broach and Ms Khatija Hafesji (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Ms Galina Ward and Mr Admas Habteslasie (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: **27-28 July**

- -

Approved Judgment

Mrs Justice Lieven DBE :

1. This is a challenge to the lawfulness of the Adoption and Children (Coronavirus) Amendment Regulations 2020 ("the 2020 Regulations") which amend a series of regulatory protections in respect of children social care services. The Claimant is a children's rights charity whose aims are the promotion and protection of children living in institutional settings.

2. The Claimant was represented before me by Ms Richards QC, Mr Broach and Ms Hafesji and the Defendant by Ms Ward and Mr Habteslasie. I am very grateful to all of them for their assistance.

3. The Claimant raises three grounds of challenge (a fourth ground having been refused permission for judicial review by Soole J). They are (a) a failure to consult; (b) an allegation that the 2020 Regulations are contrary to the objects and purpose of the statutory scheme contrary to the *Padfield* principle; and (c) that they were made without regard to the welfare of children contrary to the statutory obligation under s.7 of the Children and Young Persons Act 2008. I will refer to the children who are impacted by the 2020 Regulations as looked after children ("LACs")

4. At the heart of the challenge are two very different views of what the 2020 Regulations did and were designed to do. The Claimant argues that the 2020 Regulations undermine a wide range of statutory protections for vulnerable children, are a disproportionate response to the Covid-19 crisis, and significantly increase the risk to vulnerable children. The Defendant argues that the 2020 Regulations were a temporary and proportionate response which put in place limited flexibility in a number of absolute requirements in order to prioritise the needs of children by supporting the delivery of services at an exceptionally challenging time.

The background facts

5. The chronology of events is explained by Ms Sophie Langdale, Director of Children's Social Care at the Department of Education ("the Department"). The 2020 Regulations were laid before Parliament on 23 April 2020. On 30 January the four Chief Medical Officers had increased the risk level in the UK from low to moderate in the light of Covid-19 and advised the Government to plan for *"all eventualities"*. On 26 February the Scientific Advisory Group for Emergencies (SAGE) published a document setting out the then current understanding of Covid-19 with a series of planning assumptions. This document set out a reasonable worst-case scenario of infection rates resulting in workforce absences of 17-20% during peak times and some 820,000 excess deaths.

6. As Ms Langdale explains, these concerns needed to be seen against the fact that the children's social care system *"was already facing significant pressures prior to Covid-19"*. These pressures manifest themselves in the fact that as at March 2020 only 50% of local authorities were judged good or outstanding by Ofsted with 21 local authorities judged inadequate. There is a vacancy rate nationally amongst social workers of 16.4% with much higher rates in some local authorities. The problems within the children social care sector are longstanding and extremely well documented, not least in judgments from the Family Division of the High Court.

7. The impact of Covid-19 on this sector was compounded by a number of additional factors. The social work workforce is primarily female and therefore more likely to have caring responsibilities both for dependent children but also other family members. Ms Langdale records that the Department's highest assumption was that the additional social worker absence rate during the pandemic could reach 35% as a weekly average, rising to 41% at the peak, and that high absences could also be experienced in children's homes. Significant rates of serious illness could also result in more children needing care if their adult carers became sick. Another significant factor of concern was that three quarters of looked after children are placed with foster carers and more than 40% of foster carers are aged over 50 with some having health conditions requiring them to "shield". It is obvious therefore that Covid-19 could have had a very serious impact on the availability of foster care places and thus the need to place children urgently in other placements.

8. A factor that Ms Langdale highlights is the shortage of places in children's homes and the significant increase in young people aged 16 and over being placed in unregulated provision, from 3,660 in 2015 to 6,190 in 2019. This is a problem which has been highlighted in a number of judgments over the last few years and is wholly independent of Covid-19. These children are at real risk by being placed within unregulated placements, often with precarious safeguards in place.

9. The matters highlighted by Ms Langdale are evidence of how fragile the children's social care system is and that it was therefore in a poor position to deal with the potential impacts of Covid-19.

10. It was against that background that the Department had to consider what legislative interventions would be necessary in the light of the Covid-19 pandemic in order to ensure that the sector could continue to operate in anything approaching an appropriate manner. I have seen a series of emails concerning consideration of amending the 2020 Regulations. On 16 March the Independent Children's Homes Association emailed the Department setting out some of the concerns their members had raised, including about regulatory visits and the need for flexibility within the statutory regime. On 17 March 2020 there is an email within the Department setting out the various regulations which needed to be considered. On the same day, the Department contacted representatives of 20 local authorities which led Regional Adoption Agencies asking for views on regulations that needed to be reviewed and whether there were *"any other issues [the Department] should be considering"*. There were a range of responses to this request largely from local authorities and adoption agencies but also Ofsted.

11. The responses varied considerably, some referred to regulations which they considered needed to be changed, such as quoracy requirements on adoption panels. I am not going to set out passages from the various responses because to do so would be necessarily highly selective. As an overview, some authorities were more concerned to have wider flexibility, some thought that so long as panels could go ahead "virtually" that would be sufficient and one at least raised a concern that if nothing were done then children would be left at significant risk of harm and there was therefore a need to ensure that resources could be targeted to meet potential needs.

