Neutral Citation Number: [2022] EWHC 589 (Admin)

Case No: CO/1777/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2022

**Before** :

**MR JUSTICE HOLGATE**

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**Between :**

**THE QUEEN**

**on the application of**

**ARTICLE 39** **Claimant**

**- and –**

**SECRETARY OF STATE FOR EDUCATION** **Defendant**

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**Stephen Broach and Khatija Hafesji** (instructed by **Irwin Mitchell LLP**) for the **Claimant**
**Joanne Clement and Benjamin Tankel** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 8 and 9 February 2022

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# Approved Judgment

**Mr. Justice Holgate:**

## Introduction

1. Until 8 September 2021 it was permissible for a child up to the age of 18 being "looked after" by a local authority under the Children Act 1989 ("CA 1989") to be placed in an "unregulated setting", subject to the authority being satisfied *inter alia* that the accommodation identified was suitable for that individual child.

2. A "regulated setting" typically refers to placement with a parent, a person with parental responsibility, a foster placement or a children's home. For example, a children's home is regulated because the person by whom it is run or managed must be registered with Ofsted under the Care Standards Act 2000 ("CSA 2000"). An "unregulated setting" refers to independent or semi-independent accommodation such as shared housing, hostels, flats and bedsits, but does not qualify as a children's home requiring registration under CSA 2000. By contrast, the term "unregistered accommodation" is used to refer to accommodation which qualifies as a children's home under the CSA 2000, but is being operated illegally without a certificate of registration from Ofsted (see s.11).

3. Unregulated accommodation has been used for older children who are judged to be suitable for living with a greater degree of independence as part of a transition to adulthood. As of 31 March 2020 there were about 6,390 looked after children aged 16 or 17 and about 100 children aged under 16 living in unregulated accommodation. Those children represented about 8% of the total number of children then being "looked after" under the CA 1989 which was 80,080. This represented an increase in the proportion of looked after children in unregulated accommodation from a level of around 5% in both 2010 and 2015. As at 31 March 2020 about 64,020 children, or 80% of the total number of looked after children, were living in settings regulated by Ofsted, notably children's homes and foster care.

4. The Secretary of State considers that unregulated accommodation is a vital part of the care system for meeting "the needs of older children who are ready to live with an increased level of independence". But by February 2020 he had become concerned about the growing number of children being placed in unregulated accommodation. The concerns included: -

    - the placement of increasing numbers of children in unregulated accommodation unsuited to meeting their needs;

    - the poor quality of some unregulated accommodation;

    - the illegal operation of children's homes without registration under the CSA 2000.

    However, the Department expressed the view that in some cases the illegal operation of a children's home is inadvertent, arising from a misunderstanding as to what provision constitutes "care" for the purposes of the CSA 2000 and so requires to be registered.

5. Accordingly, in February 2020 the Department published a consultation paper "Reforms to unregulated provision for children in care and care leavers". In summary, the department's proposals included: -

    - prohibiting the use of independent and semi-independent accommodation for children under the age of 16;

    - requiring local authorities to use only independent and semi-independent accommodation meeting national standards and Ofsted to check compliance by authorities;

    - alternatively, requiring independent and semi-independent accommodation to be the subject of a registration and inspection regime operated by Ofsted;

    - increasing Ofsted's powers to issue enforcement notices in respect of unregistered children's homes before proceeding to prosecution.

6. At the end of the consultation process the Secretary of State decided to proceed with legislation prohibiting the use of unregulated accommodation for looked after children under 16. The main effect of The Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021 No. 161) ("the 2021 Regulations") is that from 9 September 2021 a local authority's residual power under s.22C(6)(d) of the CA 1989 to place a child in accommodation described as "other arrangements" is restricted in the case of children under 16 to: -

    - a care home;

    - a hospital;

    - a residential family centre;

    - a school providing accommodation not registered as a children's home;

    - an establishment providing care and accommodation as a holiday scheme for disabled children.

    All these types of accommodation are said to be regulated. The use of unregulated accommodation for those under 16, notably independent and semi-independent provision as described above, has become *ultra vires.*

7. Since 9 September 2021 the powers of local authorities to provide accommodation, including unregulated accommodation, for looked after children aged 16 and over remain the same as before.

8. The Secretary of State has taken this course because, in summary, he considers that unregulated accommodation should never be treated as suitable for children under 16, whereas such placements are suitable for *some* 16 or 17 year olds moving towards independence, subject to individual assessment of their needs. In order to address problems identified with some placements in unregulated accommodation, the Secretary of State has decided (1) to introduce a registration and inspection regime based on new national standards and (2) to remind local authorities that the use of

unregulated accommodation is subject to their statutory obligations to place a child in the placement which is the most appropriate placement available and suitable to meet the needs of that child (see [34] and [50] below).

9. Article 39, the claimant, is a charity which seeks to promote and protect the rights of children living in institutions. It takes its name from Article 39 of the UN Convention on the Rights of the Child.

## The grounds of challenge

10. The claimant has sought judicial review of regulation 27A of the 2021 Regulations on a number of grounds, which may be summarised as follows: -

**Ground 1**

(a) By definition, a child who is looked after under the CA 1989 is in need of care and care must be provided in the home where they live. Care in the CA 1989 and in the CSA 2000 have the same meanings. One consequence of the requirement to provide care *in situ* is that children who do not live with a parent or foster parent cannot be placed in an unregulated setting. They must be placed in a children's home or in one of the regulated facilities referred to in [6] above;

(b) The difference in treatment in the 2021 Regulations between children above and below the age of 16 is based on no evidence and is irrational.

**Ground 2**

The defendant failed to comply with the public sector equality duty ("PSED") in s.149 of the Equality Act 2010 in that he failed to consider whether equality of opportunity would be advanced by extending the ban in the 2021 Regulations on placements in unregulated accommodation to 16 and 17 year old children.

**Ground 3**

(a) The consultation carried out by the defendant was unfair and unlawful because the defendant failed to consult on an option which had been discarded, namely banning placements in unregulated accommodation for children aged 16 or 17 as well as those aged under 16;

(b) The Secretary of State failed to consider conscientiously the views of children and young people expressed in the consultation exercise.

11. When this judgment was circulated in draft the claimant's counsel contacted the court to say that ground 1(a) had *never* formed part of the claimant's case, although they did acknowledge that the defendant submissions had proceeded on the basis that it had. I had certainly understood the claimant's opening of its case to have raised the arguments I have summarised as ground 1(a). Mr Broach asked the court to delete any reference to ground 1(a) and for the judgment not to express any conclusions on those matters. I do not consider that that would be the right course to take.

12. Parts of the claimant's pleadings did involve contentions which I have summarised as ground 1(a) (see e.g. paras. 2 to 6 of the Statement of Facts and Grounds and paras.

4 and 11 of the Reply). This was noted by the defendant in, for example, paragraph 5 of his Detailed Grounds of Defence, where it was described as a central issue. The defendant's understanding of the claimant's case was repeated in his skeleton argument (e.g. paras. 30, 33 and 42).

13. Mr Broach, who together with Ms Hasfeji appeared for the claimant, developed this line of argument when he opened the case, as I noted during the hearing and have summarised under ground 1(a) below. The extracts now provided to the court from the note of the opening prepared by the claimant's Solicitor do not cover the parts where those submissions were made. Ms Clement, who together with Mr. Tankel appeared for the defendant, replied orally to those submissions. She also helpfully analysed the statutory framework in some detail. In his oral submissions in reply Mr Broach disavowed any reliance upon the arguments I have summarised under ground 1(a). But that simply contradicted what had been said in the claimant's opening, without adequately explaining why the submissions had been made in the first place.

