Neutral Citation Number: [2020] EWCA Civ 1577

Case No: C1/2020/1279

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
The Hon Mrs Justice Lieven DBE
CO/2044/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 November 2020

Before :

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE HENDERSON
and
LORD JUSTICE BAKER

- -

Between :

THE QUEEN (on the application of ARTICLE 39)	**Appellant**
- and -	
SECRETARY OF STATE FOR EDUCATION	**Respondent**

- -
- -

Jenni Richards QC, Stephen Broach and Khatija Hafesji (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Clive Sheldon QC and Admas Habteslasie (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 4 September 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Tuesday 24th November 2020.

LORD JUSTICE BAKER :

1. This is an appeal against an order dismissing the appellant's claim for judicial review by which it sought to challenge the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 (the "Amendment Regulations") introduced by the Secretary of State for Education ("the Secretary of State") in response to the outbreak of the Covid-19 pandemic. The Amendment Regulations introduced a range of temporary amendments to ten statutory instruments governing the children's social care system.

2. The issue arising on the appeal is whether the Secretary of State acted unlawfully in failing to consult bodies representing children in care, including the Children's Commissioner for England, before introducing the Amendment Regulations.

Background

3. The appellant is a registered charity which takes its name from Article 39 of the United Nations Convention on the Rights of the Child. Its charitable objectives are (1) the relief of need, and promotion of the protection, of children living in institutional settings in England and (2) the advancement of the human rights of children living in institutional settings in England.

4. The background to this claim is all too familiar – the rapid spread of the coronavirus Covid-19 across the world in the first few months of 2020. On 30 January 2020, the four Chief Medical Officers of the UK increased the risk level from low to moderate because of Covid-19 and advised that the government plan "for all eventualities". On 3 March, the government published an "Action Plan" for the pandemic.

5. The evidence subsequently put before Lieven J by the Secretary of State was that the crisis arose at a time when the children's social care system was already facing significant pressures. As the judge later observed (at paragraph 4 of her judgment):

> "the problems within the children's social care sector are long-standing and extremely well documented, not least in judgments from the Family Division of the High Court."

There were concerns that Covid-19 would have a disproportionate impact on the sector for a number of reasons, including the fact that the workforce was predominantly female, and therefore more likely to have caring responsibilities, and the shortage of places in children's homes highlighted in a number of recent judgments.

6. In the first half of March, discussions took place between officials within the Department for Education ("DfE" or "the Department") about whether or not to amend certain regulations in the child social care field. On 17 March, officials within the Department contacted representatives of 20 local authorities asking for views on regulations that should be considered for amendment. On the same day, the Department wrote to certain adoption agencies and fostering agencies along the same lines. On 18 March, the Department circulated a note to the Association of Directors for Children's Services ("ADCS") seeking views on the proposals for regulatory amendment. Over the course of the next week, the Department received a range of responses from local authorities, Regional Adoption Agencies, service providers, the Local Government

Association, ADCS, Cafcass and Ofsted addressing the question of whether any regulations should be amended.

7. On 18 March, the Prime Minster announced that all schools would be closed to the majority of pupils from Monday 23 March. On 19 March, DfE officials sent a long list of potential amendments to children's social care regulations to local authorities, service providers and Ofsted. The list was not shared with advocacy groups or lawyers' organisations or any agency or charity involved with children's rights, nor, at that stage, with the Children's Commissioner. In submissions to us, Ms Jenni Richards QC on behalf of the appellant described what happened as a form of private discussion with one side but excluding anybody representing children in care. Over the next three weeks, the Department received feedback regarding specific amendments from those organisations it had consulted, in the form of meetings, telephone calls and email exchanges.

8. On 22 March, the Department published guidance ("Coronavirus (Covid-19): guidance on vulnerable children and young people") setting out arrangements to ensure that vulnerable children who had a social worker would continue to attend school. On 25 March, the Coronavirus Act received the Royal Assent. On the same day, officials in the DfE Coronavirus Response Team presented a preliminary submission to ministers in the Department on the secondary legislation which they were proposing to amend in response to Covid-19, identifying in an annex to the document the statutory instruments being considered for amendment. In the following week, various meetings and telephone calls took place between officials and social work practice leaders and principal social workers.

9. On 6 April, DfE officials presented a further submission to ministers setting out in greater detail the amendments to regulations which were being proposed. The purpose of the submission was described in these terms:

> "1. Agreement to temporarily amend certain regulations related to children's social care to help local authorities, services and providers manage the Covid-19 outbreak."

This was developed in the following paragraphs under the heading "Summary":

> "2. Ensuring that vulnerable children are properly safeguarded and have their welfare promoted remains a top priority. At the same time, we recognise that the challenging context means that local authorities and partners will struggle to meet the full range of statutory duties relating to child protection, safeguarding and care at present. Therefore, we are proposing to lay regulations before Parliament that will make temporary changes to provide additional flexibility in meeting statutory obligations whilst maintaining appropriate safeguards.
>
> 3. 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 on 25 September.

4. 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. Issues raised by stakeholders which do not require legislative change will be addressed through accompanying operational guidance."

10. At paragraph 8, the submission continued:

"8. While we understand local authorities and their local partners will want to continue to meet their existing statutory duties as far as they can, there will be times in the current circumstances when this may not be possible, so the proposed amendments provide proportionate flexibility to allow for the pressures of Covid-19. We want local authorities and local safeguarding partners to feel empowered to support families and protect children to the best of their abilities given the challenging context and have set out a series of principles, broadly endorsed by the sector, they should follow in making decisions:

- **Child-centred** - promoting children's best interests
- **Risk-based** - prioritising support and resources for children at greatest risk
- **Family focused** - 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 maintaining professional curiosity about a child's well-being."

11. The submission continued by summarising proposed amendments to ten sets of regulations. Before the judge, and in this Court, the appellant has focused in particular on amendments to three particular sets of regulations – the Adoption Agencies Regulations 2005, the Care Planning, Placement and Case Review (England) Regulations 2010 and the Children's Homes (England) Regulations 2015. The submission presented to ministers on 6 April included the following observations about the proposed amendments to those regulations;

(1) "The Adoption Agencies Regulations 2005 ["the 2005 Regulations"] govern how adoption agencies exercise their functions in relation to adoption under the Adoption and Children Act 2002. We are proposing to relax the need to secure medical and DBS [Disclosure and Barring Service] checks by the end of stage 1 of the approval process to allow agencies to continue processing applications from prospective adopters …. We are advising amending the requirement to convene an adoption panel and the minimum number of panel members required would be reduced from 5 to 3 to ensure that adoption approvals and

matches can continue even where there are a shortage of panel members because of Covid-19. The requirements for reviews and visits is [sic] also recommended to be amended during this period to provide maximum flexibility for agencies working with families. We are also proposing to relax some timescales within the Regulations to give agencies more flexibility, requiring them to meet timescales 'where reasonably practicable'.

(2) The Care Planning, Placement and Review (England) Regulations 2010 ["the 2010 Regulations"] set out the ways in which placement should be identified for looked-after children, and how the child's best interests should be maintained through those placements. They include provisions for making decisions about placements and timings for when placement decisions should be reviewed. We are proposing to amend regulations to remove some of the timescales around formalising a placement plan, moving from before a placement, or within five days of the start of a placement, to as soon as reasonably possible after the start of a placement. We would also relax deadlines for placement reviews, allow people who are not 'connected persons' to be approved as temporary foster carers and to increase the timescales of placement with a temporary foster carer. The duration of short breaks would also be expanded to allow increased flexibility and we propose to modify requirements around how visits to the child in placement are conducted and their placement reviews to provide greater flexibility. We are also recommending removing the requirement to get nominated officer approval for Fostering for Adoption placements, to reduce delay in decisions for these children.

(3) The Children's Homes (England) Regulations 2015 ["the 2015 Regulations"] set up the standard that must be met for everyone providing residential care. We are proposing to relax the supervision requirements for individuals delivering care relating to health and development, so that supervision by an appropriate person only needs to be in place 'as far as reasonably practicable' …. We're also suggesting amendments to provide flexibility around how independent visits are conducted and that the registered manager provide suitable facilities for young people to speak privately over the phone or other video-link facility if required to their parents, relatives, advocate etc. We are proposing amendments to enable children's homes to enforce a deprivation of liberty that arises from cases where a young person is infectious or suspected of being infectious …. The above amendment would only capture cases where the young person has been deemed infectious or suspected of being so and couldn't be used to generally enforce restrictions on movement. In all other cases where restrictions of movement are being sought that amount to a deprivation of liberty, Local Authorities will have to apply for a court order …."

