

## ***Court of Appeal delivers powerful judgment on consultation in R (Article 39) v Secretary of State for Education [2020] EWCA Civ 1577***

**David Gregory, Barrister, Monckton Chambers**

January 2021

**Khatija Hafesji acted for Article 39**

### **The facts**

As the pandemic took hold in the early part of 2020, the Department for Education had fears for implications of widespread sickness on the ability of local authorities to provide care to vulnerable children. It reviewed the applicable regulations and ultimately proposed a wide-ranging number of changes including:

- relaxing the requirement for social workers to visit children in care in accordance with strict timescales; relaxing the requirement to review plans for children in care to set timescales;
- relaxing the requirement for social workers to visit children in care in accordance with strict timescales;
- enabling local authorities to approve anyone who meets the requirements as a temporary foster carer rather than only those connected to the child;
- relaxing the requirement for monthly independent visits to children's homes;
- extending the period for which children could be placed with emergency foster carers;
- removing the requirement for decisions to place children in care outside the local area to be approved by a nominated officer.

The DfE carried out a short informal consultation of the changes by email with a variety of local authority stakeholders, including the Association of Directors or Children's Services and Ofsted (who carry out inspections of children's homes). However, it did not consult the Children's Commissioner, instead informing her via email that it would be "*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.*"

The regulations came into force on 24 April 2020. On 30 April the Children's Commissioner issued a statement complaining of the minimal consultation undertaken and stating that the changes were unnecessary: "*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.*"

Article 39, a charity whose objects include promoting the protection of children living in institutional settings in England challenged the regulations. At first instance, it alleged that the consultation had been carried out in a one-sided manner and that powers had not been used for their proper purpose of promoting the welfare of vulnerable children.

At first instance the challenge failed on all its grounds. In relation to the alleged failure to consult Lieven J had found that whereas in ordinary circumstances it would have been unlawful not to consult the children's commissioner the focus of the amendments, the extreme urgency and scale of issues facing the DfE mean that it was not an error of law not to consult the children's commissioner.

Article 39's appeal focused on the alleged failure to consult, in particular, the Children's Commissioner.

## **The outcome**

The appeal succeeded.

The Court outlined the four cases in which a duty to consult may arise in accordance with R (Plantagenet Alliance Ltd) v Secretary of State for Justice and others [2014] EWHC 1662: (i) where there is a statutory duty; (ii) where a promise to consult has been made; (iii) where there is an established practice of consultation and (iv) where it would be conspicuously unfair not to.

The Court recalls the three main purposes of consultation: (i) to improve the quality of decision making, (ii) those affected may have a right to be consulted by it and feel injustice if they do not and (iii) consultation is part of a wider democratic process [37].

The court also reminded itself that the role of the Children's Commission is set out in statute. Established in 2004, the role was reviewed as part of the 2010 Dunford report. Part 6 of the Children and Families Act 2014 expanded the role to including:

- advising persons exercising functions or engaged in activities affecting children on how to act compatibly with the rights of children;
- advise the Secretary of State on the rights, views and interests of children; and
- consider the potential effect on the rights of children of government policy proposals and government proposals for legislation [40].

Looking at the facts, the Court was highly concerned that the changes had been described as minor in the email to the Children's Commissioner. This suggested that the DE had not appreciated their full impact: "*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.*" The changes represented a significant change in the substantive vision of services to children. [80]

The duty to consult arose in three ways:

- With regard to some of the changes, there was a **statutory duty** to consult persons considered appropriate. Given some consultation had been carried out it was irrational 'not to include the Children's Commission and other bodies representing children's rights; [83]
- There was an **established practice** of consulting such bodies. [84]
- Given the impact of these proposed amendments on the very vulnerable children in the care system, it was **conspicuously unfair** not to include those bodies representing their rights and interests within the informal consultation. The people affected were some of society's most vulnerable. Organizations set up to represent their interests were better equipped to identify the impacts of the changes than local authorities and care providers. Accordingly, it had been misleading for the DFE's submission to ministers to state that the changes were broadly endorsed by "*the sector*" when such bodies had been excluded. Further, it was irrational not to consult the Children's Commission given her statutory functions. Consultation would have better equipped the Secretary of State to make judgments [85].

The Court declared that the Secretary of State had 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 [90].

## Discussion

This is a landmark decision in the importance of children's rights and the importance of the Children's Commissioner and other bodies in the sector in upholding them. The judgment is likely to be of strategic importance as the government takes steps to carry out its manifesto-promise of a "Care Review".

The Court of Appeal plainly considered that if any consultation is to be carried out, it should not be done in a one-sided manner. However well-intentioned, local authorities and other care providers have a mixed interest in relaxing of safeguards for children since the obligations fall on them and impact their resources. The vulnerable children themselves are some of society's most marginalized and require robust and powerful representation in order to be given a voice.

The Court recognises this and provides a ringing endorsement of the function and role of the Children's Commissioner. It did not matter that the Dunford report had considered and rejected a proposal to include an express statutory duty of consultation. In circumstances where there are substantial effects on the rights of children and any consultation is to be carried out, it will be irrational to exclude the Children's Commissioner.

Moreover, the judgment is not limited to the failure to consult the Children's Commissioner (whose role is bolstered by statute). It was irrational also not to consult "*other bodies representing children's rights.*" These are not defined by the Court but paragraph 7 notes that there was no consultation of "*advocacy groups or lawyers' organisations or any agency or charity involved with children's rights.*" Whilst Article 39's submissions appear to have focused on the Children's Commissioner, it has scored a broader victory meaning that charities such as a itself and also lawyers groups (e.g. the Family Law Bar Association and the Association of Lawyers for Children) should be more readily included during the formative stages of decision making in this area.

The judgment also provides a warning to policy makers against downplaying changes to be made. The DfE had referred in its email to the Children's Commissioner to the changes as "*relaxing some minor burdens.*" By contrast, the Court found the amendments "*represented a significant change in the substantive provision of services to children*" [80]. This misdescription gave the Court the impression that the import of the changes had not been clearly appreciated and made it more ready to find unlawfulness in the scope of the consultation to be carried out.

***The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.***

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Monckton Chambers  
1 & 2 Raymond  
Buildings  
Gray's Inn  
London, WC1R 5NR

Tel: +44 (0)20 7405 7211  
Fax: +44 (0)20 7405 2084  
Email: [chambers@monckton.com](mailto:chambers@monckton.com)  
[www.monckton.com](http://www.monckton.com)