14. In the circumstances, Mr Broach's suggestion that Ms Clement had "wrongly" imputed to the claimant the arguments under ground 1(a) is unfair. I should also add that it was not straightforward for the defendant to reply to the claimant's case. This was not because of any intrinsic merits in any of the claimant's legal arguments. Rather the problem was the lengthy and diffuse nature of the claimant's pleadings and arguments, in which legal analysis and submissions were interspersed with views on the merits of the defendant's policy approach. In *R (Dolan) v Secretary of State for Health* [2021] 1 WLR 2326 at [116]-121] Lord Burnett CJ expressed serious concerns about the culture of prolixity and complexity in documentation for judicial review claims which has the effect of concealing rather than illuminating the case actually being advanced. This makes the task for the court more difficult and can be wasteful of costs. In the present case grounds 1(b), 2 and 3 raised relatively short points which could have been dealt with succinctly, largely by reference to the contemporaneous documents and a modest number of authorities.

15. Yesterday Ms Clement suggested that logically ground 1(a) was a necessary part of the claimant's argument under ground 1. I disagree. The propositions in ground 1(a) and ground 1(b) are freestanding matters and this judgment deals with them on that basis. I therefore agree with Mr Broach that the legal merits of ground 1(b) and (also grounds 2 and 3) are not affected by my views on ground 1(a). However, given the unsatisfactory way in which the issue concerning ground 1(a) has arisen, and for the avoidance of any doubt on the matter, I consider that the court should express its reasoning on the submissions initially made for the claimant, as summarised under ground 1(a).

**Other issues raised in this case**

16. The claimant and other supporting organisations are firmly of the view that unregulated accommodation is unsuitable for all children and not simply those under 16. Their objective is that the provisions enacted by the 2021 Regulations for children under 16 should be extended to all children looked after under the CA 1989. However, the claim form sought an order quashing the 2021 Regulations and a declaration that they are unlawful. During the hearing the claimant recognised that that relief would not achieve its objectives and, indeed, would have the disadvantage of instantly removing the prohibition against using unregulated accommodation for

children under 16. As a result, Mr. Broach said that, if successful, he would ask for declaratory relief to enable the Secretary of State to respond to the court's judgment. But he also indicated that he might ask for a suspended quashing order. I would only comment that, whether immediate or suspended, a quashing order would not provide the real relief which the claimant seeks, which is, essentially, an extension of the change introduced by the 2021 Regulations.

17. Ms. Clement raised another practical consideration of great importance. If it were to be unlawful for children of *any* age looked after under the CA 1989 to be accommodated in an unregulated facility, "there is already a nationwide shortage of regulated placements and extending the ban to all children would require approximately 6,000 new placements in children's homes or foster care to be created" (paragraph 3(2) of skeleton). The court was told that it would take several years to provide such places. The claimant goes further, suggesting that the existing shortage, which is not a new situation, is one of the reasons why firstly, some children are placed in unregulated accommodation which is unsuitable to meet their needs and secondly, some unregulated facilities are operating illegally by providing care services which require registration under the CSA 2000.

18. It is essential to see the legal issues raised by the current claim for judicial review and the claimant's broader concerns in the correct perspective.

19. Where a facility operates as an unregistered children's home, a criminal offence is committed under s.11 of the CSA 2000 for which a sanction is provided. Where a child is placed inappropriately in unregulated accommodation, the statutory scheme does provide remedies which Parliament has judged appropriate to deal with that situation and, of course, a local authority may not act in breach of the statutory duties which it owes to that child. The current shortage of regulated placements exists irrespective of the enactment of the 2021 Regulations, or any decision made by this court as to whether those Regulations are lawful or not. The same applies to any increase in that shortage were it to be decided that fewer, or even no, 16 or 17 year olds should be placed in unregulated accommodation. Even if the 2021 Regulations had not been conceived of, these broader issues would still exist. They are issues which fall exclusively within the domain of Parliament and the Executive.

20. It is appropriate to repeat what was said in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 553 at [6]: -

> "It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully. The

> claimant contends that the changes made by the SIs are radical and have been the subject of controversy. But it is not the role of the court to assess the underlying merits of the proposals. ……"

21. The claimant has provided the court with substantial evidence from a number of witnesses: Ms Willow (for the claimant), Ms Nash (for Mind), Mr. Gunn (for Together Trust), Ms. Pritchard (for the Refugee and Migrant Children's Consortium) and persons who have first hand experience of the care system, CU, DN and MB. They provide useful information to help the court appreciate some of the issues and concerns which lie behind this litigation. But in the light of the explanation I have given above, I hope that everyone concerned will understand that a good deal of this material raises matters which fall well outside the scope of this claim for judicial review and upon which it would be inappropriate for the court to comment.

22. I will summarise the statutory framework before going on to consider the factual background and the grounds of challenge.

## Statutory Framework

*Children Act 1989*

23. Section 17 is to do with the provision of services by local authorities for children in need and their families. Subsection (1) provides that: -

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part) —
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs."

24. A "child in need" is defined in section 17(10) and (11). The expression includes a child who is disabled, or a child who is unlikely to achieve or maintain a reasonable standard of health or development, or whose health or development is likely to be significantly impaired, unless he is provided with services by a local authority under Part III of the Act. "Development" means "physical, intellectual, emotional, social or behavioural development". This is a "target" duty, not a duty owed to each individual child in need (*R (G) v Barnet London Borough Council* [2004] 2 AC 208 at [91] – [94] and [107] – [109]). Section 17 deals with the range of services which are to be provided by an authority (see also Part 1 of Schedule 2).

25. Section 22 imposes general duties on a local authority in relation to children looked after by them. By section 22(1) a child "looked after" by a local authority is a child who is (a) in their care by virtue of a care order made under s.31 or (b) provided with accommodation by the authority in the exercise of their social services functions, notably s.20 of the CA 1989. Section 22 (3) and (3A) address obligations in relation to welfare and services: -

> "(3) It shall be the duty of a local authority looking after any child—
>
> (a) to safeguard and promote his welfare; and
>
> (b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case.
>
> (3A) The duty of a local authority under subsection (3)(a) to safeguard and promote the welfare of a child looked after by them includes in particular a duty to promote the child's educational achievement."

Section 22(4) and (5) require a local authority, before making any decision about a child they are looking after, to ascertain as far as reasonably practicable the wishes and feelings of the child, his parents and any person with parental responsibility and to give due consideration to such matters.

26. Section 20 deals with the provision of accommodation. Subsection (1) provides: -

> "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of —
>
> (a) there being no person who has parental responsibility for him;
>
> (b) his being lost or having been abandoned; or
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

27. Section 20(3) imposes a specific duty to provide accommodation for a 16 or 17 year old child in need: -

> "(3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation."

28. Section 20(6) addresses the wishes of the child in relation to accommodation: -

> "(6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—
>
> (a) ascertain the child's wishes and feelings regarding the provision of accommodation; and

> (b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain".

29. Section 20(7) and (8) enable a person with parental responsibility for a child in need to provide accommodation for that child instead of the local authority, but subject to the autonomy which sub-section (11) accords to a child aged 16 or 17: -

> "(7) A local authority may not provide accommodation under this section for any child if any person who—
>
> (a) has parental responsibility for him; and
>
> (b) is willing and able to—
>
> (i) provide accommodation for him; or
>
> (ii) arrange for accommodation to be provided for him,
>
> objects.
>
> (8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section."

30. The Children and Young Persons Act 2008 ("the 2008 Act") substituted sections 22A to 22G for section 23 of the original version of the CA 1989.

31. Section 22A imposes a duty on a local authority to provide accommodation for a child who is in their care (i.e. by virtue of a care order under s.31).

32. Section 22B requires a local authority to maintain a child they are looking after in other respects apart from the provision of accommodation.