12. During April, the Department carried out an Equalities Impact Assessment of the proposed regulations. On 15 April, the Children's Rights team within the Department produced a "Child's Rights Impact Assessment" of the proposed amendments. It identified that the changes would apply to children in social care settings. Under the question "Are there particular groups of children and young people who are more likely to be affected than others?", it stated:

> "Yes – children receiving support from children's social care including those who are in care and affected by Covid-19, for example, those suffering from coronavirus and those social distancing from others because they have been in contact with others suffering from coronavirus."

The assessment of how the proposals might impact on children and young people was summarised in these terms:

> "The changes focus on administrative procedures and timescales, and on visits and contact with children in care and those who may enter care as a result of Covid-19 should, for example, their parents or carers become unable to look after them. No changes are being made to the substance of the services being provided to these children. Examples of the possible impact on children are:
>
> - children in residential care may find they are more frequently speaking remotely to family or advocates, rather than face-to-face;
> - children in residential care may be deprived of their liberty when they have, or are suspected of having, coronavirus;
> - children in private foster care arrangements may have to wait longer for the local authority to visit their placement;
> - children in temporary foster care may be in that arrangement for longer than usual;
> - children who have complained about the services they have received from their local authority may have to wait longer than usual for a response from their local authority.
>
> The measures are in place to ensure children have stability and contact with their parents, relatives, advocates etc in the best, most practicable way possible given the circumstances. Changes such as emergency foster carers is [sic] there to ensure capacity in the sector so that those children who need care can get it.
>
> Changes which impact on statutory timescales do not, in the main, remove the timescales, rather caveat, where appropriate, with a requirement for local authorities to do things as soon as reasonably practicable where statutory timescales cannot be met due to Covid-19 -related pressures. It is still the expectation that local authorities and providers should meet the current timescales where they can which will be emphasised in guidance.
>
> These changes introduce greater operational flexibility for local authorities, but they do not reduce or remove any responsibility that local authorities have towards children. Local authorities are still expected to provide children's services and to identify, support and protect vulnerable children. The changes are intended to give local authorities flexibility to help them deliver the services whilst resources are limited due to the Covid-19 pandemic."

13. The impact assessment identified a number of articles in the UN Convention on the Rights of the Child ("the Convention") which were relevant to the proposed

amendments, namely article 2 (non-discrimination), article 3 (best interests of the child), article 6 (life, survival and development), and article 12 (respect for the views of the child). The broad conclusion was that the proposed changes would not lead to the infringement of these rights. The authors express themselves as being confident that they would not lead to any discriminatory application of the Convention. They asserted that

> "safeguarding and acting to ensure that decisions are made in the best interest of the child is integral to the operational guidance we have issued and is the first principle we have set out in the guidance."

With regard to article 6, they noted that:

> "Of course for more vulnerable children, who might be at greater risk, it might be that a visit that is done over a video-call isn't enough – that would be for the LA to risk assess on an individual basis. In some instances, this will also be protecting children from each other, where this will help to minimise the chances of the virus spreading. This may involve depriving some children in residential care of their liberty, on the basis that they have, or are likely to have, coronavirus. We believe that these new temporary powers can make an important contribution to the rights under this article by helping to minimise the spread of coronavirus amongst children in residential care."

Finally, with regard to article 12, the authors expressed themselves as being confident that none of the changes remove any mechanism that currently gave voice to children in care.

14. Up to this point, the Department had still not consulted with, nor indeed informed, the Children's Commissioner or any other person or agency concerned with children's rights about these proposals. At 17.06 on 16 April, however, a member of the Residential Care Policy Team in the Department sent an email to the Children's Commissioner in these terms:

> "Good evening.
>
> 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 circumstances. Changes are being made to 10 sets of regulations which are outline[d] in the document attached. Most changes are small procedural changes to ease administrative burdens, allow visits and contact to take place remotely and relax strict timescales where possible. However, given a large proportion of foster carers are vulnerable to coronavirus, we are also making amendments to allow individuals who are not connected persons to the child, to be approved as temporary foster carers and extend the timescales for placements in an emergency. We consider most of these changes to be low risk and will support increased demand for services and staff and carer shortages who are ill with coronavirus. These amendments will be kept under continuous review and in place

> until the Coronavirus Act renewal date on 25 September. We are not making any other change to statutory duties set out in legislation.
>
> We will be updating the guidance for local authorities and children's social care that you will be aware of … to reflect these changes. The guidance will emphasise that we want LAs to meet current timescales as far as possible, but we have provided some flexibility should they require it.
>
> We have shared our proposals for these legislative changes with Ofsted, the Association of Directors of Children's Services, the Local Government Association, Principal Social Workers and Practice Leaders. We have undertaken a Public Sector Equality Duty and a Children's Right[s] Impact Assessment, and we do not consider children with particular protected characteristics will be negatively impacted nor will it have a negative impact on children's rights."

15. The following day, 17 April, a member of staff in the Children's Commissioner's office replied making a number of observations about the regulations but not at that stage raising any objections about the failure to consult the Commissioner before the regulations were approved.

16. On 23 April, the Adoption and Children (Coronavirus) Amendment Regulations 2020 were laid before Parliament. On the following day, 24 April, the regulations came into force, making changes to the ten statutory instruments as proposed. They were all time-limited, expiring on 25 September 2020. The Explanatory Memorandum accompanying the regulations included the following statements:

> "2.1 The instrument temporarily amends 10 sets of regulations relating to children's social care to support services manage the coronavirus (Covid-19) outbreak …. 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 ….
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> …
>
> 3.1 It is not possible in the case of this instrument to comply with the 21-day rule which requires relevant instruments to be laid before Parliament for at least 21 days prior to coming into force. Children's social care resources are already stretched as a result of staffing shortages and an increased demand for services. The Department has consulted informally with the sector who have asked for these changes to be in force as a matter of urgency. Waiting 21 days will put extraordinary pressure on local authorities, providers and services to try to meet statutory obligations while continuing to provide care for vulnerable children and young people during the outbreak.
>
> …
>
> 3.3 The Department has shared proposed changes to regulations widely with the children's social care sector via key stakeholders to consult and give notice that regulatory changes are coming into force.

> 3.4 The instrument will make temporary changes to provide additional flexibility for local authorities, providers and services to meet statutory duties whilst maintaining appropriate safeguards. These are low risk changes to ease administrative and procedural duties and are required to ensure stability of children's social care during the outbreak.
>
> …
>
> 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 the representative body The Association of Directors of Children's Services, and with Ofsted, and have informed the Children's Commissioner. These consultations have helped identify which changes would be most helpful to local authorities during the outbreak ….
>
> …
>
> 10.1 Key stakeholders across the children's social care sector were consulted including Ofsted, the Association of Directors of Children's Services, the Local Government Association, Principal Social Workers and Practice Leaders in local authority children's social care. The Children's Commissioner was also informed. Consultees provided suggestions for suitable amendments and have subsequently been provided with further detail of the changes that are being made and have provided broad support. There has been no public consultation due to the urgency of the regulatory amendments."

17. On 30 April, the Children's Commissioner issued a statement on the changes to the regulations in which she highlighted a number of concerns:

> "These regulations make significant temporary changes to the protections given in law to some of the most vulnerable children in the country – those living in care.
>
> I appreciate that Local Authority children's services are likely to be experiencing challenging working conditions during the pandemic, and there are many inspiring examples of frontline workers going above and beyond the call of duty to keep children safe. Nevertheless, I do not believe that the changes made in these regulations are necessary – except perhaps for some clarifications (in guidance) about contact with children taking place remotely during the lockdown. Children in care are already vulnerable, and this crisis is placing additional strain on them – as most are not in school, less able to have direct contact with family and other trusted professionals, and facing the challenges of lockdown and anxiety about illness – all on top of the trauma they have already experienced. If anything, I would expect to see increased protections to ensure their needs are met during this period.

> These changes have been made with minimal consultation, and without complying with the usual 21-day rule of being published three weeks before coming into force. The explanation for this is that '*waiting 21 days will put extraordinary pressures on local authorities, providers and services to try to meet statutory obligations while continuing to provide care for vulnerable children and young people during the outbreak.*' However, the reports I have been receiving from local authorities are that staffing for social care is holding up well. It therefore appears that bringing these regulatory changes to ease excessive strain on a depleted workforce, and to do so without the opportunity for public scrutiny, is not justified."