12. There was a meeting of the Child Services Development Group on 26 March 2020. The minutes of this meeting show that there were a range of concerns such as the problems

of social workers carrying out home visits to foster carers and the risk of spreading the virus, particularly within children's homes.

13. Ofsted was one of the consultees and they said that concerns had been raised about visits to children's homes. They said:

> *"Providers are querying if they need to continue these visits. We want to keep in mind the purpose is to provide an important check on whether children are appropriately safeguarded so these visits are important. However, they present difficulties in the current circumstances.*
>
> *Our approach is to accept that providers will not be able to fully comply and to take a pragmatic approach. We may not take enforcement action in relation to failure to comply fully, provided the provider is trying to comply as far as possible using other means e.g. telephone/skype interviews (or even skype walkaround inspections) and reviewing documents remotely.*
>
> *We may seek amendments to the regulations to temporarily suspend the requirement for visits in person if the situation persists but we do not currently want to lift requirements as these measures are an important safeguard."*

14. On 7 April Ofsted provided comments on the duration of any proposed amendments:

> *"Reimposing inspection intervals on 26 Sep for children's homes would create significant practical difficulties. During COVID we will be conducting only urgent inspections on a risk assessed basis. We anticipate that there will therefore be a significant number of medium risk, homes (and potentially even high risk homes which have not met the threshold for urgent inspection) which will require inspection post COVID. The reimposition of inspection intervals would force us to schedule inspections according to their "due date" rather than according to risk…..I simply point out that the amendments [redacted] the lifting of inspection intervals) will be needed until the end of the financial year and we would appreciate being involved at an early stage in the reconsideration of amendments that will be needed post 25 September."*

15. The Care Quality Commission was also consulted and replied on 2 April 2020 stating that they thought the changes being considered were sensible.

16. The Office of the Children's Commissioner ("OCC") was not consulted. The first contact with the Commissioner appears to have been on 16 April 2020 in an email that says:

> *"We want to give you advance notice in confidence that the Department is intending to make some minor changes to children's social care secondary legislation next week in light of Covid-19. Our intention is to continue to prioritise the needs of children whilst relaxing some minor burdens in order that local authorities can continue to deliver children's services without being unnecessarily hindered by process in these*

> *extraordinary times….Most changes are small procedural changes to ease administrative burdens, allow visits and contact to take place remotely and relax strict timescales where possible….*
>
> *… we do not consider children from particular protected characteristics will be negatively impacted nor will it have a negative impact on children's rights."*

17. The OCC responded the following day saying that local authorities did not seem to be too concerned about staffing at present and there was a need not to relax things too far. It appears that this response was from a member of staff not the Commissioner, Ms Longfield, herself. This email does not make any point that the OCC was not consulted and the concern raised about the amendments is limited. However, on 30 April, by which time the 2020 Regulations had been made, the Commissioner made a press statement stating that she was extremely concerned about the 2020 Regulations because they relaxed important safeguards for children living in care. She raised the issue of there having been minimal consultation and the normal 21 day period between statutory instruments being published and their coming into force not having been met. She questioned the justification for the 2020 Regulations given that staffing levels appeared at that point to be holding up well.

18. On 6 April there was a Ministerial Briefing setting out the rationale for the proposed changes. The summary section states:

> *"changes are being made to 10 sets of regulations to ensure children's social care providers and local authorities have sufficient flexibility to respond to COVID-19 while still maintaining safe and effective care. Most changes will ease administrative burdens, allow visits and contact to take place remotely and relax strict timescales where possible. These are low risk changes and will provide more flexibility to focus on core safeguarding responsibilities. These amendments will be kept under review and in place until the Coronavirus Act renewal date of 25 September.*
>
> *We have engaged with stakeholders on the proposals in confidence, including Ofsted, Association of Directors of Children's Services, the Local Government Association, Principal Social workers and Practice Leaders…"*

19. The Defendant produced a Children's Rights Impact Assessment ("CRIA") which is dated 15 April 2020.

20. The 2020 Regulations were laid before Parliament on 23 April 2020 and came into effect on 24 April. The Explanatory Memorandum states:

> *2.1 … the changes prioritise the needs of children, whilst relaxing some administrative and procedural obligations to support delivery of children's services but maintaining appropriate safeguards in such extraordinary circumstances. The changes will support services to try and manage the increased pressure on children's social care and staff and carer shortages who are ill with coronavirus…*

> …
>
> *3.1… The Department has consulted informally with the sector who have asked for these changes to be in force as a matter of urgency…*
>
> …
>
> *3.4 … these are low risk changes to ease administrative and procedural duties….*
>
> *7.1 Ensuring that vulnerable children are properly safeguarded and have their welfare promoted remains a top priority for Government. At the same time, the challenging context of the outbreak means that local authorities and partners may struggle to meet the full range of statutory duties relating to child protection, safeguarding and care at present due to administrative and procedural requirements set out in legislation.*
>
> *7.2 The Department has consulted informally with a variety of local authority stakeholders, including their representative body The Association of Directors of Children's Services, and with Ofsted as regulator, and have informed the Children's Commissioner. These consultations have helped identify which changes would be most helpful to local authorities during the outbreak. Feedback has been set out against the amendments within this section of the memorandum to provide clarity."*

