(1) R (Every Child Protected Against Trafficking) v Kent County Council and Home Secretary

(2) R (Kent County Council) v Home Secretary

(3) R (Brighton and Hove City Council) v Home Secretary

Press summary

Embargoed until 10.45am on Thursday 27 July 2023

Important note for press and public: 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.

Introduction

1 Mr Justice Chamberlain, sitting in the High Court, today determined preliminary issues in three linked judicial review claims concerning the accommodation and care of unaccompanied asylum seeking ("UAS") children, most of whom have crossed the Channel in small boats.

Background

2 Ensuring the safety and welfare of children with no adult to look after them is among the most fundamental duties of any civilised state. In England and Wales, this duty is imposed on local authorities. They discharge it in a variety of ways, depending on the needs of the child concerned. The common feature of these arrangements is that the children are, to use the statutory term, "looked after", and not simply given a roof over their head.

3 In recent years, large numbers of unaccompanied children have arrived in the UK and claimed asylum, most having crossed the Channel in small boats. All have travelled long distances. Some have been abused or mistreated in their country of origin or on their journey here. Some are victims of human trafficking. Many speak little or no English and are ill-equipped to navigate life as an asylum-seeker in the UK. As a cohort, they are especially vulnerable.

4 Because almost all these children enter the UK in Kent, the local authority responsible for accommodating and looking after them in the first instance is Kent County Council ("Kent CC"). At various times, the numbers of children in Kent CC's care have reached what it considers to be the limit at which its children's services can continue to operate safely. It has responded by announcing that it will no longer accept newly arriving UAS children into its care, while continuing to accept other children.

5 In September 2021, Kent CC and the Home Secretary agreed a protocol ("the Kent Protocol"), which sets out how Kent CC will deal with UAS children in the future. It has never been published but was disclosed in the course of this litigation. It was agreed that Kent CC would accept a capped number of UAS children into its care pending their transfer to other local authorities under the National Transfer Scheme ("NTS"), which was made by the Home Secretary under s. 72(1) of the Immigration Act 2016 ("the 2016 Act") to provide for the transfer of social services functions between local authorities. The NTS itself operates according to a protocol ("the NTS Protocol").

6 The Home Secretary responded to Kent CC's "derogation" from its statutory duties by commissioning hotels to accommodate UAS children outside the care system altogether. This started before the Kent Protocol was agreed and has continued ever since. In total, more than 5,400 UAS children have been accommodated in hotels, of whom 32% were under 16. Some 1,700 were housed at Langfords Hotel in Hove. The remainder were sent to other hotels in Kent, East Sussex, London, Oxfordshire and Warwickshire. The children remain in hotels while a local authority is found that is prepared to offer them a placement under the NTS. While in these hotels, the children are offered some support in addition to accommodation and food, but they are not "looked after".

7 According to data given to Parliament on 3 April 2023, 447 UAS children had by that time gone missing from these hotels, mostly within 72 hours of arrival; and 186 were still missing. At the time of the hearing, 154 were missing. They are mostly 16 or 17 years old but they also include 11 children aged 15, a 14-year old and a 12-year old. Neither Kent CC nor the Home Secretary knows where these children are, or whether they are safe or well. There is evidence that some have been persuaded to join gangs seeking to exploit them for criminal purposes. These children have been lost and endangered here, in the United Kingdom. They are not children in care who have run away. They are children who, because of how they came to be here, never entered the care system in the first place and so were never "looked after".

8 As at 17 July 2023, 218 UAS children were being housed in hotels in Kent and elsewhere. None is currently at Langfords Hotel, but the Home Secretary has said that she is "standing up" this hotel in anticipation of further UAS children arriving in the coming days and weeks. Brighton & Hove City Council ("Brighton & Hove CC"), the local authority for the area, considers that Langfords Hotel is unsuitable and unsafe.

The claims

9 There are three claims for judicial review. The first is brought by ECPAT UK (Every Child Protected Against Trafficking) against Kent CC and the Home Secretary. The second and third are brought by Kent CC and Brighton & Hove CC respectively, in each case against the Home Secretary as defendant.