18. The Commissioner then expressed concern about a number of the specific amendments in particular:

- the relaxation of the requirement for social workers to visit children in care in accordance with strict timescales;
- the relaxation of the requirement to review plans for children in care to set timescales;
- the provision empowering children's homes to enforce the deprivation of liberty of children showing symptoms of coronavirus;
- the provision making independent panels approving foster carers and adoption placements optional;
- the provision enabling local authorities to approve anyone who meets the requirements as a temporary foster carer rather than only those connected to the child;
- the relaxation of the requirement for monthly independent visits to children's homes;
- the extension of the period for which children could be placed with emergency foster carers;
- the extension of the period of "short break" placements, and
- the removal of the requirement for decisions to place children in care outside the local area to be approved by a nominated officer.

19. The Commissioner added that, as an absolute minimum, if the government refused to revoke the Amendment Regulations, she wanted to see guidance making clear that the changes would only be used as a last resort and for as short a time as possible. She proposed that local authorities should only be entitled to relax their adherence to statutory duties if they could show that their workforce had been significantly depleted and that this decision had involved the Principal Social Worker and been evidenced and recorded.

20. On 6 May, DfE published further guidance for children's social care services. On 7 May, the appellant sent a pre-action letter to the Secretary of State who responded by letter dated 21 May. On 5 June 2020, the claim for judicial review was issued,

challenging the regulations on four grounds, namely (1) failure to consult; (2) irrational failure to lay the regulations before commencement; (3) breach of the *Padfield* principle, and (4) breach of s.7 of the Children and Young Persons Act 2008. The appellant sought a declaration that the regulations and/or the Secretary of State's decision to make the regulations were unlawful and an order quashing the regulations. On 26 June, permission to bring the claim was granted by the single judge.

21. On 1 July, the Parliamentary Under-Secretary of State for Children and Families issued a statement about the use of the amended regulations. She stressed that the government had always been clear that the temporary amendments should be used only when absolutely necessary and only if consistent with the overarching safeguarding and welfare duties that had remained in place. She reported that the Department's monitoring has shown that the majority of the regulatory flexibilities had been rarely used. The most used related to the fostering and adoption regulations, in particular allowing medical reports to be considered at a later stage in the process and the relaxation around adoption panels. Virtual engagement with children and families had been used alongside face-to-face visits and in some respects had improved engagement with young people. The Minister stressed that it had always been the government's position that the temporary arrangements would remain in place only for as long as they were needed and that the government had now concluded that the overwhelming majority of the regulations would expire as planned on 25 September. She was, however, minded to extend a small number of temporary changes for a further period, but this would be subject to further consultation. That consultation duly started two days later, and on this occasion included the Children's Commissioner and other agencies involved with children's rights.

22. On 27 and 28 July, the hearing of the judicial review claim took place before Lieven J, and on 7 August judgment was handed down dismissing the claim.

23. On 12 August, the appellant filed a notice of appeal against Lieven J's decision. On 21 August, Macur LJ granted permission to appeal. On 26 August, the Secretary of State filed a respondent's notice seeking to uphold the judge's decision on an additional ground.

24. On 28 August, following the consultation described above, the Secretary of State published the Adoption and Children (Coronavirus) (Amendment) (No.2) Regulations which came into force on 25 September. It is unnecessary to consider the scope of these latest regulations beyond to note that the extent of the amendments to the principal regulations is much more limited than in the Amendment Regulations that form the subject of the current proceedings.

The law

(a) *Statutes and statutory instruments in outline*

25. The statutory scheme governing the provision of support to children is found primarily in the Children Act 1989, amended and augmented by subsequent statutes including the Adoption and Children Act 2002, the Children Act 2004 and the Children and Families Act 2014. (Provision in Wales is now governed by the Social Services and Well-being (Wales) Act 2014.) Part III of the 1989 Act sets out the core statutory provisions for the support of children and families provided by local authorities in England. S.22C makes

provision for the accommodation and maintenance of "looked-after" children (defined in s.22 as meaning children in the care of the local authority under Part IV of the 1989 Act or being provided with accommodation by the authority in the exercise of its statutory functions). Unless it would not be consistent with the child's welfare, or would not be reasonably practicable, the local authority must make arrangements for the child ("C") to live with a parent, or with some other person with parental responsibility, or (in respect of a child subject to a care order) with a person named as a person with whom C was to live in a child arrangements order in force immediately prior to the care order: s.22C(2) to (4). If the local authority is unable to make such arrangements, it must place C in "the most appropriate placement available": s.22C(5). S.22C continues with the following provisions:

"(6) In subsection (5), 'placement' means

(a) placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;

(b) placement with the local authority foster parent who does not fall within paragraph (a);

(c) placement in a children's home in respect of which a person is registered under Part 2 of the Care Standards Act 2000 or Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016; or

(d) subject to s.22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section.

(7) In determining the most appropriate placement for C, the local authority must, subject to … the other provisions of this Part …

(a) give preference to a placement falling within paragraph (a) of subsection (6) over placements falling within the other paragraphs of that subsection;

(b) comply, so far as is reasonably practicable in all the circumstances of C's case, with the requirements of subsection (8); and

(c) comply with subsection (9) unless that is not reasonably practicable.

(8) The local authority must ensure that the placement is such that

(a) it allows C to live near C's home;

(b) it does not disrupt C's educational training;

(c) if C has a sibling for whom the local authority are also providing accommodation, it enables C and the sibling to live together;

(d) If C is disabled, the accommodation provided is suitable to C's particular needs.

(9) The placement must be such that C is provided with accommodation within the local authority's area."

26. In addition, there is substantial provision by statutory instruments governing the provision of support to children, a number of which were temporarily amended by the Amendment Regulations including the three particular sets of regulations on which the appellant has focused in these proceedings – the 2005 Regulations (made under the Adoption and Children Act 2002), the 2010 Regulations (made under the Children Act 1989) and the 2015 Regulations (made under the Care Standards Act 2000). The details of the amendments are considered below.

(b) *Duty to consult*

27. Consultation about legislative and regulatory change is a significant feature of modern governance. In identifying the extent of the duty to consult, it is instructive to consider when the duty arises, how it should be carried out, and why the duty arises in the first place - that is to say, what is the purpose of consultation.

28. When does a duty to consult arise? The legal principles governing the duty to consult were summarised by the Divisional Court (Hallett LJ, Ouseley and Haddon-Cave JJ) in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice and others* [2014] EWHC 1662 Admin, the judicial review proceedings concerning decisions about the re-interment of the remains of King Richard III. At paragraph 97, the court stated:

> "A duty to consult may arise by statute or at common law. Where a statute imposes a duty to consult, the statute tends to define precisely the subject matter of the consultation and the group(s) to be consulted. The common law recognises a duty to consult but only in certain circumstances."

At paragraph 98(2), the court summarised the circumstances in which a duty to consult may arise in these terms:

> "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 circumstances, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult …."

29. The appellant asserts that the first, third and fourth of the circumstances identified in the *Plantagenet Alliance* judgment arose in the present case. The Care Standards Act 2000 contains a statutory duty to consult. S22(9) provides:

> "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."

The preamble to the Amendment Regulations included the following statement:

> "In accordance with section 22(9) of the Care Standards Act 2000 the Secretary of State has consulted such persons as were considered appropriate."

I consider below the competing arguments as to whether there was a breach of the statutory duty under s.22(9) in this case. But in any event, of those regulations under scrutiny in these proceedings, only the 2015 Regulations were made under the 2000 Act. It follows that, with regard to the remaining regulations, the appellant must demonstrate that a duty to consult arose at common law – either because there was an established practice of consultation or because a failure to consult would lead to conspicuous unfairness.

30. A number of authorities were cited to us on these elements of the common law duty.

31. In *R (Bhatt Murphy and others) v Independent Assessor* [2008] EWCA Civ 755 Laws LJ put forward the following summary (at paragraph 50):

> "A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power."

The "paradigm case" and "secondary case" of procedural expectation described by Laws LJ are in effect, respectively, the third and fourth of the circumstances identified in *Plantagenet Alliance* as giving rise to a duty to consult.

32. For a practice to give rise to a legitimate expectation, it must be "so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a group … of treatment in accordance with it " (per Lord Wilson in *R (Davies and another) v Revenue and Customs Commissioners* [2011] UKSC 47 at paragraph 49). A party seeking to establish a legitimate expectation must identify "practice of the requisite clarity, unequivocality and unconditionality" (the Divisional Court in the *Plantagenet Alliance* case at paragraph 98(10)).

33. When a decision is taken to consult about regulatory change, how should it be carried out? In short, it must be carried out properly and fairly. In *R v North and East Devon Health Authority ex p Coughlin* [2001] QB 213, Lord Woolf MR described this obligation in these terms (at paragraph 108):

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly.