33. Section 22C provides for ways in which a looked after child is to be accommodated and maintained. It sets out a hierarchy of potential placements. First, under s.22C(2) a local authority must make arrangements for a child to live with a person falling within subsection (3) unless that would not be consistent with the child's welfare or would not be reasonably practicable (s.22C(4)). A person falls within s.22C(3) if he or she is a parent of, or has parental responsibility for, the child, or is named in a "child arrangements order" as a person with whom a child in local authority care is to live.

34. Where a local authority is unable to make arrangements for a child under s.22C(2) and (3), they must choose the placement which is, in their opinion, "the most appropriate placement available" (s.22C(5)). Section 22C(6) defines "placement" so as comprising the following alternatives: -

> "(a) placement with an individual who is a relative, friend or other person connected with [the child] and who is also a local authority foster parent;

> (b) placement with a 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 section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section."

35. The present case is concerned with placement "in accordance with other arrangements" under s.22C(6)(d). When this provision was inserted into the CA 1989, paragraph 40 of the Explanatory Notes to the 2008 Act stated that placements under s.22C(6)(d) could include "supporting young people to live independently in rented accommodation, residential employment or in supported lodgings/hostels".

36. Subject *inter alia* to their duties under s.22, when determining the most appropriate placement available for a child, a local authority is required by s. 22C(7) to give preference to a placement within s.22C(6)(a). So far as is reasonably practicable, they must also comply with subsections (8) and (9): the placement must be in the local authority's area, allow the child to live near his home, not disrupt his education or training, enable the child to live with any siblings and, if disabled, be suitable for his particular needs.

37. It is to be noted that the provisions dealing with accommodation or placement do not mandate that any form of care must necessarily be provided *in situ*, although that is implicit in certain types of placement.

38. Section 22G imposes a general duty on a local authority to take steps to secure, so far as reasonably practicable, that they are able to provide children they are looking after with accommodation to meet their needs within the authority's area. The authority must have regard to the benefit of having a number of accommodation providers and a range of accommodation capable of meeting different needs that is, in their opinion, sufficient to secure that outcome.

39. Section 23ZA imposes a duty on a local authority to ensure that a child they are looking after is visited by a representative who is to arrange for appropriate advice, support and assistance. Under s.23ZB a local authority may be required to appoint an independent person to be a visitor for a looked after child and who can provide advice.

40. Where a local authority is looking after a child, section 25A(1) requires the local authority to appoint an "independent reviewing officer" ("IRO") for that child's case. Under s.25B(1) the IRO must monitor the local authority's performance, participate in any review, and ensure that the authority gives due consideration to the wishes of the child. The IRO may refer a child's case to the Children and Family Court Advisory and Support Service ("CAFCASS"). Section 26 provides for a complaints procedure.

41. Paragraph 19B of Schedule 2 to the CA 1989 imposes additional obligations on a local authority in relation to a child aged 16 or 17 who has been looked after by the authority for a certain amount of time. The authority has to carry out an assessment of the child's needs to determine what advice, assistance and support should be provided both while they are still looking after him and after they cease to do so. The authority must prepare a "pathway plan". Section 23E provides for the content of such plans. Once again, the legislature has accepted the need for differential treatment as a 16 or 17 year old child approaches 18.

*The Care Planning, Placement and Case Review (England) Regulations 2010*

42. I have already referred to the duty of a local authority in s.22 to safeguard and promote the welfare of a child they are looking after. The substance of that obligation, in particular placement and the provision of care, is dealt with in The Care Planning, Placement and Case Review (England) Regulations 2010 (SI 2010 No. 959) ("the 2010 Regulations").

43. Part 2 of the 2010 Regulations deals with arrangements for looking after a child. They cover care planning (regulation 4), care plans (regulation 5) and health care (regulation 7). Part 3 contains general provisions dealing with placements, including placement plans. Part 4 contains specific provisions dealing with different types of placement. Chapter 3 of Part 4 deals with placements in accordance with "other arrangements" under s.22C(6)(d), including the amendment inserted by the 2021 Regulations which the claimant seeks to impugn.

44. By regulation 4(1) where a child looked after by an authority is not in their care under s.31, the authority must assess the child's needs for services to achieve or maintain a reasonable standard of health or development (see s.17 of CA 1989), and prepare a care plan. By regulation 4(3) the assessment of need must consider whether a placement meets the requirements of Part 3 of the CA 1989, which includes s.22C. Once again the legislation respects the increasing autonomy of a child aged over 16. Where such a child has agreed to be provided with accommodation under s.20, the care plan should be agreed with him.

45. Regulation 5 deals with the content of a care plan. It must include *inter alia* the arrangements made by the authority to meet the child's needs in relation to health ("health plan" in paragraph 1 of schedule 1), education and training ("education plan" in paragraph 2 of schedule 1), emotional and behavioural development, identity, family and social relationships, social presentation and self-care skills.

46. Regulation 6(1) requires the care plan to be kept under review. Under regulation 6(3) the authority must give a copy of the plan to *inter alia* the IRO and, where a child is placed in accordance with "other arrangements" under s.22C(6)(d), to "the person responsible for [the child] at the accommodation".

47. Regulation 7 requires the preparation of a health assessment for a looked after child covering the matters set out in schedule 1, including "the role of the appropriate person, and of any other person who cares for [the child] in promoting [the child's] health". The "appropriate person" includes the person responsible for a child placed in s.22C(6)(d) accommodation (regulation 2(1)).

48. Before accommodation arrangements are made for placing a looked after child in accordance with s.22C, a placement plan must be prepared under regulation 9 setting out how the placement will "contribute to meeting" the child's needs and including the matters set out in schedule 2 as applicable. Thus, the legislature plainly recognised that not all of a child's needs for which the authority is responsible under CA 1989 will necessarily be met by or at the placement where the child is placed, or by the provider of the placement. Health, education and training needs are obvious examples.

49. Paragraph 1 of Schedule 2 requires the placement plan to state *inter alia* how on a day to day basis the child "will be cared for" and how his or her welfare "will be safeguarded and protected by the appropriate person". The plan must also record arrangements made for visits by the authority's representative under s.23ZA and by any independent visitor under s.23ZB, and for support and assistance between visits. Paragraph 3 of Schedule 2 requires that where a child is placed in s.22C(6)(d) accommodation, the name of the person responsible for the child at that accommodation and the authority's arrangements for the financial support of the child are to be included in the placement plan.

50. Part 4 of the 2010 Regulations deals with different types of placement. Chapter 3 deals with placement in "other arrangements" under s.22C(6)(d). Regulation 27 provides: -

> "Before placing [a child] in accommodation in accordance with other arrangements under section 22C(6)(d), the responsible authority must –
>
> (a) be satisfied that the accommodation is suitable for [that child] and, where that accommodation is not specified in regulation 27A, must have regard to the matters set out in Schedule 6;
>
> (b) unless it is not reasonably practicable, arrange for [that child] to visit the accommodation, and
>
> (c) inform the IRO"

51. The matters specified in schedule 6 include the facilities and services provided, safety, location, support, tenancy status, the financial commitments involved for the child and their affordability, and also the child's: -

> (a) views about the accommodation;
>
> (b) understanding of rights and responsibilities in relation to the accommodation; and
>
> (c) understanding of funding arrangements.

Plainly these last three factors will be highly relevant to the suitability of a placement providing a greater degree of independence for a child. The obligations under section 23ZA and s3ZB to provide support through formal arrangements for visitors may also

be relevant (see [39] above). Regulation 28 imposes requirements in relation to visits to a child by a local authority's representative. The placement plan must set out the arrangements made for those visits and for the making available of advice, support and assistance to a child between visits (paragraph 1(5), (6) and (8) of schedule 2).