10 At a directions hearing on 7 July 2023, Linden J identified certain preliminary issues common to all claims, which he ordered to be tried on a highly expedited timetable.

Summary of the parties' submissions

<u>ECPAT</u>

11 When Kent CC announced that it would accept no more UAS children, it breached its duties under the Children Act 1989 ("CA 1989") to accommodate and look after UAS children. Those duties are absolute and non-derogable. The Kent Protocol is premised upon and formalises this breach of duty by capping the numbers of UAS children it will accept. The Home Secretary acted unlawfully in agreeing the Kent Protocol and continues to facilitate Kent CC's breach of duty by routinely accommodating UAS children in hotels, outside the care system, when she has no statutory or other power to do so, save in a genuine emergency situation. The use of hotels to accommodate children destined for the care of another local authority is also contrary to the scheme of IA 2016, which contemplates transfers between local authorities and does nothing to attenuate Kent CC's duties up to the point when the transfer takes effect.

Brighton & Hove CC

12 Brighton & Hove CC adopts ECPAT's arguments and adds that the Home Secretary's practice of using hotels is also unlawful for other reasons. The practice was begun on the understanding that the local authority for the area in which the hotel is situated would not owe CA 1989 duties to the children accommodated there. But the local authority does owe such duties. They will invariably include a duty on the local authority to accommodate UAS children, even where they are already in hotels – especially where the hotel is both unsuitable and unsafe. The NTS has a carefully calibrated threshold (currently 0.1% of the total child population) for identifying the numbers of UAS children that a local authority could fairly be expected to accept. It is irrational for the Home Secretary to place UAS children in hotels in areas where the numbers already exceed this threshold. At the very least, it is unlawful to do so without taking into account the additional burden which these children will place on the local authority in whose area the hotel is situated.

Kent CC

13 As defendant to ECPAT's claim and claimant in its own claim against the Home Secretary, Kent accepts that it has breached its statutory duty to UAS children who are physically in its area, but claims to be in an impossible situation. It says that, if it accepted more UAS children, it would breach another equally important duty, to ensure that the children already in its care (both UAS and others) are safe. The Kent Protocol and the establishment of the RSCS were attempts to remedy the admitted illegality, not perpetuate it. These attempts might well have succeeded if the Home Secretary had not waited failed to enforce transfers from Kent CC to other local authorities within the 10 working day limit which the provided in the NTS Protocol. Kent CC adds that the use of hotels in Kent is unlawful for reasons similar to those advanced upon by Brighton & Hove CC.

The Home Secretary

14 The Home Secretary says that, although she has no express statutory power to accommodate UAS children, she has a common law power to do so, alternatively a statutory power under s. 3(5) CA 1989, particularly where the provision of accommodation is necessary to avoid a breach of the children's rights under Articles 2 and 3 ECHR. Kent CC was acting unlawfully when it refused to accept newly arriving UAS children. The Home Secretary agreed the Kent Protocol because the establishment

of the RSCS was a step forward, but she did not thereby endorse Kent CC's continuing breach. If Kent CC will not comply with its duties in respect of UAS children, it is better to put them in hotels than leave them in immigration reception centres (which have no proper beds) or with no accommodation at all. There is nothing irrational about commissioning hotels in areas where the population of UAS children exceeds 0.1% of its total child population. The burden this will place on the local authority is not likely to be large and in any event was taken into account as one among a number of factors relevant to the selection of hotels.

The Court's conclusions

15 In his judgment, Mr Justice Chamberlain concluded as follows:

(a) Kent CC was and is acting unlawfully, in breach of its duties under the CA 1989, by failing to accommodate, and then look after, all UAS children when notified of their arrival by the Home Office. In ceasing to accept responsibility for some newly arriving UAS children, while continuing to accept other children into its care, Kent CC chose to treat some UAS children less favourably than other children, because of their status as asylum seekers. This violates a fundamental aspect of the statutory scheme: that a local authority's duties under the CA 1989 apply to all children, irrespective of immigration status, on the basis of need alone.