> To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168."

At paragraph 112, however, Lord Woolf added this qualification:

> "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."

34. In *R (Moseley) v Haringey LBC* [2014] UKSC 56, Lord Wilson observed (at paragraph 23):

> "A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted."

35. Once a duty to consult has been found to arise, it is for the decision-maker to determine who should be consulted. His determination is open to challenge, however, on grounds of irrationality: *R (Liverpool City Council) v Secretary of State for Health* [2003] EWHC 1975 Admin.

36. Where a duty to consult exists, can it be overridden in certain circumstances? In *R (Christian Concern) v Secretary of State for Health and Social Care* [2020] EWHC 1546 (Admin), the Divisional Court (Singh LJ and Chamberlain J) considered an application for permission to bring a claim for judicial review of a decision, taken on 30 March 2020 in the early stages of the Covid-19 pandemic, to extend an earlier decision (the "Approval") taken in 2018 by temporarily approving the administration of abortion pills at a woman's home. The claimant sought to challenge the decision on several grounds, including failure to carry out a public consultation. The court rejected all the grounds and refused the claimant permission. On the issue of public consultation, the court said (at paragraphs 73 to 4):

> "73. In the present case, the Claimant has failed to establish that there was a past practice of consultation giving rise to a legitimate expectation that it would have been consulted in the present context. Tellingly, there was no consultation before the Approval of 2018.

> 74. Furthermore, and in any event, even if there had in the past been a sufficient practice of consultation to generate a legitimate expectation, that would clearly have been capable of being overridden by the need to act swiftly in the context of the current emergency."

37. The purpose of consultation has various strands. First, experience shows that fair and broad consultation improves the quality of decision-making. Secondly, as a general proposition, those affected by prospective regulatory change may, in certain circumstances, have a right to be consulted about it and may feel a sense of injustice if they are not. Thirdly, and more broadly, consultation about regulatory change is part of a wider democratic process.

38. These strands were identified by Lord Wilson in *Moseley* at paragraph 24, immediately following the passage cited above:

> "Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2013] UKSC 61, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement 'is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested' (para 67). Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel' (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not 'Yes or no, should we close this particular care home, this particular school etc?' It was 'Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?'"

(c) *The Children's Commissioner for England*

39. The Office of the Children's Commissioner is a non-departmental public body created by the Children Act 2004 to promote and protect the rights of children. As originally enacted, s.2 of the 2004 Act defined the Commissioner's general function in the following terms (so far as relevant to this appeal):

> "(1) The Children's Commissioner has the function of promoting awareness of the views and interests of children in England.
>
> (2) The Children's Commissioner may in particular under this section
>
> (a) encourage persons exercising functions or engaged in activities affecting children to take account of their views and interests;
>
> (b) advise the Secretary of State on the views and interests of children;

(c) consider or research the operation of complaints procedures so far as relating to children;

(d) consider or research any other matter relating to the interests of children;

(e) publish a report on any matter considered or researched by him under this section.

(3) The Children's Commissioner is to be concerned in particular under this section with the views and interests of children so far as relating to the following aspects of their well-being -

(a) physical and mental health and emotional well-being;

(b) protection from harm and neglect;

(c) education, training and recreation;

(d) the contribution made by them to society;

(e) social and economic well-being.

(4) The Children's Commissioner must take reasonable steps to involve children in the discharge of his function under this section….

…

(9) Any person exercising functions under any enactment must supply the Children's Commissioner with such information in that person's possession relating to those functions as the Children's Commissioner may reasonably request for the purposes of his function under this section (provided that the information is information which that person may, apart from this subsection, lawfully disclose to him).

…

(11) In considering for the purpose of his function under this section what constitutes the interests of children (generally or so far as relating to a particular matter) the Children's Commissioner must have regard to the United Nations Convention on the Rights of the Child."

The Commissioner's functions in other parts of the UK were defined in subsequent sections of the Act.

40. Following a review carried out by John Dunford on the office, role and functions of the Commissioner, the report of which was published in November 2010, the 2004 Act was amended by Part 6 of the Children and Families Act 2014 to incorporate some, but not all, of the report's recommendations. So far as relevant to this appeal, s.2 now reads as follows:

"(1) The Children's Commissioner's primary function is promoting and protecting the rights of children in England.

(2) The primary function includes promoting awareness of the views and interests of children in England.

(3) In the discharge of the primary function the Children's Commissioner may in particular –

(a) advise persons exercising functions or engaged in activities affecting children on how to act compatibly with the rights of children;

(b) encourage such persons to take account of the views and interests of children;

(c) advise the Secretary of State on the rights, views and interests of children;

(d) consider the potential effect on the rights of children of government policy proposals and government proposals for legislation;

(e) bring any matter to the attention of either House of Parliament;

(f) investigate the availability and effectiveness of complaints procedures so far as relating to children;

(g) investigate the availability and effectiveness of advocacy services for children;

(h) investigate any other matter relating to the rights or interests of children;

(i) monitor the implementation in England of the United Nations Convention on the Rights of the Child;

(j) publish a report on any matter considered or investigated under this section.

(4) In the discharge of the primary function, the Children's Commissioner must have particular regard to the rights of children who are within section 8A (children living away from home or receiving social care) and other groups of children who the Commissioner considers to be a particular risk of having their rights infringed

…"

41. In *R(C) v Secretary of State for Justice* [2008] EWHC 171 (Admin), a case decided prior to the amendment of the 2004 Act, a statutory instrument was passed amending the Secure Training Centre Rules 1998 so as to permit the physical restraint of a trainee for the purpose of ensuring good order and discipline. The claimant, who was at the time a trainee at a secure training centre, sought judicial review to quash the amendment on the grounds *inter alia* that the Secretary of State had unreasonably failed to consult with the Children's Commissioner. The Divisional Court held that there was no

statutory duty to consult nor any legitimate expectation of consultation in circumstances where there had been no consultation prior to the promulgation of the original rules or any intervening amendment. The Secretary of State had, however, accepted, under the general heading of *Wednesbury* unreasonableness, that, if the amended rules had reflected a significant change of policy in relation to children there would have been a wider consultation in particular with the Children's Commissioner. The Secretary of State's case was that the amended rules represented no such change of policy, but the Divisional Court disagreed, concluding (at paragraph 35):

> "We unhesitatingly characterise that as a significant change of policy and we do not consider that the Secretary of State, if he had applied [his] mind to it, could reasonably have seen it in a different way. For these reasons we conclude that, so far as consultation with the CC is concerned … the *Wednesbury* challenge succeeds in substance …."

Despite this conclusion, the Divisional Court declined to quash the amended rules, but on the claimant's appeal, this Court reversed that decision (see [2008] EWCA Civ 882).

The judgment of the Administrative Court

42. In her judgment, having summarised the background to the introduction of the regulations, Lieven J considered in particular the seven amendments on which counsel for the claimant had focused their submissions. She broadly accepted submissions made on behalf of the claimant that the changes introduced by the regulations were substantial. For example, with regard to the amendment to the 2010 Regulations which permitted a looked-after child to be temporarily placed with an unconnected person, the judge observed (at paragraph 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."

Similarly, with regard to the introduction of flexibility into the timescales for visits to looked-after children, the judge observed (at paragraph 36):

> "Again, the importance of regular visits within a fixed time scale 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[s] 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 properly protected."

43. Having considered the parties' submissions, the judge expressed her conclusions on ground one of the claim, the failure to consult, in the following paragraphs:

"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 [the Scientific Advisory Group for Emergencies] 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 LACs [looked-after children] 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 [red – amber – green] 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."

44. The judge then proceeded to reject the other grounds advanced by the Claimant. Those arguments have not been pursued on this appeal and I need not consider them further.

Submissions

(a) *The appellant's submissions*

45. On behalf of the appellant, Ms Richards submits that the judge was wrong to find that the respondent had not acted unlawfully. Having (i) rejected his submissions that the Amendment Regulations represented only "minor" changes to merely "procedural" duties which were akin to "burdens" upon local authorities, and (ii) rejected any argument that the respondent did not have sufficient time to consult the Children's Commissioner in the context of the pandemic, the judge erred in concluding that the respondent had nevertheless acted unlawfully in failing to consult the Commissioner and, by implication, any other person or body concerned with children's rights, or the children in care themselves.