The 2020 Regulations

21. The Claimant challenges the entirety of the 2020 Regulations and seeks an order that they are unlawful in their entirety. There are in total 65 changes, however Ms Richards focused, both orally and in the documentation, on 7 specific changes in the 2020 Regulations. These were as follows:

    i. Regulation 4(2)(a), concerning the loss of independent scrutiny in the adoption process;

    ii. Regulation 8(11), concerning the loss of safeguards for children placed in out-of-area foster placements with persons unconnected to them;

    iii. Regulation 8(8), concerning the loss of safeguards for children placed in fostering for adoption placements;

    iv. Regulation 8(13), concerning the removal of timeframes for social worker visits to looked after children;

    v. Regulation 8(14), concerning the loss of timescales for statutory reviews of the welfare of children in care;

    vi. Regulations 8(18) and 9(13), concerning the loss of safeguards in relation to short breaks;

vii. Regulation 11, concerning the dilution of the duty on children's home providers to ensure that independent persons are able to visit and write a safeguarding report each month.

22. The 2020 Regulations amend a wide range of existing Regulations relevant to the children's social care sector and those amended Regulations are made under a number of different statutory powers. The specific enabling powers are not themselves relevant to this challenge and I will not set them all out. The 2020 Regulations are, in their entirety, time limited, expiring on 25 September 2020, subject to some limited saving provisions. On 14 July 2020 the Parliamentary Under Secretary of State made a written statement to Parliament stating that the Defendant intended to allow all the Regulations to lapse on 25 September save for: medical reports to be provided at a later stage of the process; regulations providing for virtual visits, and the suspension of the requirement for Ofsted to inspect at prescribed intervals. Those proposals are currently subject to a short consultation.

23. At the heart of the challenge is the Claimant's submission that the 2020 Regulations contain important protections for highly vulnerable children. This is relevant both to argument on the duty to consult children's rights groups, and the alleged breaches of statutory purpose and provision in Grounds Two and Three. It is therefore necessary to go through each of the seven regulations which Ms Richards' specifically referred to in order to understand its effect.

24. Ms Ward submitted that I should also have regard to what the Guidance issued in respect of the changes says and I will therefore refer to that at the same time. Ms Ward also referred to the review of the use of the 2020 Regulations that had been undertaken by Ofsted and the Department since April 2020 in order to argue that the 2020 Regulations had been used in a careful and proportionate manner. I treat the statistics that come out of this review with some caution as by no means have all local authorities have responded to the review. It is therefore possible that some of the authorities that have been regularly using the flexibility in the 2020 Regulations have not submitted returns to the review. However, the figures from the review do give some indication of the level of use, and they are fairly consistent, so I will refer to them below, albeit with considerable caution.

25. The Guidance requires that the use of the amended powers as set out below requires approval of the use of the 2020 Regulations at chief officer/top tier management level and that such decisions must be properly recorded with reasons.

Regulation 4(2)(a)

26. This changes the obligation in Regulation 4(1) of the Adoption Agencies Regulations 2005 to constitute an adoption panel to a mere discretion. Ms Willow, the Claimant's Director, in her witness statement explains why adoption panels are an important protection for children, providing for a level of independent oversight of the local authority decision making at a crucial stage in the child's progress through the care system.

27. The Guidance states that any use of the amended power must be approved at chief officer/top tier management level and must be properly recorded with reasons.

28. The review suggests that authorities have been using the reduction on the quoracy levels for adoption panels (from 5 to 3) but few have used the discretion not to constitute a panel at all.

Regulation 8(11) and Regulation 8(5)

29. These allow a LAC to be temporarily placed with an unconnected person (i.e. not a relative or friend and not an approved foster carer) and also removes the oversight of a nominated officer. The changes are to Regulation 24 of the The Care Planning, Placement and Case Review (England) Regulations 2010 ("the 2010 Regulations"). A nominated officer is a statutory position and in effect means a senior local authority officer. The placement is for a maximum of 24 weeks, although in practice this can be extended to up to 32 weeks in total. The local authority must still conduct an assessment of the person's suitability under Schedule 4 of the 2010 Regulations.

30. The potential impact of allowing a child to be placed with a stranger who is not a family member hardly needs stating. Further, this is a situation where there is no nominated officer oversight. I therefore fully accept that the protection that has been removed is an important one.

31. However, the authority does still need to be satisfied that the placement is the most appropriate one for the child in question and it must conduct an assessment of the suitability of the person to care for the child, including of all other persons living in the proposed accommodation.

Regulation 8(8)

32. This amends Regulation 22A of the 2010 Regulations and provides for the placement of a child with a foster parent who is also an approved adopter without the approval of a nominated officer. This type of placement is known as fostering for adoption.

33. The Guidance makes clear that the authority must be satisfied that the placement is the most appropriate one for the child; that it will safeguard and promote the child's welfare; that his/her wishes and feelings have been taken into account; that the independent reviewing officer has been informed and the parents (where practicable) have been informed.

34. Ms Willow makes the point, entirely correctly, that this is a very important provision both for the future of often very young children but also their parents. These placements are often soon after birth and once the child is placed under Regulation 22A that can in practice fix that child's future in a way that is very difficult to change later.