52. The claimant seeks to impugn regulation 27A which, in relation to England, provides: -

> "A responsible authority may only place a child under 16 in accommodation in accordance with other arrangements under section 22C(6)(d), where the accommodation is –
>
> (a) in relation to placements in England, in –
>
> (i) a care home;
>
> (ii) a hospital as defined in section 275(1) of the National Health Services Act 2006;
>
> (iii) a residential family centre as defined in section 4(2) of the Care Standards Act;
>
> (iv) a school within the meaning of section 4 of the Education Act 1996 providing accommodation that is not registered as a children's home;
>
> (v) an establishment that provides care and accommodation for children as a holiday scheme for disabled children as defined in regulation 2(1) of the Residential Holiday Schemes for Disabled Children (England) Regulations 2013;"

53. Regulation 27B allows an unaccompanied asylum seeker whose age is uncertain and who claims to be 16 or 17 to be placed in accommodation under s.22C(6)(d) unless and until their age is assessed as being under 16.

*Care Standards Act 2000*

54. By s.1(2) an establishment is a "children's home" (subject to the remainder of section 1) if "it provides care and accommodation wholly or mainly for children". Section 1(3) excludes from that definition a home used by a parent or relative or foster parent to care for and accommodate a child. Section 1(4) excludes a hospital within the National Health Service Act 2006 and a residential family centre. Schools used to provide accommodation may fall within the definition of a care home (s.1(5) and (6)).

55. However, the CSA 2000 does not contain any definition of "care". The court was told that that concept is not defined or addressed in detail in any delegated legislation under that statutory scheme. The position stands in marked contrast to the scheme created by the CA 1989, where the matters to which the terms "welfare" and "care" are applied are described in considerable detail.

56. In some circumstances a child may be accommodated in a "care home". An establishment is a care home if it provides accommodation, together with "nursing or personal care" for persons who are or have been ill, or dependent on alcohol or drugs, or who have or have had a mental disorder, or who are disabled or infirm (s.3(1) and (2)). A hospital within the National Health Service Act 2006 or a children's home is excluded from the definition of care home (s.3(4)).

57. By s.5 Ofsted is the registration authority for *inter alia* children's homes and residential family centres.

58. Section 11 imposes the requirement to apply for and obtain a certificate of registration, supported by a criminal sanction for non-compliance.

59. Ofsted has produced a guidance document "Introduction to Children's Homes". The court was shown the version issued in November 2021. The guidance has been issued for the purposes of explaining the statutory scheme under CSA 2000. It has not been issued for the purposes of the regime under the CA 1989. It does not purport to explain what provision could properly fall within s.22C(6)(d) of the CA 1989, and, in particular, unregulated provision (i.e. provision outside the establishments specified for under 16 year olds in regulation 27A of the 2010 Regulations).

60. The document provides guidance on a distinction drawn by Ofsted between a children's home requiring registration under s.11 of CSA 2000 and "supported accommodation" which does not. The guidance describes a variety of indicators which point towards one category or the other. For example, the fact that a young person can leave an establishment without permission or has full control of their finances are indicators that they live in "supported accommodation", whereas the opposite position would indicate that care is provided for the purposes of the CSA 2000. Some of the answers in a particular case to the questions posed could pull in different directions and, presumably, an overall view would need to be taken. Plainly there are issues of judgment and fact and degree involved.

## Factual Background

*Ministerial briefing September 2019*

61. On 6 September 2019 officials provided a briefing to the Secretary of State. They advised that much unregulated accommodation is of good quality and can provide a suitable alternative for older children as part of a planned transition to a situation where care is not provided. However, concern was expressed that some young people were not receiving the level of support they need, particularly if they are placed in an unregulated setting in the area of a different local authority (paras. 9-10).

62. The briefing produced and summarised a draft research report. That research included discussion with 42 interviewees connected with 22 local authorities, including some looked after children. It also pointed to a lack of suitable accommodation for children with the most complex needs, for example secure children's homes, as opposed to "regular" children's homes and foster care.

63. Officials recognised that children were being placed in unsuitable "unregulated" or "unregistered" settings and set out steps being taken to address those issues.

However, providers had sounded a note of caution. Full regulation of unregulated provision might lead to good providers being pushed out of the market. Furthermore, regulation of independent and semi-independent provision as children's homes would not allow for independent living arrangements.

64. Most of the local authorities reported that while there are many examples of high-quality unregulated provision, overall the quality is highly variable. The least issues occur where a local authority works closely and collaboratively with their unregulated providers to ensure that the provision aligns with the authority's requirements and meets their quality criteria.

65. The court was taken to examples from the research carried out showing that there are young people who do wish to live in independent or semi-independent accommodation. One authority reported that some young persons are going into care for the first time at the age of 16 or 17 and are adamant they do not want to live in a children's home or in foster care. Some have previously lived in such settings, have done well there and are ready to move to semi-independence. Another authority only used unregulated accommodation for 17 year olds judged to be ready for semi-independent living. A third authority explained that even if a child aged 16 said that they wanted to move into semi-independent accommodation, it was the authority's own assessment and care plan which determined whether they would make that move. The authority was committed to keeping children in foster care or a children's home if that was the appropriate placement. Some local authorities operated their own unregulated provision which they controlled directly.

66. The briefing also described some common examples of good types of unregulated accommodation. "Supported lodgings" enable a young person to live in a family home, experiencing domestic life in a shared and supportive environment but with a lower level of monitoring than in foster care.

67. "Supported" accommodation typically has multiple rooms and staff on site, often 24/7, with experience in helping young people to develop independent skills. Such accommodation does not provide care by providing meals, managing money and laundry, or granting permission to go out or stay away overnight. Young residents provide peer support to each other on accessing services and facilities. Staff and health providers may organise sessions to support the development of independent living and social skills and to support homework.

68. "Shared housing" is a multi-occupancy house, shared between young people to provide peer support, "with additional visiting support" which should be tailored to meet individual needs. This type of accommodation enables a young person to live "very independently". A young person may move into shared housing after a period in a placement with more supervision so that their independent living skills and ability to manage their own health needs can be fully assessed first.

69. I note that some of the evidence filed by the claimant indicates that there are sometimes problems with shared housing, not least a lack of support. But that raises an issue as to whether the authority concerned had properly assessed the suitability of that type of placement for a particular child. I fully appreciate that there are differing views on matters such as these.

70. The briefing also referred to reports indicating that where children are placed in unregulated settings and not provided with adequate support, there may be a risk of grooming by criminal gangs and child sexual exploitation. The briefing referred to discussions which had already taken place at Ministerial level on, and the media interest in, this subject. The briefing proceeded on the basis that Ministers were already well aware of those concerns. The documents which followed, and which led on to the making of the 2021 Regulations, continued to emphasise the need for children placed in independent or semi-independent accommodation to be safe.

*Ministerial briefing October 2019*

71. Officials provided further briefing to the Secretary of State on 30 October 2019. They advised that independent and semi-independent provision plays an important role in the social care system for children. There will continue to be a need for these settings, providing high quality support for older children as they move towards independence and providing "vital flexibility" for local authorities. However, measures were needed to ensure quality assurance and that placements are appropriate for those who are ready to live with some independence. Since March 2019 the Department had obtained more evidence about the use of this provision. A roundtable discussion had taken place with the sector. There was agreement within the sector that much of the use of independent and semi-independent unregulated accommodation is appropriate and that high quality care is provided.

72. However, the briefing recognised that the lack of a regulated place for a child sometimes drives a decision to make a placement in unregulated accommodation which is unsuitable in terms of quality, supervision or in relation to the age of the child. Accordingly, an important part of the Department's response should be to ensure that there are sufficient suitable placements available.