46. It is accepted on behalf of the appellant that there was no time for a formal consultation exercise involving the publication of draft proposals and a period for stakeholders to respond. Rather, the appellant's case is that the Secretary of State plainly had time to consult the Children's Commissioner and/or other representatives of the rights, interests and views of children in care in the same *informal* manner by which it engaged with various local authorities, agencies and other providers, but inexplicably failed to do so.

47. The appellant submits that the respondent was under a statutory duty to consult on parts of the Amendment Regulations by virtue of s.22(9) of the Care Standards Act 2000, as acknowledged in the Explanatory Memorandum. In addition, he was under a duty to consult at common law generally because there is an established practice of consultation in this area. Ms Richards drew attention to the observation in the pre-action response that "it is of course in any event the Secretary of State's usual practice to carry out appropriate consultation whenever substantive changes are made to regulations". She submits that, as recognised by the judge, the changes made by the Amendment Regulations were unarguably substantive. Further, the appellant submits that the Secretary of State was also a under a duty to consult at common law because of the significant impact of the Amendment Regulations on highly vulnerable looked-after children. The unprecedented nature and impact of the pandemic on the lives of vulnerable children, and the extent of the proposed changes, required such a

consultation before the changes were finalised and implemented. In those circumstances, it is submitted that the case falls within the fourth category identified in *Plantagenet Alliance* where a failure to consult leads to conspicuous unfairness.

48. Whether or not a consultation is a legal requirement, if it is embarked on it must be carried out properly and fairly: *R (Coughlan) v N and E Devon Health Authority*. In circumstances where the respondent considered it appropriate to consult anyone at all, any rational decision-maker would also have considered it appropriate to consult those who would be directly affected by the proposed changes, either directly or through their representative organisations and/or their statutory representative, the Children's Commissioner. Accordingly, under *Wednesbury* principles, it was irrational or unreasonable for the respondent to consider that he could properly discharge his consultation obligations by privately consulting only certain local authorities and a select number of providers.

49. Ms Richards put forward five submissions in support of her argument that the judge's decision was wrong. First, the judge erred in failing to apply the logic of her factual finding that, notwithstanding the pandemic, the respondent did have time to consult the Children's Commissioner. Instead, the judge appears to have given the fact of the pandemic some intrinsic relevance in reaching her conclusion. The *obiter* observations of the Divisional Court in *R (Christian Concern) v Secretary of State for Health and Social Care* have no relevance to the decision in this case in which the respondent chose to carry out the consultation but on an entirely one-sided basis and not involving those most directly affected by the changes. Secondly, the judge rightly rejected the argument that it was unnecessary to consult the Commissioner because the changes were "minor" and "administrative" but again failed then to apply the logic of that finding, which was that the Commissioner ought to have been consulted about changes of this kind. Third, it is submitted that the judge failed to provide any rational justification for concluding that the failure to consult the Commissioner was lawful in circumstances where she had expressly stated that, but for the pandemic, she would have found the respondent to be under such a duty. Fourth, it is submitted that the judge's conclusion that local authorities could adequately represent the interests of children in care is unsustainable. The appellant asserts that the interest of views of local authorities cannot simply be aligned with those of children in care where, as the judge recorded, many local authorities are rated as inadequate and make poor decisions in relation to the children in their care. Furthermore, the idea that children require representation independent of local authorities is well recognised by Parliament, and is demonstrated, for example, by the creation of the post of Children's Commissioner. Finally, it is submitted that the judge also erred in failing to find that in the specific context fairness also required proportionate consultation with other children's rights organisations and with children themselves.

(b) *The respondent's submissions*

50. On behalf of the Secretary of State, Mr Clive Sheldon QC submits that no duty to consult the appellant or the Children's Commissioner or any other body representing children's rights arose on the particular facts and in the particular context of this case. There was no statutory duty to consult nor any legitimate expectation to do so. A limited number of the regulations amended under the Amendment Regulations were subject to the duty to consult under s.22(9) of the Care Standards Act 2000 but on the facts of this

case there was no breach of that duty. Even if there was a legitimate expectation of consultation, it was overridden in the particular circumstances of this case.

51. The duty to consult is fact-specific and varies greatly from one context to another. Mr Sheldon stresses the context in which the Amendment Regulations were introduced, namely the global pandemic and its anticipated effects on this country. At the time the decision was made to proceed with the amendments, the government was operating on the basis of scientific advice of a reasonable worst-case scenario forecast including workforce absences of 17 to 20%, several million people requiring health assessments, 1.3 million people in hospital for an average of six days, and some 820,000 excess deaths. In the children's social care context, it was anticipated that there would be significant reductions in the available workforce due to sickness, self-isolation and caring responsibilities, at the same time as a potential increase in demand for children's social care services. The Department, in common with government as a whole, was seeking to respond responsibly to a fast-moving situation on the basis of incomplete information about the true effect of the virus.

52. In that context, the Department focused its consultation on service-providers whom it considered would be best placed to provide information about what was required to allow vital services to continue. It is submitted on behalf of the Secretary of State that, in the context of this particular decision-making process, as recognised by the judge, the interests of providers and interests of children were aligned. Everyone involved was seeking to ensure that services could continue to function for the benefit of the most vulnerable children notwithstanding the pandemic.

53. Mr Sheldon also stressed that the structure of the Amendment Regulations included a number of safeguards. First, the regulations were time-limited and expired on 25 September 2020. Secondly, they incorporated a review mechanism which allowed a much wider pool of stakeholders, including children's charities and the Children's Commissioner, to provide feedback to the Department on the operation of the amendments. Thirdly, revised guidance (as published in July 2020) stressed that the amendments "should only be used when absolutely necessary, with senior management oversight, and must be consistent with the overarching safeguarding and welfare duties that remain in place."

54. In so far as there was a statutory duty to consult under s.22(9) of the Care Standards Act 2000 in respect of the 2015 Regulations, it is submitted that the Secretary of State complied with his obligation to consult such persons as he considered appropriate. In the context of the pandemic, any failure to consult the Children's Commissioner and/or the appellant cannot be described as unreasonable or so unfair as to be unlawful. As for the common law obligations to consult, it is submitted that no legitimate expectation arose in the circumstances, whether on the basis of past practice or exceptionality. The basis on which the appellant seeks to assert that there was a legitimate expectation does not have the "requisite clarity, unequivocality and unconditionality" necessary to give rise to such an expectation. There was no established practice of consultation which could be characterised as "so unambiguous, so widespread, so well-established and so well-recognised" as to establish an obligation to consult. By his respondent's notice, the Secretary of State invites the Court to conclude that the judge's finding to the contrary at paragraph 78 of her judgment was erroneous. It is submitted that the appellant's alternative arguments as to an exceptional duty to consult lack substance. The simple fact that the pandemic was unprecedented cannot form a basis for a duty to

consult. On the contrary, the judge had been correct to hold, in line with the *obiter* observations of the Divisional Court in *R (Christian Concern) v Secretary of State for Health and Social Care*, that any legitimate expectation to be consulted in normal circumstances would not give rise to a right to be consulted in the exceptional circumstances of the pandemic. The question was not whether there was, literally, sufficient time to consult the Children's Commissioner or other bodies but whether the failure to do so was unlawful in the light of the context of the pandemic. In oral submissions Mr Sheldon accepted that consulting the Children's Commissioner and others might have been helpful to those drafting the regulations but submitted that the failure to do so was not unlawful.

55. Mr Sheldon stressed that it had never been part of the respondent's case that he had been justified in not consulting more broadly because the proposed amendments were "minor" or "administrative". It was accepted that the protections in question were important. It was for that reason that the Amendment Regulations provided for a review mechanism, that guidance was published and that the regulations were strictly time-limited. Furthermore, in the context of this particular decision-making process, the interests of providers and the interests of children were aligned and the judge had been right to so hold.

56. Finally, Mr Sheldon contended that the appeal was, to all intents and purposes, academic. In practice, the powers granted to local authorities by the Amendment Regulations had rarely been used. The Amendment Regulations were set to expire automatically a few days after the appeal hearing. The new statutory instrument (Amendment (No.2) Regulations) is much more limited and has been produced following a broader consultation including with the Children's Commissioner and others.

(c) *Supplemental submissions on the Dunford report*

57. In the course of oral argument, a point arose as to whether the conclusions and recommendations of the Dunford report on the Office of the Children's Commissioner and the consequential amendments to the 2004 Act implemented by the 2014 Act were relevant to the question whether the Secretary of State was under a duty to consult the Commissioner. We therefore invited counsel to file supplemental submissions on this issue.