Regulation 8(13)

35. This amends Regulation 28 of the 2010 Regulations. It introduces a flexibility so that if the authority is "unable" to visit a child within the times set by the 2020 Regulations then it must do so as soon as reasonably practicable thereafter. The Claimant highlights two particular issues. Firstly, that of children as young as 12 in secure training centres (STCs) who from 2 July 2020 can be held in their cells for 22.5 hours per day. Secondly, the very large number of LACs being placed in unregulated settings (more than 6000), i.e. where they do not receive care and there are no Ofsted inspections.

36. Again, the importance of regular visits within a fixed timescale cannot be overstated. This is true both for visits to foster care placements, which may serve to alert the local authority to risks posed by foster carers, but also visits to the very large number of children in unregulated settings where there are no Ofsted inspection and thus are heavily reliant on social worker visits. This is a situation which has concerned many of those in the children's care sector including Family Division judges in recent years, see Cobb J in *Re S (Child in care: Unregulated Placement)* [2020] EWHC 1012 Fam. These children are often being placed away from family, school and friends who could provide some support and informal oversight, and are intensely vulnerable, including to child sexual exploitation. Regular visits by their social workers are one of the ways, if not the critical way, of ensuring they are being properly protected.

Regulation 8(14)

37. This amends Regulation 33(2) of the 2010 Regulations to allow reviews of a child's care plan, after the second review, to be carried out *"where reasonably practicable",* rather than there being an absolute requirement for such a review in a fixed timescale. The review meeting is chaired by an Independent Reviewing Officer (IRO) and no change to the child's care plan can be made unless it has been considered at a review meeting. The significance of the IRO to a child's welfare was set out by Keehan J in *Herefordshire DC v A, B and C* [2018] EWFC 72 at [51]:

> *"The essential safeguard the court and the public at large have that a local authority will be a good corporate parent is the function and role of the IRO. Any obstruction of an IRO performing their statutory role or any diminution in an IRO, or their manager, feeling empowered to do so, is a matter of the utmost consequence. For otherwise a looked after child is subject to the vagaries of social work practice and the local authority's different pressures and priorities."*

38. I note in respect of this amendment that both the bodies which represent IROs have publicly questioned the changes and the lack of consultation upon them.

Regulation 8(18)

39. This amends Regulation 48 of the 2010 Regulations with respect to "short breaks". The original regulation requires modified care planning for children who are being provided with short breaks under section 20 of the Children Act 1989 of up to 17 days but no more than 75 days in the year. The amendment removes the limit of 17 days on each placement thus meaning that a child can be in a short break for longer without the full LAC requirements being applied.

40. The Claimant points out that the protection for children in short breaks is particularly important for disabled children living with their parents when the short break is often respite provision for the parents. The reason for the amendment advanced by Ms Langdale was that 17 days might not have been sufficient for a parent or foster carer to recover from illness and the Department was concerned to ensure that authorities were not dis-incentivised from leaving the child in a short break placement that they were familiar with.

Regulation 11(6)

41. This amends Reg 44(1) of the Children's Homes (England) Regulations 2015. This provision required that a children's home provider ensured that an independent person visited the home at least once a month. This has been changed to an obligation to use reasonable endeavours to see that there is such a visit once per month. Ms Willow highlights the concerns in recent years about children in such homes being vulnerable to child sexual exploitation.

42. The Claimant argues that this is a weak duty because the provider is only required to use reasonable rather than best endeavours and relies upon *Rhodia International Holdings v Huntsman International LLC* [2007] EWHC 292 at [33] as to the difference between best and reasonable endeavours. In my view this is a somewhat sterile debate on the facts of this case. The 2020 Regulations change an absolute duty to visit once a month to a duty to merely take reasonable endeavours to make such visits which is plainly a material lessening of the obligation. There might have been an intermediate position of requiring the provider to use best endeavours which would then have entailed consideration of the degree to which there was a difference between best and reasonable endeavours but that was not the language used in the 2020 Regulations.

The Guidance

43. The Department has produced Guidance on Children's Social Care ("the Guidance") during the course of the pandemic and this has regularly been updated. The Defendant relies on this guidance as showing how the flexibilities introduced should be applied and that various safeguards have been put in place.

44. The Claimant rightly points out that the Guidance is non-statutory, not having been made under section 7 of the Local Authorities and Social Services Act. Ms Richards argues that local authorities are therefore only subject to a public law duty to have regard to the guidance rather than if it was statutory guidance where the authority could only depart with good reasons, see Sedley J in *Rixon v London Borough of Islington* [1997] ELR 66 at p.6. Although there is necessarily a difference in the weight to be attached to statutory and non-statutory guidance, I do not think the potentially different impacts change the approach in the present case. This is not a challenge to an individual decision and whether the guidance was properly followed. It is a challenge to the 2020 Regulations in circumstances where there is Guidance, and it is only of limited relevance to the legality of the 2020 Regulations. I accept that in the very challenging circumstances of Spring 2020 it was reasonable for the Defendant to produce non-statutory guidance rather than go through the more formal mechanisms of statutory guidance. I will refer to some specific parts of the Guidance below.