73. Paragraph 16 of the briefing expressed particular concern about children under the age of 16 being placed in unregulated settings. Mr. Broach placed emphasis upon a sentence which stated that "it is implicit that children under 16 require care" and therefore should be placed in lawfully registered rather than unregulated or unregistered settings. He sought to suggest that officials were taking the erroneous view that looked after children aged 16 or 17 did not require care and that this had then formed part of the basis for a cut-off in the subsequent 2021 Regulations prohibiting placements of those under 16 in unregulated settings. When the sentence criticised is read as part of the overall briefing to the Secretary of State as it should be, and not wrenched out of context, it is plain that officials made no such error. When the document is read fairly and as a whole, it is clear that officials appreciated that (1) children aged 16 or 17 may continue to need care (under the regime in the CA 1989) and (2) some of those children need to be in children's homes or in foster placements, but (3) others may appropriately be placed in an unregulated setting of appropriate quality. Their advice remained consistent with the 2021 Regulations which emerged.

74. In the October 2019 briefing officials included policy options for the Secretary of State to consider which resulted in the consultation exercise in February 2020.

*The research report February 2020*

75. When that consultation exercise began the Department published the final version of the research report which the Secretary of State had seen in September 2019: "Use of unregulated and unregistered provision for children in care", authored by Professor David Greatbatch and Sue Tate.

76. The report reviewed statistics kept by the Department. As at 31 March 2019 99% of those living in independent settings and 97% of those in semi-independent settings were aged 16 or 17. There was a higher proportion of boys living in such accommodation (72% in independent and 70% in semi-independent) compared to the national average for all looked after children (56%)). There was a higher proportion of Asian, Asian British, black or black British and other ethnic groups living in independent or semi-independent accommodation compared to the national average.

77. The report identified (section 2.2) some "evidence gaps", including (1) the reasons why 16 or 17 year olds are placed in unregulated settings, distinguishing between those who are transitioning to independence and those placed in such settings for other reasons and (2) the reasons why children under 16 are placed in settings other than registered homes. The authors envisaged that such data would be collected for each local authority and at the national level. However, they did not suggest that these "evidence gaps" in any way detracted from their ability to reach the conclusions they did on the research they had carried out.

78. In their conclusions (section 7) the authors said: -

> "All the LAs involved in this research use unregulated provision, although some of what they assert to be 'unregulated' may actually fall within the Ofsted definition of 'unregistered'. For most LAs, this type of provision is being used in accordance with regulations as a positive choice to support young people aged 16 and 17 to transition to independence. The extent to which it is used in this way varies depending on the extent to which LAs have a policy that encourages all children in care to remain looked after until age 18."
>
> "While many LAs report that their use of unregulated provision to support care leavers to transition towards independence has positive outcomes, interviewees identified concerns about unregulated provision when used as a last resort for children and young people with more complex needs. While LAs said that they took every step necessary to ensure young people in such provision had the support they needed, including through providing or commissioning additional support to that offered by the provider, they were clear that their preference would have been to place in registered provision."
>
> "A majority of LAs believe that some form of regulation is required to ensure the quality of currently unregulated provision, with most suggesting the introduction of a national framework underpinned by standards – an option which Ofsted identified as the minimum that should be in place in their 2018 annual report. This is consistent with the recommendations of the Children's

> Society, which has called for appropriate standards, regulation and inspection for the unregulated sector (Children's Society, 2015b). There was a strong current of opinion amongst those that took this view, however, that regulation would need to be light touch in order to avoid exacerbating the current situation through higher prices, due to the costs of complying with a regulatory framework, and reduced supply of provision, due to providers withdrawing from the market and using their properties in different ways to avoid the framework."
>
> "Most of the LAs reported that, while there are many examples of high-quality provision in the unregulated sector, overall the quality is highly variable. The LAs that reported the fewest issues were those that said they had developed close relationships with their core providers and work collaboratively with them to ensure that their provision is aligned with the LAs' requirements and meets the LAs' quality criteria. It would be worth considering how good practice could be identified and shared across LAs".

79. The body of the report shows how these findings were based upon the research work carried out, including the 42 interviews spread across 22 local authorities. For example, 18 out of 22 authorities used unregulated settings for 16 or 17 year olds with skills for independent living but still having some support needs. The data also showed unregulated placements being used by 11 authorities where registered provision was not available.

80. On page 23 of the report the authors said this: -

> "LAs were fairly evenly split between those who thought those placed in unregulated settings had more complex needs and those who thought there was a mixture of those close to independence and those with complex backgrounds, multiple issues and often a history of placement breakdown. Only one LA thought that generally those in unregulated provision had fewer complex needs. The split centres on whether the LA makes systematic use of semi-independent accommodation; where they do so, they are likely to have young people in unregulated provision as a positive choice as a transition to adulthood"

The claimant sought to draw a number of inferences from a partial quotation of this paragraph (see paragraph 34 of skeleton) which do not fairly reflect the text as a whole or the data upon which it is based. However, it is unnecessary in this judgment for me to delve into this material because Mr. Broach did accept, rightly, that what he described as "admissions" made by local authorities could reflect poorly on their decision-making in respect of individual children. As I have explained previously, that is not a point which goes to the legal validity of the regulations which the claimant seeks to impugn. Any remedy for that issue does not lie in these proceedings.

*The consultation document February 2020*

81. The consultation document published in February 2020 sought views on measures proposed to ensure that the use of independent and semi-independent placements provide the right level of support and do not place "children in care" (or rather looked after children) at risk. The document stated that such children are amongst the most vulnerable in society and they should have access to a stable and secure placement in accommodation that meets their needs and keeps them safe. The Department said that unregulated placements form "a vital part of the care system in meeting the needs of older children who are ready to live with an increased level of independence". However, Government was concerned that independent and semi-independent settings are not always of a sufficiently high quality and sometimes are inappropriately used because they do not meet the needs of particular children.

82. The document consulted on a proposal to prohibit the use of unregulated accommodation for children under 16 and at the same time explained why such a placements is sometimes suitable for children aged 16 and over. It may be appropriate "where it is part of a carefully managed transition to independence *as part of their care plan"* (emphasis added).

83. The document also consulted on the introduction of national standards for unregulated placements and methods of enforcing those standards. In particular, it proposed the introduction of a "protection of children and young people standard". This would include requirements for enhanced DBS checks and "fit and proper" assessments for personnel, for procedures to be in place to protect young people against abuse, neglect and exploitation, and for reporting incidents.

84. Mr. Jonathan Bacon, the Deputy Director for Looked After Children at the Department has explained the steps taken to obtain views of people with personal experience of the care system under CA 1989 (First witness statement at para. 35 *et seq.*). The Department worked with a number of NGOs to achieve this. There were 17 focus groups involving some 165 care experienced young persons. He also explains that the diversity in the range of approaches used by organisations to obtain the views of young people meant that they could not be analysed and reported in the same way as the written responses to the consultation. Instead, a "summary" of the feedback from young people was prepared. While that summary document was not placed before the Secretary of State prior to the decision to make the 2021 Regulations, officials relied upon the findings of that exercise to inform their advice to ministers (see e.g. the briefing dated 14 July 2020 referred to below) and in the drafting of the formal Consultation Response document (see para.39 of Mr. Bacon's first witness statement).

85. Ms. Clement showed the court a sample of the responses contained in the summary document. Not surprisingly, a range of views were expressed. But the Department's summary seems to me to be fair. Most young people felt that under 16 was the right age for a ban on unregulated placements. Some felt that "guidance" should discourage the use of such placements for those aged 16 to 18. It was said that while most 16 to 17 year olds should be in foster care or children's homes, unregulated provision could be appropriate for some young people.