58. In his further submissions, Mr Sheldon draws attention to the fact that the Dunford report had specifically considered but rejected a proposal that a statutory requirement to consult the Commissioner on law and policy relating to children should be introduced. In turn, that proposal was not adopted by Parliament when enacting the 2014 Act. Furthermore, Parliament did not adopt a recommendation in the Dunford report that a mechanism be found to ensure that the Commissioner is alerted to new policies or laws sufficiently early in the process for his or her advice to make a difference. Mr Sheldon submits that the fact that, when expanding the role of the Commissioner in 2014, Parliament chose not to introduce a duty to consult the Commissioner is relevant when determining the extent of any such duty. He contends that it is particularly significant that Parliament chose that course notwithstanding the fact that, under the amended s.2(4) of the 2004 Act introduced in 2014, the Commissioner was given extended duties and powers in respect of children living away from home or receiving social care.

59. In reply, Ms Richards contends that the respondent has erected a "straw man" by raising these issues since it has never been any part of the appellant's case that the respondent was under a statutory duty to consult the Children's Commissioner. Rather, the appellant's case has always been and remains that it was unlawful for the respondent to fail to consult with the Commissioner (and others with a specific focus on children's rights) through the wholly one-sided consultation process on which he embarked. Ms Richards adds, however, that, insofar as points arising from the Dunford report have any relevance to the issues on this appeal, they tend to reinforce rather than undermine the appellant's case that it was irrational and/or conspicuously unfair for the respondent to make these changes without consulting the Commissioner. Through the 2014 Act, Parliament amended the statutory scheme to give the Children's Commissioner powers which can only properly be exercised if she is made aware of proposed policy and legislation. This is most obviously the case in relation to the power under s.2(3)(d) "to consider the potential effect of government policy proposals and government proposals for legislation" but also applies to her other powers under s.2. In particular, the appellant draws attention to the amended s.2(4) which requires the Children's Commissioner to have "particular regard to the rights of children who are … living away from home or receiving social care … and other groups of children who the Commissioner considers to be at particular risk of having their rights infringed". Ms Richards points out that the Amendment Regulations directly affect precisely this cohort of children. In those circumstances, it is submitted that it was irrational for the Secretary of State to act in a way which frustrated the Children's Commissioner's exercise of the significant new powers given to her by Parliament following extensive review.

(d) *Detailed submissions on the Amendment Regulations*

60. In its original statement of facts and grounds for judicial review, and in its submission to the judge and before this Court, the appellant has focused on _seven of the regulatory amendments:

(1) regulation 4(2)(a) concerning the loss of independent scrutiny in the adoption process;

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

(3) regulation 8(8) concerning the loss of safeguards for children placed in fostering for adoption placements;

(4) regulation 8(13) concerning the removal of timeframes for social work and visits to looked-after children;

(5) regulation 8(14) concerning the loss of timescales for statutory reviews of the welfare of children in care;

(6) regulations 8(18) concerning the loss of safeguards in relation to short breaks; and

(7) 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.

The parties' arguments about these provisions can be summarised as follows.

61. (1) Regulation 4(2)(a) concerning the loss of independent scrutiny in the adoption process – The appellant rightly describes adoption as a major event in the life of a child and their adoptive parents and birth family. It is important that children and prospective adopters are both individually suitable for adoption and are a good match. The appellant points out that, where adoptions go ahead in the absence of these conditions, they are likely to break down and thereby cause a significant amount of trauma to all involved, with long-term adverse consequences for the child's well-being. Adoption panels contribute vital independent security and quality assurance to the pre-court adoption process. Their functions include recommending to the adoption agency whether a particular child should be placed for adoption, advising whether an application for a placement order should be made, and advising, where relevant, on any contact that the child may have with their birth family. Adoption panels consider and recommend whether prospective adopters are suitable to adopt a child and whether a particular child should be placed for adoption ("matched") with prospective adopters. The Statutory Guidance on Adoption published by the Secretary of State in July 2013 describes, at paragraph 1.19, how "adoption panels perform an important role in assisting the agency to reach the best possible decision …. Panels play an important quality assurance role, providing objectivity and having the ability to challenge practice which is felt not to be in the interests of children or to fall short of the regulations …."

62. Regulation 4(1) of the 2005 Regulations provides that "the adoption agency must constitute one or more adoption panels, as necessary, to perform the functions of an adoption panel under these Regulations." This provision is amended by regulation 4(2)(a) of the Amendment Regulations so as to read "the adoption agency may constitute one or more adoption panels, as necessary, to perform the functions of an adoption panel under these Regulations" (emphasis added). The respondent states that this amendment was put in place to address the scenario of significant illness limiting the ability of local authorities and adoption agencies to bring panels together and to help ensure there were no delays in the adoption process. The appellant submits that the conversion of the duty to constitute an adoption panel into a discretion to do so is obviously disproportionate, having regard to the centrally important quality assurance role played by the panels.

63. (2) Regulation 8(11) concerning the loss of safeguards for children placed in out-of-area foster placements with persons unconnected to them. An out-of-area foster placement describes a situation where a child is placed with foster carers living outside the local authority's area. In some cases, this placement may be many miles away in a different part of the country. Such a move may be in the child's best interests – for example, in the case of older children, to move them away from harmful relationships – but comes at a cost of cutting them off from family support, educational settings and other local connections. As the appellant points out, it is more difficult for local authorities to monitor the child's welfare when they are placed many miles from their home area. Such moves are generally considered detrimental and, under s.22C(6) and (9) of the Children Act 1989, a local authority is under a statutory obligation to provide the child with accommodation within its area "unless that is not reasonably practicable". For those reasons, the 2010 Regulations provide additional procedural safeguards where a local authority seeks to move a child out of area. Under regulation 11, any decision to place a child out of area must be approved by a nominated person who must

satisfy themselves that a number of factors have been addressed. Regulation 11(4), however, exempts from these safeguarding mechanisms placements made under regulation 24, namely where the placement was with a "connected person", defined as "a relative, friend or other person connected with" the child. In the case of such placements, there is no requirement under the 2010 Regulations for prior approval by a nominated person. Instead, the local authority is empowered to approve that person as a local authority foster parent for a temporary period not exceeding 16 weeks, provided they comply with further specified requirements.

64. Regulation 8(11) of the Amendment Regulations amended regulation 24 of the 2010 Regulations by expanding its provisions so that it applied not merely to placements with "connected persons" but to all foster placements. On behalf of the respondent, it is said that the inclusion of unconnected persons during the pandemic was intended to cater for a scenario in which there were no known relatives or connected people able to provide emergency care for a child where their parents contracted Covid-19, or in the eventuality of their death. This increased flexibility would enable the right placement to be found quickly and not be constrained by geographical limitations in circumstances where the available pool of approved foster carers may be significantly reduced as a result of foster carers being ill or declining new placements for fear of contracting the virus. The appellant submits that as a result of this amendment, regulation 24 was vastly expanded in scope so as to allow the temporary approval of not just connected persons but any persons not yet approved as foster carers. It is submitted that this effectively allowed children to be moved out of area, to live with persons unconnected to them in any way and who had not yet even been approved as foster carers. All of this was permitted without the significant procedural safeguard of the oversight of a nominated person.

65. (3) Regulation 8(8) concerning the loss of safeguards for children placed in fostering for adoption placements. This amended regulation 22A of the 2010 Regulations which concerns the placement of a child with a foster parent who is also an approved prospective adopter. The advantage of such placements is that they reduce disruption and unnecessary moves for the child. As the appellant points out, however, such placements can be very contentious for birth parents since they often follow an assessment by the local authority that the child is unlikely to return to their care. The appellant contends that such arrangements are therefore extremely sensitive and require careful professional scrutiny and oversight. For that reason, sub-paragraph (2) of regulation 22A provides that a decision to place a child in such a placement must not be put into effect until it has been approved by a nominated officer and, *inter alia*, sub-paragraph (3) imposes obligations on the nominated officer to be satisfied, *inter alia*, that the placement is the most appropriate placement available for the child and will safeguard and promote his or her welfare. Regulation 8(8) of the Amendment Regulations removed sub-paragraph (2) entirely. As a result, there is no requirement for a nominated officer to approve such a placement. Sub-paragraph (3) is amended so as to require the authority to ensure that the requirements therein are satisfied.

66. The respondent submits that this flexibility was introduced in cases where additional scrutiny by a nominated officer would delay a child being placed with an appropriate and approved carer. The appellant submits that there is no evidence of any pressure on nominated officers as a result of the pandemic which made compliance with regulation 22A difficult and no evidence to justify removing the safeguards which, in the

appellant's submission, are integral to ensuring that children are placed in appropriate placements while minimising the risk of traumatic and unnecessary moves.