Submissions

45. Ms Richards started by emphasising that the concerns the Claimant raises about the Regulations are widely shared by those concerned with children's rights. Ms Willow, Director of the Claimant, refers to a statement issued by the Children's Commissioner dated 30 April saying:

> *"I would like to see all the regulations revoked, as I do not believe that there is sufficient justification to introduce them. This crisis must not*

> *remove protections from extremely vulnerable children, particularly as they are even more vulnerable at this time. As an urgent priority it is essential that the most concerning changes detailed above are reversed."*

46. A number of other organisations in this field have echoed those views and I have a witness statement from Ms Nash of Mind setting out the particular concern about the impact of the 2020 Regulations on children's mental health.

47. Ms Richards referred to the large proportion of LACs who have issues with their emotional and behavioural concerns and raised the poor outcomes for many of these children. I entirely accept that this is a very vulnerable group of children, both because of their life experiences but also because they are being looked after away from home and often in vulnerable settings. I also accept the point that many local authorities struggle with the quality of their decision making and that poor decision making in this context can impact on a child for the rest of their lives. Ms Willow highlights instances where very serious impacts, up to the death of children, have occurred at least in part because of poor local authority decisions.

48. I also entirely accept the argument that the safeguards dealt with in the 2020 Regulations are of real importance to the protection of this very vulnerable cohort of children. I will return in more detail to this point below but I agree with the Claimant that these are not bureaucratic provisions that are a "burden" and as such can be set aside relatively lightly. Regular visits to children, oversight by more senior officers over decision making and provision for independent scrutiny are critical safeguards to protect deeply vulnerable children in a field where errors happen with sad frequency and the consequences can be devastating.

49. Ms Richards went through the chronology of consideration and consultation that I have set out above. She argued that there was a lack of consideration of the impact of the changes on children and no consideration of the significance of the safeguards for the welfare of those children. The focus of the Defendant was entirely on lifting the "burden" on local authorities and introducing flexibility to help local authorities. She says, correctly, that the consultation was all with the providers of services, i.e. local authorities and private providers, and not with either children's rights groups, the Children's Commissioner, or children themselves. She also points out that the Department said that the consultation was confidential but has never explained why this was the case.

50. Ms Richards argues that the Explanatory Memorandum and the Ministerial Briefing do not contain any assessment of the impact of the changes on children and wholly fail to consider the draft 2020 Regulations from the children's perspective.

51. On Ground One, the Claimant's central point is that this was a one-sided consultation with no engagement with those who were advancing children's rights, whether the Claimant and other NGOs, the Children's Commissioner or children themselves. Ms Richards advances three bases on which there is a duty to consult. Firstly, she submits that the Defendant was under a statutory duty to consult under s.22(9) Care Standards Act 2000 in respect of some of the 2020 Regulations. Section 22(9) states:

> *(9) Before making regulations under this section, except regulations which amend other regulations made under this section and do not, in the*

> *opinion of the appropriate Minister, effect any substantial change in the provision made by those regulations, the appropriate Minister shall consult any persons he considers appropriate.*

52. In respect of all the Regulations she argues there was a duty to consult at common law because there was an established practice of consultation in this area. She points to the consultation on the 2010 Regulations. She relies on *R (Plantagenet Alliance) v Secretary of State for Justice and others* [2014] EWHC 1662 at [98.2-3]:

> *98.2 There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs [2011] EWHC 1975 (Admin) at paragraphs [68-82], especially at [72]).*
>
> *3. The Common Law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) ((R Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755, at paragraphs [41] and [48], per Laws LJ).*

53. She argues that a duty to consult can arise not just where there has been a policy or practice giving rise to a legitimate expectation, but also where the failure to consult would be conspicuously unfair or irrational, see *R (Gallaher Group) v Competition and Markets Authority* [2018] UKSC 25.

54. Ms Richards accepts that consultation can take many forms, but it must comply with the general requirements set out in *R (Moseley) v London Borough of Haringey* [2014] UKSC 56 at [25]:

> *"In R v Brent London Borough Council, ex p Gunning, (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said at p 189:*
>
> *"Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third,…that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."*
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> *Clearly Hodgson J accepted Mr Sedley's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in the Baker*

> *case, cited above (see pp 91 and 87), and then in R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213 at para 108. In the Coughlan case, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated at para 112:*
>
> *"It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."*
>
> *The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472, 126 BMLR 134, at para 9, "a prescription for fairness".*

55. Simon Brown LJ in *Ex p Baker* [1995] 1 All ER 73, 91 said *"the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit".* The Claimant argues strongly that this is the case here where rights to statutory protection for LACs are being taken away.

56. Ms Richards argues that the Defendant did have time to consult with local authorities and other providers and therefore the circumstances of the current pandemic do not absolve him of the obligation to consult relevant stakeholders including the Claimant and the Children's Commissioner. She argues that it was irrational not to consult those persons and unfair given that it was in effect a one-sided consultation.