*Ministerial briefing July 2020*

86. In the briefing to the Secretary of State dated 14 July 2020 officials stated that "the vast majority" of consultation responses supported the proposed reforms. Accordingly, it was recommended that the placement of under 16 year olds in unregulated accommodation be banned (supported by 80%), new mandatory standards should be introduced and enforced by Ofsted (70%), and Ofsted should have new powers to take enforcement action against illegal unregistered providers (85%). In addition 20% of respondents, particularly some "advocacy groups" and the Children's Commissioner, supported the banning of unregulated accommodation for *all* children. Officials advised against taking that course because there is a place in the care market for independent and semi-independent settings to meet the needs of those ready for that type of provision, a view supported by most respondents. It was also a view supported in the additional engagement with 160 young people.

*Ministerial briefing February 2021*

87. On 2 February 2021 the Secretary of State accepted the recommendation. On 16 February 2021 he received further briefing which included the Equalities Impact Assessment, the Child's Rights Impact Assessment and the Explanatory Memorandum for the draft Regulations. This led to the publication of the Department's Consultation Response and the laying of the 2021 Regulations before Parliament on 19 February 2021.

*Consultation Response*

88. The relevant passages in the Consultation Response were to substantially the same effect as the briefing supplied to the Secretary of State on 14 July 2020. However, the document described those in favour of a complete ban on the use of unregulated placements for all children as "a small group". The Department disagreed with that view, saying that this type of provision, when it involves "high quality tailored support for older children, is an important part of the care system and is vital in ensuring that there is a range of placement options that reflect the diverse needs of the children in care and care leaver cohort aged 16 and 17".

89. The Secretary of State's Foreword referred to concerns over the safety of young persons in unregulated settings and the need for national standards to address this and other issues concerned with the quality of provision.

90. Professor Greatbatch and Sue Tate also prepared an "analytical report" on the consultation exercise. Ms. Clement showed the court key passages from that document. They substantiated the summary of the outcome of the consultation exercise in the briefings provided to the Secretary of State and in the Department's Consultation Response. I note one additional point. Over 60% of respondents provided examples of good practice relating to unregulated provision, firstly, by local authorities ensuring the quality of providers and secondly, the provision of high-quality support.

*National Standards*

91. For completeness, Mr Bacon has explained the steps which have been taken since the making of the 2021 Regulations to consult upon and formulate national standards for

independent and semi-independent provision. However, those matters do not fall within the scope of this claim for judicial review.

## Ground 1

*Ground 1(a)*

92. In his opening of the claimant's case, Mr. Broach submitted that all looked after children require care in accordance with a care plan and not simply accommodation under s.20. Where a child lives with a parent or foster parent in their home, care is provided *in situ*. The same applies where a looked after child is accommodated in a children's home. Mr. Broach pointed out that where a child is placed under s.22C(6)(d) in "other arrangements", they will still need care appropriate for their needs and that some of that care will need to be provided *in situ*. He then said that where "care" is provided in unregulated accommodation, the situation would fall within the definition of a children's home for the purposes of the CSA 2000. He suggested that it is legally impossible to discharge the obligations in the CA 1989 to provide care as well as accommodation in premises which are unregulated.

93. Any suggestion that the use of unregulated accommodation for children with care needs must be treated as a children's home is incorrect. First, s.22(6)(c) refers to a children's home under the CSA 2000. So when s.22(6)(d) refers to "other arrangements" Parliament must have meant something other than a children's home under the CSA 2000. The words mean what they say. Parliament did not explicitly enact sub-paragraph (d) and provide for the making of regulations only for those provisions to be completely redundant. As Ms. Clement pointed out, in *A Mother v Derby City Council* [2021] EWCA Civ 1867, the Court of Appeal decided that a children's home registered under CSA 2000 falls within s.22C(6)(c), not (d), and that an unregistered children's home falls outside s.22C altogether (see [42] and [73]-[80]).

94. Secondly, the argument assumes that whatever care is provided for a looked after child under the CA 1989 automatically qualifies as "care" within the meaning of s.1(2) of the CSA 2000. At one point, Mr. Broach submitted that the use of the word "care" in the two statutory schemes is synonymous. I do not agree. In the scheme established by the CA 1989 the legislature has spelt out in great detail what is meant by "welfare" and "care" and their different aspects. By contrast, in the CSA 2000 Parliament has not provided any definition of "care". It has not sought to read across the meaning of "care" under the scheme created by the CA 1989 to the use of the word "care" in the CSA 2000. That cannot have been accidental. Section 1 of the CSA 2000 is primarily concerned to define a children's home and "care" is used in s.1(2) in that context. No doubt that term refers to care of the kind that would be found in a children's home. There is no reason to assume that every aspect of care which has to be provided to meet the needs of a looked after child under the CA 1989 is of such a kind that it would necessarily have to be provided in a children's home or, indeed, in regulated accommodation. Care includes for example, arrangements for education, training and health. Such arrangements might be made with or without intervention by a provider or manager of a placement, depending on the needs identified for any particular child.

95. The correct understanding of the relationship between the care provisions in the CA 1989 and the definition of a children's home in s.1 of the CSA 2000 should not be conflated with the separate concern that some establishments are illegally operating as children's homes without registration. The latter is an enforcement issue. For example, if shared lodgings begins to provide services of such a nature and extent as to cause that establishment to be a children's home under s.1 of the CSA 2000, that simply means that registration under that Act has to be obtained and the placement would be treated as falling within s.22C(6)(c). If no such registration is obtained the establishment is operating illegally contrary to s.11 of the CSA 2000. None of this throws any light on the meaning and scope of s.22C(6)(d).

96. Mr. Broach then pointed to regulation 27A of the 2010 Regulations. That provision defines the five types of placement which may lawfully be made for under 16 year olds pursuant to s.22C(6)(d). He says that all of these types of establishment are regulated in one way or another and provide care *in situ*. Assuming that he is correct, it does not follow that it would be ultra vires for a local authority to place a child over 16 in a s.22C(6)(d) setting which does *not* provide any care *in situ*. The CA 1989 does not contain any provision which requires all care to be provided *in situ* or as part of a placement.

97. On the evidence before the court it is plain that some looked after children aged 16 or 17 are assessed as being suitable for a very independent level of living and are therefore placed in a shared home with care in the form of external, rather than *in situ*, support. For example, a child might be assessed as not requiring any assistance from the person responsible for the shared house in organising the child's use of educational, training or medical facilities provided for in the care plan. That accommodation would fall within s.22C(6)(d), and regulation 27 of the 2010 Regulations. It would be an example of a currently unregulated placement which is *intra vires* the CA 1989 scheme.

98. Mr. Broach also sought to reinforce his submissions by relying upon the decisions of the House of Lords in *R(M) v Hammersmith and Fulham London Borough Council* [2008] 1 WLR 53 and *R(G) v Southwark London Borough Council* [2009] 1 WLR 1229, where it was stated that a looked after child needs more than a roof over their heads; he or she will have needs for care. However, those decisions were to do with the interface between the CA 1989 (in particular s.20) and the code for homeless persons in the Housing Act 1996. It was decided that a local authority could not shuffle off their responsibility to provide accommodation for a "child in need" to a local housing authority. The court did not consider the nature of the welfare and care provisions under CA 1989 and their implications for decisions as between specific types of placement under that legislation, in particular unregulated placements.

99. For these reasons, I cannot accept the claimant's earlier suggestion that independent or semi-independent placements are inconsistent with an obligation in the CA 1989 to provide care for a child *in situ*, with the consequence that they should be treated as *ultra vires* the legislation. The claimant was correct to disavow that suggestion in reply. I cannot accept the propositions I have summarised as ground 1(a). But I emphasise again that that does not affect the legal merits of ground 1(b), which is a freestanding matter.