67. (4) Regulation 8(13) concerning the removal of timeframes for social work and visits to looked-after children. Regulation 28 of the 2010 Regulations establishes three types of statutory timescales for social work visits to children in care. They must be visited within one week of starting a new placement, and then every six weeks for the first year of the placement, and then every six weeks or every three months thereafter, depending on the circumstances. Children in long-term placements can, with their consent, be visited only twice a year. The appellant contends that the statutory timescales are of particular importance. One source of present concern is that more than 6000 looked-after children are placed in unregulated settings, many of which are outside the area of the responsible local authority. The appellant contends that regular and timely social work visits are essential to safeguard the welfare of all looked-after children, but especially those who are at risk of sexual exploitation or of being exploited by criminal gangs, children who are in unregulated settings, and children settling into new placements.

68. Regulation 8(13) of the Amendment Regulations inserted a new sub-paragraph (1B) into regulation 28 of the 2010 Regulations providing that, where the local authority's representative is unable to visit the child within the timescales set out in the regulation, the responsible authority must ensure that he or she visits the child "as soon as is reasonably practicable thereafter". The justification for this amendment, according to the respondent, is that where a local authority is unable to comply with the timescales due to the exigencies of the pandemic, it should not automatically be in breach of the law. The appellant submits, however, that this provision was likely to have an adverse effect on some of the most vulnerable looked-after children, including children in new placements, institutional settings, and unregulated placements. As a result, any risks to the child's welfare arising from their placement or otherwise would be far less likely to be identified by the local authority.

69. (5) Regulation 8(14) concerning the loss of timescales for statutory reviews of the welfare of children in care. The statutory review of a child's care plan is conducted by a meeting, chaired by an "independent reviewing officer" ("IRO"), and attended by professionals involved with the child and, in the case of older children, the child himself or herself. In the relevant statutory guidance ("The Children Act 1989 Guidance and Regulations: Volume 2 Care Planning, Placement and Case Review, paragraph 4.1) the purpose of the case review is described as being:

> "to monitor the progress of achieving the outcomes set out in the care plan and to make decisions to amend the plan as necessary in light of changed information and circumstances. Reviews take place in order to ensure that the child's welfare continues to be safeguarded and promoted in the most effective way throughout the period that s/he is looked after."

Under regulation 33 of the 2010 Regulations, the first review must take place within 20 working days of the date on which the child becomes looked after, the second review no more than three months later, and subsequent reviews at intervals of not more than six months. Regulation 8(14) of the Amendment Regulations amends the last of these timescales. Instead, they provide that subsequent reviews must be carried out "where reasonably practicable thereafter".

70. The purpose of this amendment, according to the respondent, was to address the risk of staff absences affecting the ability for reviews to be carried out within the regulatory timescales. The appellant submits that review meetings are not simply "procedural" or "administrative" but rather the means by which the individuals involved in the child's life come together so that decisions about their future are well informed. Review meetings are also an important means by which a local authority's decision making is given independent scrutiny by the IRO. It is submitted that the dilution of the requirement for regular reviews has obvious implications for the welfare of looked-after children. The appellant's position is that there is in fact a greater need to ensure that a child's care plan is reviewed in a timely manner during the pandemic.

71. (6) Regulation 8(18) concerning the loss of safeguards in relation to short breaks. One type of support provided for children and families is respite overnight accommodation for short periods of time – so-called "short breaks". The most common users of short breaks are disabled children. Children accommodated in this way do not enjoy the full rights and entitlements conferred by the 2010 Regulations. The safeguards are less stringent in terms of planning, visiting requirements and reviews. Under regulation 48, this modified form of looked-after status applies where a child is using overnight short breaks for up to and including 75 days in a year in the same setting, but where each individual short break lasts for 17 days or less. Under the Amendment Regulations, the modified form of looked-after status was extended to all children using overnight short breaks for no more than 75 days a year, irrespective of the timescale of the individual short break or the number of different settings used.

72. The respondent explains that this temporary change was intended to cater for a situation where, for example, a child in a short break placement was temporarily unable to return to their full-time carer as a result of the pandemic. It is submitted that it would have been disproportionate to require the full care planning regime to be engaged in that scenario, particularly at a time of greatly increased pressure on children's social care services. The appellant submits that these changes were likely to have an adverse effect on disabled and other vulnerable children. Such children would continue to require short breaks throughout the period of the pandemic restrictions. The appellant submits that in many cases there would be a greater need for respite care, given the additional strains resulting from those restrictions. It is submitted that the effect of the amendments would be that disabled children will be going away from home for longer periods of time without the benefits of the protection of "full" looked-after status.

73. As set out above, it was asserted in the submission to the Minister that the reason for the relaxation introduced by regulation 8(18) was to allow greater flexibility. The appellant submits that this demonstrates a fundamental misunderstanding of the statutory scheme. The prior 17-day limit did not mean that children could not be placed for 17 days in a short-break placement. Rather, it meant that, if they were placed for more than 17 days, they were entitled to the full protection of the 2010 Regulations.

74. (7) 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. Regulation 44 of the 2015 Regulations requires the children's home provider (the "registered person") to ensure that an independent person visits the children's home at least once a month and to help the independent person carry out interviews of the child and others and inspect the premises and records as the independent person requires. The regulation also requires the independent person to produce a report about

such a visit setting out his or her opinion as to whether children are effectively safeguarded and the conduct of the home promotes their well-being. These provisions were amended by regulation 11 of the Amendment Regulations so as to provide that the registered person "must use reasonable endeavours to ensure" that an independent person visits the children's home at least once a month.

75. The respondent describes the purpose of this amendment as being to allow workforce flexibility in delivering care to a child. The appellant submits that this change removed key safeguards established following widespread abuse in children's residential care and that the pandemic did not provide a justification for watering down these important safeguards.

Discussion and conclusion

76. Before considering whether the judge's decision was wrong, I make three preliminary points.

77. First, the Covid-19 pandemic undoubtedly created an urgent and very difficult problem for agencies and practitioners in children's social care and for the Secretary of State with responsibility for overseeing the system. But the urgency was not so great as to preclude at least a short informal consultation. And the fact that the Secretary of State was facing difficult decisions about whether and, if so, how to modify services made it important that he should receive as wide a range of advice as possible.

78. Secondly, leaving aside for a moment the question whether the Secretary of State was under a duty to consult, the fact is that he did consult, albeit informally and over a limited period. In those circumstances, the case law is clear that, whether or not a consultation is a legal requirement, if it is embarked on it must be carried out properly and fairly: *R (Coughlan) v N and E Devon Health Authority*. In my judgment, the *obiter* observations of the Divisional Court in *R (Christian Concern) v Secretary of State for Health and Social Care* to the effect that a legitimate expectation of consultation arising out of past practice is capable of being overridden by the need to act swiftly in the context of the pandemic are of little if any relevance in the present case where the Secretary of State in fact chose to carry out a consultation.

79. Thirdly, on any view, the amendments as a whole were unquestionably substantial and wide-ranging and, when implemented, had the potential to have a significant impact on children in care. The regulations which were under consideration for amendment are an integral part of the whole statutory scheme governing children's social care. They supplement, support and amplify the provisions in the principal statutes. Thus, for example, the provisions in the 2010 Regulations about out-of-area placements, including regulation 11, supplement the statutory obligation under s.22C(7) and (9) of the 1989 Act to place a child within the local authority area "unless that is not reasonably practicable". Similarly, the provisions in the 2010 Regulations about connected persons, including regulation 24, supplement the statutory provisions in s.22C(6) and (7). The provisions governing adoption panels in the 2005 Regulations supplement the statutory powers granted to local authorities under s.18 of the 2002 Act to place a child for adoption.

80. If, as asserted in the Explanatory Memorandum to the Amendment Regulations, it was correct that, as a result of the pandemic, "local authorities and partners may struggle to

meet the full range of statutory duties relating to child protection, safeguarding and care", there was plainly a significant risk that the rights of children in care or otherwise being looked after by local authorities would be affected. Although Mr Sheldon in his submissions to this Court disclaimed any characterisation of the Amendment Regulations as "minor", that is precisely how they were described in the initial email to the Children's Commissioner sent on 16 April 2020. This suggests to me that the Department may not have fully appreciated the potential impact of the proposed amendments on children in care. Contrary to what was said in the Child Rights Impact Assessment produced by the Department's Children Rights Team on 15 April 2020, the amendments manifestly had the potential to change the substance of the services being provided to children in care. For example, I entirely agree with the judge's observation that the potential impact of allowing a child to be placed with a stranger who is not a family member hardly needs stating, particularly in circumstances where there may be no nominated officer oversight. I also agree with her about the importance of regular visits to children in care within a fixed time scale, particularly in the context of placements out of area and given the very large number of children at present placed in unregulated settings. On any view, these amendments, taken as a whole, represented a significant change in the substantive provision of services to children.