57. On Ground Two, the Claimant argues that the Defendant breached the well-known *Padfield* principle by exercising the statutory power in a way that failed to promote the policy and objects of the statutes in question. She relies on *R (Rights of Women) v Lord Chancellor* [2016] EWCA Civ 91 at [42]:

> *42. Mr Sheldon protests that this shows that the challenge being made to regulation 33 is in truth a rationality challenge, a challenge which the Rights of Women have always disavowed. But that is to confuse the Wednesbury jurisdiction with the Padfield jurisdiction of the court, when they are separate concepts. Any discretion conferred on a Minister "should be used to promote the policy and objects of the statute", R (Electoral Commission) v Westminster Magistrates' Court [2011] 1 A.C. 496 para 15 per Lord Phillips of Worth Matravers PSC. As Lord Kerr of Tonughmore JSC said (at para 83) of R (GC) v Commissioner of Police of the Metropolis [2011] 1 WLR*
>
> *1230:-*

> *"… a discretion conferred with the intention it should be used to promote the policy and objects of the Act can only be validly exercised in a manner that will advance that policy and those objects. More pertinently, the discretion may not be exercised in a way that would frustrate the legislation's objectives."*
>
> *Any inquiry as to frustration of purpose must consider whether there is a rational connection between the challenge requirement and the legislation's purpose.*

58. It is not in dispute that the object and purposes of the legislation here are to safeguard and promote the welfare of vulnerable children. Ms Richards argues that the 2020 Regulations appear to give no regard to that object and their entire effect is to undermine important protections which safeguard these children. She points to the language of the CRIA and the Ministerial Briefing which refer to *"easing the burden"* on a local authority in order to prevent children's services being unnecessarily hindered. She argues that the Defendant can point to no evidence that he had the object of promoting the welfare of children in mind when making the 2020 Regulations.

59. On Ground Three, section 7 of the Children and Young Persons Act 2008 states that:

> ***7 Well-being of children and young persons***
>
> *(1) It is the general duty of the Secretary of State to promote the well-being of children in England.*
>
> *(2) The general duty imposed by subsection (1) has effect subject to any specific duties imposed on the Secretary of State.*
>
> *(3) The activities which may be undertaken or supported in the discharge of the general duty imposed by subsection (1) include activities in connection with parenting.*
>
> *(4) The Secretary of State may take such action as the Secretary of State considers appropriate to promote the well-being of—*
>
> > *(a) persons who are receiving services under sections 23C to 24D of the 1989 Act; and*
> >
> > *(b) persons under the age of 25 of a prescribed description.*
>
> *(5) The Secretary of State, in discharging functions under this section, must have regard to the aspects of well-being mentioned in section 10(2)(a) to (e) of the Children Act2004 (c. 31).*
>
> *(6) In this section—*
>
> > *"children" means persons under the age of 18; and*
> >
> > *"prescribed" means prescribed in regulations made by the Secretary of State.*

60. The Claimant argues that the Defendant cannot demonstrate that he had the aim of promoting the welfare of children properly in mind when making the 2020 Regulations. Much of the material on this ground is the same as that under Ground Two. Ms Richards here relies on the duty under article 3 of the United Nations Convention on the Rights

of the Child ("UNCRC") "to ensure the child such protection and care as is necessary for his or her wellbeing". She argues that the reference to this obligation in the CRIA was entirely superficial and did not demonstrate any adequate consideration of the degree to which the changes would run counter to the welfare of children.

61. Ms Ward for the Defendant starts by emphasising that the overarching statutory duties in respect of LAC continued to be in force and were not amended. Therefore, the broad range of statutory protections for these children have remained throughout.

62. The amendments to the 2020 Regulations was not about what were the best protections for LACs in normal circumstances but an attempt to ensure that the system of children's social care continued to function in exceptionally challenging circumstances. This was self-evidently being done for the protection of the welfare of those children. The Defendant rationally considered that there was a need to provide flexibility for providers in relation to some of the administrative safeguards in the extraordinary conditions being faced in March and April 2020. This was particularly the case given the features of the children's social care sector which I have referred to above.

63. Ms Ward argues that the Claimant's case rests on there being a conflict of interest between relieving the burden on providers and protecting children's welfare but there was no such conflict in the light of the pandemic. Introducing administrative flexibility was part and parcel of protecting LACs.

64. She relied on the fact that the 2020 Regulations are temporary and will expire on 25 September with no mechanism to automatically extend. Therefore, it was always the case that they would be reviewed in the light of experience, including the experience of the degree to which they were being used in practice. Reviews are undertaken both by the Department and Ofsted and these have shown that in practice the 2020 Regulations have been used only where necessary and not very frequently.

65. The Defendant issued Guidance on how the 2020 Regulations should be used which made clear they should only be used if the local authority was facing staff absences through sickness. She relied upon the following principles set out in the Guidance:

> *The difficult and complex decisions that need to be taken during this period should be made in the spirit of the following principles:*
>
> *-child-centred – promoting children's best interests: nothing is more important than -children's welfare; children who need help and protection deserve high quality and effective support as soon as help is identified risk-based – prioritising support and resources for children at greatest risk family focussed – harnessing the strengths in families and their communities evidence informed – ensuring decisions are proportionate and justified collaborative – working in partnership with parents and other professionals transparent – providing clarity and maintaining professional curiosity about a child's wellbeing.*

66. She did not accept that there was any real distinction between this Guidance and statutory guidance. If a local authority was not going to follow the guidance it would have to give good reasons for not doing so. The Children's Commissioner had said that

if the Government would not revoke the 2020 Regulations then they should only be used as a last resort and that was very much the tenor of the Guidance.