*Ground 1(b)*

100. It is important to bear in mind the nature of the change in the 2010 Regulations which was introduced by the 2021 Regulations. Before the amendment, it was lawful for an authority to place any child in an unregulated setting, so long as the criteria in s.22C and the 2010 Regulations were applied properly. Such a placement could have been made for a child older or younger than 16. Following the amendment by the 2021 Regulations that legal approach continues to apply unchanged to children aged 16 or over. The effect of the legislation challenged by the claimant is simply to restrict the s.22C(6)(d) placements that might be provided for children under 16 to one of the 5 types of regulated accommodation in regulation 27A and thus prohibit the placing of those children in unregulated settings. Under ground 1(b) it is that distinction which the claimant must show is irrational in the public law sense.

101. However, the claimant does not challenge the ban in regulation 27A on unregulated accommodation for children under 16 as irrational. Rather it contends that it was irrational for the Secretary of State not to extend that regulation to 16 and 17 year olds, so that it applies to all children.

102. There was some disagreement between counsel on the intensity of review which the court should apply. Ultimately the conclusion I reach in this case does not depend on reaching a firm view on this issue. Even applying the approach most favourable to the claimant, as contended for by Mr. Broach, this ground fails for the reasons set out below.

103. I see some force in Mr. Broach's submission that the statutory scheme in this case is rather different from that in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240. The latter was concerned with the controlling of central government grants to local authorities, a matter involving economic policy at a national level. I bear in mind, as Mr. Broach invited me to do, the analysis of Lord Mance JSC in *Kennedy v The Information Commissioner* [2015] AC 455 at [51] – [55]. Here we are concerned with the protection of vulnerable children. However, we are not dealing with the rationality of a decision in relation to an individual child, but a national policy decision in the interests of all looked after children, in particular those aged 16 and over. That decision has then been enshrined in legislation which Parliament has had the opportunity to consider and to annul if it saw fit. It is plain from the authorities cited that, while recognising the vulnerability of the children affected, the court must proceed with some caution and, of course, have appropriate respect for the views of the defendant and of the legislature.

104. Mr. Broach relied upon *G* again to submit that it had been irrational in the light of that decision for the Secretary of State to disregard the point made by Baroness Hale that looked after children aged 16 or 17 still need "care" under the CA 1989. For the reasons I have already given under ground 1(a), it is untenable to suggest that an unregulated placement is legally incompatible with meeting the care needs of *any* 16 or 17 year old child. Furthermore, *G* is not authority to the contrary; it does not lend any support to the claimant's irrationality argument. The case was not concerned with the issues raised by this challenge.

105. Ms. Clement rightly emphasises the point that the 2021 Regulations do not require a 16 or 17 year old child to be placed in an unregulated setting in any given case. The placement decision is a matter for the local authority concerned, based on their assessment of the most appropriate placement available, and which is "suitable" for

the needs of the child in question. As Baroness Hale indicated in *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055 at [2] – [3], the issue for the court here is not whether the effect of the 2021 Regulations is irrational in relation to an individual child or claimant, but whether it is irrational more generally. The questions is: would the legislation inevitably operate unlawfully in the case of all, or substantially all, 16 or 17 year old children (see by analogy *R (Joint Committee for the Welfare of Immigrants* [2021] 1 WLR 1151 at [16] – [19])? It is difficult to bring such a challenge when the regulations the claimant seeks to impugn can only be applied through individual assessment of each 16 or 17 year old child by the relevant local authority.

106. Essentially, Mr. Broach relies upon an allegation that the 2021 Regulations are irrational because there is no rational justification for their differential treatment of children above and below the age of 16. This discrimination or unequal treatment argument is based on common law principles, not the ECHR. In those circumstances, any unequal treatment is only a ground for judicial review if it has involved the drawing of an irrational distinction (*R (Gallaher Group Limited) v Competition and Markets Authority* [2019] AC 96; *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin) at [98]).

107. I can see no basis for the court to conclude that it was irrational for the Secretary of State to draw the distinction contained in the 2021 Regulations. The first judgment which has been made is that unregulated accommodation is unsuitable for all children under 16. The claimant does not disagree with that judgment. The second judgment is that there are some children aged 16 and over for whom a semi-independent or independent placement is the most appropriate solution. Unless that judgment can be impugned on public law grounds I do not see how it can be irrational to draw a distinction in the legislative scheme which allows effect to be given to that judgment following assessment in each individual case in accordance with the CA 1989.

108. Consequently, Mr. Broach has to contend that there was no evidence, alternatively he said insufficient evidence, to support the judgment reached by the Secretary of State. I am not convinced that, as a matter of public law, it would be irrational to reach such a judgment without having gathered evidence. There are plenty of instances in public law where a judgment may properly be reached without there being a legal requirement for evidence to be obtained to support that judgment. This may depend upon such matters as the nature of that judgment and the expertise or experience of the decision-maker, or the collective knowledge or understanding of government officials providing advice to a minister. However, I will assume, without deciding, that the judgments made in the present case were required to have been based upon evidence or information.

109. However, it is plain that the manner and intensity of any inquiry to obtain such evidence, and the sufficiency of the material obtained, were matters for the Secretary of State, subject to review solely on the grounds of irrationality (*R (Khatun v Newham London Borough Council* [2005] QB 37 at [35]; *Flintshire County Council v Jayes* [2018] EWCA Civ 1089 at [14]); *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at [70]).

110. In my judgment, there was ample evidence before the Secretary of State to justify the distinction drawn in the 2010 Regulations, as amended by the 2021 Regulations,

between children above and below 16 in relation to placements under s.22C(6)(d) of the CA 1989. The evidence has been summarised in the Factual Background section of this judgment. That conclusion does not mean that the court is expressing a view one way or the other on the merits of that evidence or on the Secretary of State's judgment. Under our constitution that is not the function of the court in judicial review. In this context, I recognise that that evidence and the Secretary of State's conclusions drawn from it are not accepted by the claimant and by others who hold similar views.

111. I do not accept that Mr. Broach's selective references in brief sections of the material before the Secretary of State to "evidence gaps" or limitations in the evidence, provide any support for an irrationality challenge in this case. When read properly and fairly in context, they do no such thing. Reading the material as a whole, it is plain that those passages did not detract from the robustness of the material upon which officials and the Secretary of State reached their conclusions that the legislation should not prohibit the use of unregulated accommodation for all 16 or 17 year olds.

112. One of the factors upon which the Secretary of State was entitled to rely was the wishes expressed by some young persons to be placed in unregulated accommodation. Of course, the extent to which weight is given to such wishes is subject to the authority's individual assessment of each child. But this aspect is supported by the increasing autonomy which *may* be accorded to an individual child aged 16 or 17 as they move towards adulthood. This consideration is recognised by the specific provisions which Parliament has enacted for 16 and 17 year old children, referred to in the analysis above of the statutory framework.

113. I doubt whether Mr. Broach was correct to treat the distinction in the legislation for s.22C(6)(d) placements between children above and below 16 as a bright line rule. The legislation bans unregulated placements for any child aged less than 16, but it does not say that *all* children above that age will be placed in unregulated accommodation. Instead, whether a child aged 16 or 17 may properly be placed in an unregulated setting depends on the outcome of an individual assessment, applying the CA 1989 and the 2010 Regulations. But assuming that Mr. Broach is correct to describe the legislation as creating a bright line rule, I cannot accept his submission that the judgment of the Secretary of State involved drawing an arbitrary distinction (see Baroness Hale in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [132]). As I have explained, the Secretary of State has provided an adequate justification for his judgment from a public law perspective. The Secretary of State was legally entitled to take the view that unregulated accommodation of a sufficiently high quality may continue to be provided under s.22C(6)(d) to 16 and 17 year old looked after children.

