16 March 2022

PRESS SUMMARY

The Queen (on the application of Article 39) v Secretary of State for Education [2022] EWHC 589 (Admin)

High Court of Justice: Mr Justice Holgate

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the court is the only authoritative document. It is published at www.judiciary.uk/judgments. References to paragraphs in the judgment appear in square brackets.

Outcome:

The claim for judicial review is dismissed.

Overview

This case involved a judicial review brought by Article 39, a charity seeking to promote and protect the rights of children living in institutions, challenging the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021, the effect of which leaves in place the existing powers of a local authority under s.22C(6)(d) of the Children Act 2009 to place a child aged 16 or 17 in "unregulated accommodation". That accommodation refers to independent or semi-independent provision, such as supported lodgings with a family, supported accommodation, and shared housing.

The issues in the case

The judgment summarises the grounds of challenge [10]. It sets out the remedies the claimant was seeking and other issues put before the court. The judgment explains why a number of the matters raised in the claimant's case are not appropriate for judicial review. The court's role is limited to resolving questions of law. Matters of policy are for Ministers and Parliament [16]-[22].

The statutory framework [23]-[60]

The judgment summarises the relevant parts of the Children Act 1989 and regulations, followed by the Care Standards Act 2000.

Factual background [61] – [91]

This section gives a chronological account of the events and documents leading up to the legislation challenged by the claimant, with headings to highlight the key stages.

Officials provided the defendant with a briefing in September 2019. They advised that unregulated accommodation of good quality can be a suitable alternative for some children over 16 in a planned transition to adulthood where care will no longer be provided. A research report was put before the defendant which included the results of discussions with 42 interviewees from across 22 local authorities. Local authorities consulted said that whilst there any many examples of high-quality unregulated provision, overall the quality is highly variable. Some young people were not getting the support they need, particularly where they are placed in an unregulated setting in the area of a different local authority.

In a further briefing in October 2019 officials advised that there will continue to be a need for independent and semi-independent settings. They play an important role. But measures were required to ensure quality assurance and that placements are appropriate for those young people ready to live with some independence. There was also a recognition that the lack of regulated places sometimes result in a child not ready for independent living being placed in unregulated accommodation which is not suitable to meet their needs. Accordingly, it would be important for the Department's response to ensure the availability of sufficient suitable placements.

The research report was published in February 2020 alongside a consultation document. The consultation sought views on a number of proposals, including a ban on the use of unregulated accommodation for children under 16 and on the introduction of national standards for that type of accommodation and the enforcement of those standards. The defendant worked with a number of NGOs to seek evidence from young people who had experienced care.

In July 2020 officials recommended to the Secretary of State that the use of unregulated accommodated for children under 16 be banned and new mandatory standards for such placements be introduced and enforced by Ofsted. This was accepted. The ban was included in the statutory instrument laid before Parliament in February 2021.

The grounds of the claim

Ground 1 [100] – [115]

The claimant contended that it was irrational for the defendant to have drawn a distinction between children above and below the age of 16 as regards placement in unregulated accommodation. The key issues raised by the claimant was whether the defendant had a rational justification for this distinction and whether his view was based upon any evidence. The claimant accepted that the defendant had been entitled to take the view that unregulated placements are unsuitable for all children aged under 16. The court decided that, as a matter of law, the defendant had been entitled to take the view that there are some children aged 16 or over for whom independent or semi-independent provision is suitable, subject to assessment by a local authority of each individual and subject to the accommodation being of an appropriate quality. The court also concluded that there had been ample evidence before the Secretary of State to provide support for his conclusion. These were matters of judgment for the defendant. It could not be said that the distinction drawn in the 2021 Regulations was irrational. Accordingly, there was no legal basis for the court to intervene.

Ground 2 [116] – [119]

The second ground of the claim focused on the defendant's alleged failure to comply with the public sector equality duty ("PSED") set out in s.149 of the Equality Act 2010. The claimant alleged that the defendant failed to consider whether equality of opportunity would be advanced by extending the ban in the 2021 Regulations on placements in unregulated accommodation to children aged 16 or 17. It was agreed that as a matter of fact the equality assessments carried out for the purposes of s.149 had not considered that aspect.

The court rejected ground 2. It agreed with the defendant's submission that, applying existing case law, the PSED did not apply to matters falling outside the scope of the decision maker's proposal.

Ground 3 [120] – [131]

The claimant submitted that the consultation exercise undertaken by the defendant was unlawful in two respects, applying the *Gunning* criteria approved in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947.

First, it was said that defendant failed to seek views on an option extending the prohibition of unregulated accommodation to 16 and 17 year old children. It was held by the court that the defendant was not under an obligation specifically to seek views on an option which did not form part of the Government's proposals. In any event, the consultation document stated the Government's view that the position for 16 and 17 year olds should not change and many of the consultees submitted their views on that subject, whether for or against.

The second complaint related to the fourth *Gunning* principle, that the product of the consultation must be conscientiously taken into account by the Minister when finalising any statutory proposals. Essentially, this issue related to the way consultation responses were summarised for the defendant's consideration. The court found no merit in the complaint. There was nothing unfair or unlawful in the way consultation responses were taken into account by the defendant.

Accordingly, the court rejected ground 3.