67. On Ground One, she argued that the source of the duty to some extent dictates the legal content of the duty. The relevant statutory duty is to consult such persons as the Defendant considers "appropriate" and this is only subject to a rationality challenge. She accepted that there was a practice of consultation but any duty to consult was only a duty to consult fairly. She accepted that the Claimant could argue that fairness required the Children's Commissioner to be consulted but the Claimant could not rely on a legitimate expectation that the Commissioner would be consulted where the Commissioner herself was not relying on that alleged expectation.

68. Ms Langdale's witness statement sets out the extremely urgent context of the decisions that were being made. The purpose of the consultation was to establish what changes were necessary to allow the system of protecting the welfare of LACs to continue during the pandemic.

69. She said there was no conscious decision not to consult the Children's Commissioner but to proceed with consultation of those who were providing the services to children. She accepted that the consultation could have been improved but argued it did not go clearly and radically wrong such as to be unlawful, that being the test set out by Sullivan J in *R (Greenpeace) v Secretary of State for Industry* [2007] EWHC 311 and endorsed by the Court of Appeal in *R (Royal Brompton and Harefield NHS Trust) v Joint Committee of PCTs* [2012] EWCA Civ 472 at [13].

70. She rejected any suggestion that the consultation and the decision making was not focused on protecting the welfare of children. The Association of Directors of Children's Services ("ADCS") had rated the relevant regulations on their impact on welfare of children through a RAG (red amber green) ranking system in order to reach a view on what was in the best interests of the children.

71. On Ground Two, she distinguished *Rights of Women*, where the court was determining the purpose of the legislation, from the present case where there is no dispute over the purpose, namely the protection of children, and the dispute is only whether what was done was properly for that purpose. That second question was a matter for the Defendant, subject only to a rationality challenge. She argues that plainly the purpose of the 2020 Regulations was to protect children and it cannot be argued that the 2020 Regulations have no rational connection to that purpose.

72. Similarly, on Ground Three, she argues that the CRIA shows that the Defendant made the 2020 Regulations precisely to meet the statutory purpose in section 7 of promoting the welfare of children. There is no dichotomy between introducing flexibility into the 2020 Regulations and seeking to promote the welfare of children given the circumstances of the pandemic.

73. The Defendant relies on *R (Simone) v Secretary of State for Education* [2019] EWHC 2609 at [83]:

> *"this duty is concerned with stating a broad general principle and setting out a broad aim that the Secretary of State is to have in mind"*

Conclusions

74. There are two overarching points in this case. The first is that the Defendant was facing an unprecedented situation in March and April 2020 and the decisions that were made have to be considered in that context. The advice being given by SAGE in February 2020 was of a realistic worst-case scenario of social worker absences through sickness from Covid-19 of 35% as a weekly average and rising to a peak of 41%, and an excess death toll of 828,000. Happily, nothing approaching those figures occurred and the strains on the sector although great have not been of that scale. However, that is what the Defendant had to be planning for and the fairness of the consultation has to be judged in the light of the advice the Defendant was receiving at the time.

75. Further, these impacts were within a sector which is already facing enormous challenges with some local authorities already operating at staffing levels well below optimum. A large proportion of LAC are living with foster carers and foster carers are, as a group, likely to be older and thus more vulnerable to Covid-19. These were important factors in the Defendant considering it to be critical to introduce more flexibility into the system in the light of the crisis.

76. The second overarching matter is that the Claimant is correct to reject the suggestion that the safeguards that have been relaxed in the Regulations were either minor or should be characterised as mere "administrative burdens" that could be set aside with relatively little risk. In each of the seven specific regulations that the Claimant refers to, the protections in the original Regulations are important ones. I fully accept the Claimant's submission that the children subject to these Regulations are particularly vulnerable. Many local authorities in the field do not manage to provide a good enough level of service and this leaves already very vulnerable children highly exposed to risk. When things do go wrong it can be catastrophic for the children involved. In those circumstances, the importance of having regular visits; senior officer oversight by nominated officers; some independence through independent reviewing officers and independent adoption panels cannot be overstated. These are not administrative burdens, or minor matters, they are fundamental parts of a scheme of protecting vulnerable children. Each has been introduced over time precisely because of the risks that LACs face and the need for safeguards to be in place.

77. Having accepted this, I do not need to go back through each of the Regulations to highlight the importance of the particular safeguard because I view each of them to be very important, albeit in different ways.

78. However, in judging the lawfulness of the consultation I start with the comments of Lord Reed in *Moseley* at [36] that the duty to consult may *"vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is carried out".* The statutory duty here does not apply to the majority of the impugned regulations but, in any event, is only that the Defendant shall consult such persons as he considers "appropriate". There is a practice of consulting with children's rights interest groups, including the Children's Commissioner and bodies such as the Claimant, and with children directly, on changes such as those introduced by the Regulations. However, I accept that any legitimate expectation, certainly to the Claimant, goes no further than the statutory duty. Therefore, there is a duty on the Defendant to consult appropriate persons in the sector, subject to a rationality challenge. The scope of that duty must depend on the circumstances at the time.