114. I also accept Ms. Clement's submission that the data on gender and race add nothing to the challenge, which depends upon showing that the Secretary of State did not have a rational justification for the distinction in the 2021 Regulations. The claimant has failed on that point.

115. For all these reasons, ground 1(b) must be rejected.

**Ground 2**

116. Counsel helpfully refined the issue which needs to be determined by the court on the application of the PSED.

117. It is common ground that the assessments carried out for the purposes of s.149 of the Equality Act 2010, did not consider extending a ban on the use of unregulated accommodation to 16 and 17 year old children. It is also common ground that that did not form part of the Secretary of State's proposal. But the claimant submits that no consideration was given to that extension as a means of advancing equality of opportunity in relation to gender and race. The defendant submits that s.149 did not require that exercise to be carried out in relation to a matter which fell outside the decision-maker's proposal.

118. I accept the defendant's submission. This point was decided by the Divisional Court in *R (Adiatu) v HM Treasury* [2021] 2 All ER 484 (see [239]-[244]). Mr. Broach did not contend that *Adiatu* was wrongly decided and so I should follow it (*Police Authority for Huddersfield v Watson* [1947] KB 842, 848; *R v HM Coroner for Greater Manchester ex parte Tal* [1985] QB 67 at [81]). But Mr. Broach sought to distinguish *Adiatu* on the basis that the principle it laid down does not apply where the proposal is to change existing legislation rather than to introduce entirely new legislation. I cannot see any principled basis for drawing that distinction. But in any event, one of the challenges considered in *Adiatu* did relate to an alteration of existing legislation where the claimant's argument was that the Government's proposal did not go far enough.

119. For these reasons ground 2 must be rejected.

**Ground 3**

120. Mr. Broach submits that the consultation exercise carried out by the defendant was so unfair as to be unlawful (*R (Bloomsbury Institute) v Office for Students* [2020] EWCA Civ 1074 at [69]). He refers to the four "*Gunning* criteria" approved by the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947. He advances two complaints.

*Ground 3(a)*

121. First, it is said that the defendant failed to comply with the second of the *Gunning* criteria, the requirement to give sufficient reasons for the proposal to allow for intelligent consideration of and response to the proposal. The complaint is that the consultation was unfair because it did not seek views on an option to extend the prohibition of unregulated accommodation to 16 and 17 year old children. Mr. Broach submits that this was a case where fairness required something which fell outside the scope of the defendant's proposal to be put to consultees, like the discarded options in *Moseley.* In *Moseley* Lord Wilson JSC stated that the degree of specificity required for the information supplied to consultees will depend upon the context, for example, the complexity of the subject and the characteristics of the consultees. So, in *Moseley* the consultation on local government finance and local council tax reduction schemes

required more information to be given for the benefit of members of the public being consulted, particularly the economically disadvantaged.

122. In my judgment it is clear that the Secretary of State was under no obligation in the circumstances of this consultation exercise to seek views specifically on extending the proposed prohibition of unregulated placements to 16 and 17 year old children. The consultation document plainly stated that the Government proposed to maintain the *status quo* in relation to those children. It should have been obvious to consultees who did not think that the proposed prohibition went far enough that they could say so. Indeed, many organisations and individuals, including children, did make responses on the position of 16 and 17 year olds. The subject of the consultation was not a matter of particular complexity for the consultees involved. They included local authorities, organisations such as the claimant and young persons familiar with the care system and accommodation. A number of organisations assisted in the gathering of views from young persons.

123. It is often said that unfairness depends upon showing that significant prejudice has been caused (see e.g. *R (Plant) v Lambeth London Borough Council* [2017] PTSR453 at [86]-[87]). Mr. Broach accepted that there is no evidence to suggest that the omission of an option of banning unregulated accommodation for 16 and 17 year olds has resulted in any point of substance not being made in the consultation process. This is not a case where evidence has been provided about an additional point which would have been raised if the process of consultation had been carried out differently. Instead, it is suggested that more people might have put forward responses to the same effect as those which were in fact submitted. Even if that is right, there is no reason to think from the responses which were received by the Department that any additional responses would have been solely in favour of extending the prohibition. Furthermore, it is plain from the decision-making documents that the Secretary of State and his officials reached their conclusions on the basis of the merits of the arguments presented. The consultation exercise was not in the nature of, or analogous to, a referendum.

124. Viewed overall, this aspect of the consultation cannot be said to have been unfair.

*Ground 3(b)*

125. The second criticism of the consultation exercise relates to the fourth *Gunning* principle: the product of the consultation must be conscientiously taken into account in finalising any statutory proposals.

126. This is not a case where the complaint is that the matter had been predetermined by the Secretary of State. Instead the issue relates to the way in which the consultation responses were summarised for consideration by the Minister. So, for example, it is said that it was incorrect to suggest that the vast majority of the consultees supported the Department's proposal. I have summarised the gist of these points in the Factual Background section of this judgment. I see no merit in the complaint. The analysis by officials was appropriate and, where relevant, supported by the independent report.

127. Ms Willow pointed to some detailed comments from young persons which did not find their way into the briefing to ministers or the Consultation Response document. It is unnecessary in this judgment to go through the detailed material. Very troubling

examples were put forward of inappropriate placements in unregulated settings and of sexual exploitation and abuse. They were referred to in a summary document prepared by officials. Whilst it is true that no mention is made of specific incidents of this kind in the briefing to ministers or in the Consultation Response, it is plain on any fair reading of the material which led up to the making of the 2021 Regulations, that ministers were fully aware of this issue and were seeking to address it, for example, by proposals for national standards and the involvement of Ofsted.

128. A related criticism concerned the fact that the summary document was not provided to the Secretary of State before the decision was taken to make the 2021 Regulations. However, Mr. Bacon has explained how the gist of those views, albeit not the detail, was reflected in the advice given by officials to the Secretary of State. Furthermore, ministers were plainly aware of, and seeking to address, problems of the kind referred to in the summary document. The document gave some specific examples of an issue about which ministers and officials were plainly aware in any event. The decision-making process took that issue into account. It cannot be said that merely because the defendant did not receive the summary document before he decided to make the 2021 Regulations, he failed to comply with the fourth "*Gunning*" requirement.

129. Although I do not find it necessary to base my decision on one further aspect of the defendant's response to this ground, I note that the summary document has subsequently been placed before the relevant Minister. He has confirmed that if he had read that material before the 2021 Regulations were made, it would have made no difference to the decision to make those Regulations as enacted.

130. During submissions reference was made to the decision in *R (National Association of Health Stores v Secretary of State for Health* [2005] EWCA Civ 154 on the subject of how Ministers are briefed by officials and the legal adequacy of such briefing. The principles were discussed in *R (Transport Action Network Limited) v Secretary of State for Transport* [2022] PTSR 31. Undoubtedly, some young persons pointed to the problems they had experienced with unregulated accommodation. But plainly what weighed with the Secretary of State were the benefits for some young people of being appropriately provided with high quality independent and semi-independent placements. The issue for the Secretary of State was whether to introduce a blanket ban on unregulated placements for *all* 16 or 17 year olds rather than tackle the problems of inappropriate placements in other ways suggested in the consultation paper and the documents relevant to the decision-making process. There was nothing unfair or unlawful about the way in which the consultation responses were taken into account by the defendant.

131. Accordingly, ground 3 must be rejected.

## Conclusion

132. For all these reasons, each of the grounds of challenge fail. In the circumstances, it would be inappropriate for me to address the arguments advanced by the parties on the application of s.31(2A) of the Senior Courts Act 1981. The claim for judicial review must be dismissed.