(b) Kent CC intended and expected that the Kent Protocol would help to avoid the existing illegality which had been acknowledged, but the protocol's terms included a cap on the numbers of UAS children which Kent CC would accept. It is inherent in the concept of a cap that Kent CC will continue to refuse to discharge its statutory duties in respect of a particular cohort of children – i.e. UAS children who present themselves at a time when the numbers of UAS children already in care have reached the cap. This formalised a policy which would induce a person who follows it to breach their legal duty. The policy is therefore unlawful. Since the Home Secretary agreed the Kent Protocol, the unlawfulness is attributable to her as much as to Kent.

(c) There is nothing in the terms of ss. 69-73 IA 2016 which makes the prior exercise of functions by the transferring authority a precondition of the transfer of responsibility. However, they provide for the transfer of responsibility for UAS children between local authorities. They do not provide for "transfers" in which the first authority plays no part at all. At its inception the NTS Protocol was fully consistent with these aspects of the statutory scheme. But, although the NTS Protocol does not say so in terms, the practice has been that the "arrangements" for transfers in these cases are made between the Home Secretary and receiving authority, with no part being played by the first authority. This is unlawful.

(d) The power in s. 72(3) is to direct compliance with the scheme generally, rather than in an individual case It follows that the Home Secretary has exercised the only power of direction she has under the IA 2016. The statute contains no bespoke mechanism for enforcing compliance with a direction. But the absence of such an express power does not matter, because the conferral of a power to "direct" a local authority to "comply" with the scheme necessarily implies that, where the direction is lawfully made, the local authority is under a duty to comply with it. The duty is

enforceable by proceedings for judicial review even without an express enforcement power.

(e) (1) The Home Secretary has power at common law, or under s. 3(5) CA 1989, to accommodate children in hotels.

(2) However, the exercise of that power gives rise to a serious possibility that an offence would be committed by a person carrying on or managing the hotel. This serves to underline that the provision of accommodation by a person other than a local authority is not in accordance with the scheme laid down by Parliament.

(3) This scheme envisages that children are to be accommodated by local authorities, with all the concomitant duties imposed on them in respect of looked after children. The power may be used over very short periods in true emergency situations, where stringent efforts are being made to enable the local authority promptly to resume the discharge of its duties. It cannot be used systematically or routinely in circumstances where it is intended, or functions in practice, as a substitute for local authority care.

(4) From December 2021 at the latest, the practice of accommodating children in hotels, outside local authority care, was both systematic and routine and had become an established part of the procedure for dealing with UAS children. From that point on, the Home Secretary's provision of hotel accommodation for UAS children exceeded the proper limits of her powers and was unlawful.

(5) There is a range of options open to the Home Secretary to ensure that UAS children are accommodated and looked after as envisaged by Parliament. It is for her to decide how to do so.

(6) Before deciding what relief to grant (if any), the parties will be given a chance to make further submissions. The aim will be to bring the unlawfulness to an end, without endangering or otherwise disadvantaging any individual child.

(f) If there is any breach of the timescales in the NTS Protocol, the primary breach is on the part of local authorities, not the Home Secretary. The NTS Protocol itself does not itself say what the Home Secretary must do in response to a breach by one or more local authorities. The decision whether and if so how to remedy such breaches is for her, subject to the usual public law constraints. Whether she has acted irrationally, or otherwise unlawfully, in taking that decision is not a matter that can be determined as a preliminary issue.

(g) Accommodating children in hotels engages CA 1989 functions on the part of the local authority in whose area the hotel is situated. Those functions will certainly include the s. 17 assessment function and the s. 47 safeguarding function. Given the vulnerability of the UAS child cohort, and their likely need for the services available to looked after children, it is also likely to include the full s. 20 accommodation duty. There is, however, no hard-edged legal duty on the Home Secretary not to accommodate children in hotels in local authority areas where the authority already exceeds the 0.1% threshold. The argument that the Home Secretary misdirected herself, and the broader allegation that the Home Secretary

has failed properly to consider the impact of accommodating children in Hove on Brighton & Hove CC's ability to perform its CA 1989 duties, are not among the preliminary issues and are not suitable for determination at this stage.

16 The Court will decide what orders to make and give directions for the resolution of the remaining issues, after hearing further submissions.

Ends