79. The Defendant's position is that he was concerned to discover through the consultation what urgent changes were needed by providers to make sure that they could continue to deliver vital services to protect children. This was in the face of the pandemic and in particular the very high staff shortages, including lack of foster carers, that were being predicted. Therefore, the Defendant was entirely focused on asking that question of the people who were providing the service. I accept that there is inevitably another side to that question which is what is the impact on children of introducing flexibility. In normal circumstances there can be no possible doubt that the Defendant would have had to ensure that he was consulting a range of people in order to ensure that he was getting a full answer to the question posed. In particular I have no doubt that in normal circumstances he would have been under a duty to consult the Children's Commissioner whose very statutory purpose was to put forward the views of children and promote their welfare.

80. Although the Children's Commissioner was not a party to the action and did not intervene, I accept that the Claimant can raise a failure to consult the Commissioner as an error of law. That argument succeeded in *R (C) v Secretary of State for Justice* [2008] EWHC 171 where the Claimant successfully raised an argument that the Children's Commissioner should have been consulted, and was upheld on that point in the Court of Appeal, [2008] EWHC Civ 882, with the Court of Appeal finding the relevant regulation should have been quashed.

81. However, there are two interrelated reasons why I do not consider the Defendant erred in law here in the consultation. Firstly, these were not normal times and the sector was facing an unprecedented crisis that would impact on the welfare of LACs. The Defendant had to make very quick decisions to protect those children in as effective a way as possible. To do that it was reasonable to focus on the providers of services to explain what they thought was needed in the very short term.

82. Secondly, those providers were themselves considering the welfare of the children they were caring for. I entirely accept the Claimant's case as to the importance of hearing from both children themselves and those advancing their rights and that local authorities and providers do not represent those children. There will in some cases be a conflict between the wishes and interests of providers and those of LACs. However, that is not to say that the providers who were consulted were ignoring the need to protect the children and continue to seek to protect their welfare. This is shown quite clearly by the ADCS using a RAG rating of the Regulations in order to understand which were the most important to safeguard children. This is not a situation where the interests of the children were simply not taken into consideration through the consultation.

83. I agree with the Claimant that the Children's Commissioner could have been consulted. Although matters were urgent there was time for many providers and not just local authorities to be consulted. There is no evidence that there was a positive decision not to consult the Commissioner but Ms Ward could give no very clear explanation as to why the Children's Commissioner was not consulted save that the focus was on those providing services. In anything less than a national crisis of quite such urgency I would have been minded to find that the consultation was not lawful if the Commissioner was not consulted. However, given the very particular focus of what the Defendant had to decide in amending the 2020 Regulations, the extreme urgency and the scale of the issues facing the Defendant in March-April 2020, I do not think there was an error of law in not consulting either the Commissioner or the Claimant. Although the comment

in *R (Christian Concern) v Secretary of State for Health* [2020] EWHC 1546 about the circumstances of the pandemic potentially overriding any legitimate expectation were obiter, it is in my view apposite. A legitimate expectation that arose in normal circumstances would not give a right to consultation in the circumstances of dealing with the pandemic in Spring 2020. In terms of conducting a fair consultation I do not consider that something had gone clearly and radically wrong in the consultation.

84. On Ground Two, in my view the Defendant was seeking to promote the policy and objects of the legislation and to promote the welfare of children. What needs to be borne closely in mind is the interests of the LACs as at March-April 2020. In the face of a major crisis in the whole system of children's social care services because of the large scale staff shortages feared, if flexibility had not been introduced then the risks to the LACs could have been much greater than the risks from the amendments introduced by the 2020 Regulations. The amendments were considered by the Defendant to be an important way of protecting the welfare of the children in the circumstances of the time. The fact that the flexibility introduced was to important safeguards does not mean that the flexibility was not itself protecting the children.

85. The Claimant, and many others, disagree with the balance that the Defendant struck but that does not mean that that balance is unlawful. The 2020 Regulations were intended by the Defendant to promote the purpose of the legislation, namely the promotion of the welfare of LACs, and the way that the Defendant sought to do it was not irrational.

86. Further, in judging the rationality of the way the Defendant decided to promote the statutory purpose, it is relevant to take into account the Guidance that the Defendant introduced. This stated that the flexibility in the Regulations should only be used where strictly necessary and where the need stemmed from the pandemic. It is also relevant that the amendments only took effect for a relatively short period (6 months) and was subject to review by Ofsted.

87. For very similar reasons I reject Ground Three. The Claimant argues *"there is nothing to suggest that the Defendant had in mind the need to promote the welfare of children when the [Regulations] were made*". I agree with Ms Ward that this argument has an *"air of unreality"* about it, as was said in *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2019] 1 WLR 4105 at [169]. The very reason the Defendant was promoting these 2020 Regulations was to protect LACs who were at risk because of the consequences of the pandemic. There is no inconsistency in the Defendant promoting regulations which lessen the protection of LACs by introducing flexibilities in the context of a pandemic which poses much greater risks to those children if there are no flexibilities.

88. I understand the Claimant's concern that in different circumstances the Defendant might have sought to introduce similar flexibilities in order to reduce the protection of LACs. However, that is to ignore the very particular challenge faced by the Defendant in the children's social care sector in Spring 2020.

89. In that context the Defendant did take into consideration the section 7 duty and I reject Ground Three.