81. Adapting the passage at the end of paragraph 24 of Lord Wilson's judgment in the *Moseley* case, the question here was: "required as we are by the pandemic to consider amending regulations relating to looked-after children, should we make changes in the terms which we here propose?" I agree with the judge's conclusion that in normal circumstances there can be no possible doubt that the Secretary of State would have had to ensure that he was consulting a wide range of people and agencies in order to ensure that he was getting a full answer to the question posed and that, in particular, 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. Given the scale of the amendments, it was even more important for the consultation which the Secretary of State embarked upon to include organisations representing children's rights and in particular the Children's Commissioner.

82. In these circumstances, I conclude that the appellant is correct in saying that the Secretary of State was under a duty to consult the Children's Commissioner and other bodies representing children's rights. That duty arose in three ways.

83. First, with regard to those regulations made under the Care Standards Act 2000, there was a statutory duty to consult under s.22(9). It is correct that the subsection merely requires him to "consult any persons he considers appropriate". But, given the scope of the amendments arising here, and the fact that the Secretary of State chose to conduct a consultation, albeit informally and over a limited time period, it was, in my view, irrational not to include the Children's Commissioner and other bodies representing children's rights. I accept Ms Richards' submission that the Secretary of State, having chosen to carry out a consultation, conducted it on an entirely one-sided basis and excluded those most directly affected by the changes. Had they been included, the Secretary of State would have unquestionably been better informed about the impact of the proposed amendments on the vulnerable children most affected by them.

84. Secondly, I conclude that there was an established practice of consulting the Children's Commissioner and other bodies representing children's rights when considering regulatory changes of this sort. It was acknowledged in the pre-action response served

prior to the issue of this claim that "it is of course in any event the Secretary of State's usual practice to carry out appropriate consultation whenever substantive changes are made to regulations". The judge accepted, and I agree, that an "appropriate consultation" about regulatory changes in this area manifestly must include those organisations concerned with the rights of children, including children in care, and, in particular, the Children's Commissioner. Prior to the introduction of the 2015 Regulations, the Department carried out an open consultation on the proposed changes. Although we were not referred to it in the course of submissions, the published government response to that consultation (which is available on the internet) indicates that the Children's Commissioner not only responded to the consultation but facilitated a number of consultation events with children and young people. Several other organisations concerned with the rights and interests of children in care also responded to the consultation, including The Care Leavers Association, the National Youth Advocacy Service, and the NSPCC. Thus in contrast to the position in *R (C) v Secretary of State for Justice* and *R (Christian Concern) v Secretary of State for Health and Social Care*, there had been consultation with the Children's Commissioner and other bodies representing children's rights before the introduction of at least some of the original regulations amended by the Amendment Regulations.

85. Thirdly, given the impact of these proposed amendments on the very vulnerable children in the care system, it was in my judgment conspicuously unfair not to include those bodies representing their rights and interests within the informal consultation which the Secretary of State chose to carry out. I can find nothing about the circumstances that existed in March 2020 to justify the Secretary of State's decision (if indeed any conscious decision was made) to exclude the Children's Commissioner and other bodies representing the rights of children in care from the consultation on which he embarked. He decided to undertake a rapid informal consultation, substantially by email. In the circumstances, it was plainly appropriate for the consultation to be conducted in that fashion, rather than a more formal, drawn-out process. But having decided to undertake the consultation, there was no good reason why that process should not have included the Children's Commissioner and the other bodies. On the contrary, there were very good reasons why they should have been included.

(1) The persons most affected by the regulations were the individuals whose rights and interests are represented by those bodies.

(2) Those individuals were particularly vulnerable – children in care, many of whom have been abused or neglected and in most cases were separated from their families, often at a considerable distance.

(3) The organisations best equipped to identify the impact of the proposed amendments on the vulnerable children were those expressly set up to represent their interests. They were plainly better equipped to do so than the local authorities and care providers whom the Secretary of State chose to consult. In so far as the judge concluded in the circumstances of this case that the interests of children would be sufficiently protected by consulting the providers, I respectfully disagree. The assertion in the submission to ministers on 6 April that the principles to be followed in making decisions were "broadly endorsed by the sector" was, in my view, potentially misleading. The "sector" plainly included not merely local authorities and

service providers but also all those engaged or involved with children's social care, including those bodies whose focus was on children's rights.

(4) The Children's Commissioner has statutory responsibility to promote and protect the rights of children in England, and to consider the potential effect of government policy proposals and government proposals for legislation on children, particularly those children living away from home receiving social care. She, and other bodies, had been consulted before as part of the Department's established practice. The fact that Parliament, when amending and expanding the role and powers of the Children's Commissioner in 2014, chose not to include any general statutory duty to consult the Commissioner does not, in my view, assist in deciding whether there was a duty to consult on this occasion. I accept Ms Richards' submission, however, that, given the expanded powers and duties of the Commissioner found in s.2(3) and (4) of the Children Act 2004 as amended, once the Secretary of State decided to carry out a brief informal consultation about the proposed Amendment Regulations, it was irrational and unfair not to include the Commissioner in that consultation.

(5) By consulting those persons and organisations, the Secretary of State would have been better equipped to make judgments about how the regulation should be amended.

86. All three strands of the purpose of consultation articulated by Lord Wilson in the *Moseley* case are present here. First, the extension of the consultation to organisations representing children's rights would unquestionably have informed the Secretary of State's decision about the amendments. In the context of the pandemic, when faced with difficult decisions about how to protect children's social care services, it was surely right to seek a wide range of views so that the proposed amendments could be properly tested. Secondly, it was manifestly in the interests of the vulnerable children who would be most affected by the proposed amendments that those agencies and organisations representing the rights and interests of children in care should be consulted. Thirdly, given the range of regulations under review, and the potential impact of the proposed changes across the country, a wider consultation was clearly, in Lord Wilson's words, "reflective of the democratic principle at the heart of our society". Such consultations help to ensure protection against arbitrary decision-making.

87. Accordingly, whilst I agree with the judge's first conclusion that in normal circumstances there can be no possible doubt that the Secretary of State 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 and that, in particular, he would have been under a duty to consult the Children's Commissioner, I respectfully disagree with her second conclusion that the circumstances were such as to warrant a departure from the normal rule. Mr Sheldon conceded that it was not part of the Secretary of State's case that there was insufficient time to consult the Children's Commissioner and other bodies representing children's rights. I can see no argument why the Children's Commissioner and the other representative bodies could not have been consulted in the same relatively informal way (by email) as was adopted by the Secretary of State in the two or three weeks or so when which he was consulting the local authorities and other providers.

88. In the light of my conclusion, the question arises as to the appropriate relief. In the original claim, the appellant sought a declaration that the Amendment Regulations "were unlawful and/or appropriate declaratory relief to reflect the judgment of the court" and "an order quashing the 2020 Amendment Regulations". In the course of oral argument, however, Ms Richards indicated that the appellant no longer sought a declaration of *ultra vires* or a quashing order and would be content with a declaration that the regulations were unlawful by reason of the failure to consult.

89. In *R(C) v Secretary of State for Justice* [2008] EWCA Civ 882, this Court concluded, reversing the decision of the Divisional Court, that a finding that delegated legislation had been made *ultra vires* should lead to an order quashing the regulations. It seems to me, however, that in the unusual circumstances of this case a declaration of *ultra vires* and a quashing order would be inappropriate. First, neither party now seeks such an outcome. Secondly, the evidence filed in the proceedings indicates that in the event there were very few occasions when the flexible arrangements permitted by the Amendment Regulations were actually used during the six months they were in force. Thirdly, insofar as they were used, this Court has no information as to the way in which they were used and, as a result, is in no position to judge the impact of any declaration that the regulations were *ultra vires*. Fourthly, the regulations have now expired. Finally, the new regulations, drafted in much more limited terms, were introduced after a due process of consultation that included the Children's Commissioner and other bodies representing children's rights.

90. Accordingly, I would propose to allow the appeal and grant a declaration that the Secretary of State acted unlawfully by failing to consult the Children's Commissioner and other bodies representing the rights of children in care before introducing the Amendment Regulations.

LORD JUSTICE HENDERSON

91. I agree.

LORD JUSTICE UNDERHILL

92. I also agree.