In a judgment handed down today (7 August), the High Court finds that Article 39 was correct to warn that vital safeguards for children in care were removed or diluted overnight in April. However, the Department for Education was not found to have acted unlawfully. Article 39 is now seeking an urgent appeal of the judgment focusing on the government's failure to consult children, children's rights organisations and the Children's Commissioner for England.

The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 were laid before Parliament by the Children's Minister Vicky Ford MP on 23 April, and came into force the very next day. There was no public consultation or time given for Parliamentary scrutiny. The 65 safeguards which were taken away or weakened affected social worker visits to England's 78,000 children in care, six-monthly reviews of the care of looked after children, independent scrutiny of children's homes and senior officer oversight for babies and children being considered for adoption. Disabled children having short breaks and children placed outside their home areas were also affected.

The Department for Education had insisted these were minor changes and simply involved the removal of administrative burdens rather than the watering down of core safeguards. Mrs Justice Lieven, who heard the expedited hearing last week, rejected the government's description and concluded:

I fully accept the Claimant's submission that the children subject to these Regulations are particularly vulnerable. Many local authorities in the field do not manage to provide a good enough level of service and this leaves already very vulnerable children highly exposed to risk. When things do go wrong it can be catastrophic for the children involved. In those circumstances, the importance of having regular visits; senior officer oversight by nominated officers; some independence through independent reviewing officers and independent adoption panels cannot be overstated. These are not administrative burdens, or minor matters, they are fundamental parts of a scheme protecting vulnerable children. Each has been introduced over time precisely because of the risks that [looked after children] face and the need for safeguards to be in place. [76]

Elsewhere in the judgment, Mrs Justice Lieven stated:

… I agree with the Claimant that these are not bureaucratic provisions that are a "burden" and as such can be set aside relatively lightly. Regular visits to children, oversight by more senior officers over decision making and provision for independent scrutiny are critical safeguards to protect deeply vulnerable children in a field where errors happen with sad frequency and the consequences can be devastating. [48]

Despite recognising the risk to very vulnerable children, Mrs Justice Lieven found the Department for Education had acted lawfully.

There were three grounds to Article 39's claim – that the Department for Education failed to consult before making the changes to children's legal protections; that the Regulations are contrary to the objects and purpose of primary legislation, particularly the Children Act 1989; and the Education Secretary, Gavin Williamson MP, breached his general duty to promote the well-being of children in England. The judge

dismissed all three grounds.

On consultation, the court was given no explanation as to why those organisations (predominantly local authorities and private providers) selected by the Department for Education to give their views on proposed deregulation were told to keep this private. The government first started reviewing children's social care legislation in February and correspondence it has released shows it began sharing some of its proposals with selected organisations the following month.

During the first day of the hearing parts of an email from the Chief Social Worker for Children and Families, Isabelle Trowler, to a number of local authorities was read out by Article 39's counsel, Jenni Richards QC. The email had stated, "Please do not distribute more widely for obvious reasons".

Similarly, the court was told that a briefing sent to Ministers in early April, to gain sign-off for the deregulation, had advised that civil servants had "engaged with stakeholders on the proposals in confidence". The same briefing told Ministers that only "minor changes" to children's law were being proposed though civil servants anticipated that "some in the sector could view this as 'watering down' existing arrangements, particularly around safeguarding, at this critical time". Mrs Justice Lieven said that Article 39's counsel:

says, correctly, that the consultation was all with the providers of services, i.e. local authorities and private providers, and not with either children's rights groups, the Children's Commissioner, or children themselves. She also points out that the Department said that the consultation was confidential but has never explained why this was the case. [49]

Although Mrs Justice Lieven entirely accepted Article 39's claim that children have their own views and interests, and she did not dispute that they have a separate right to be consulted, she did not accept that the interests of children were not taken into consideration:

I entirely accept the Claimant's case as to the importance of hearing from both children themselves and those advancing their rights and that local authorities and providers do not represent those children. There will in some cases be a conflict between the wishes and interests of providers and those of [looked after children]. However, that is not to say that the providers who were consulted were ignoring the need to protect the children and continue to seek to protect their welfare… This is not a situation where the interests of the children were simply not taken into consideration through the consultation. [82]

Mrs Justice Lieven found that Article 39 was entitled to argue that the Children's Commissioner for England, the only statutory body promoting and protecting children's rights and having specific legal responsibilities in respect of children in care, should have been consulted. The Department for Education denied it made a conscious decision not to consult the Children's Commissioner yet gave no "very clear explanation" [83] as to why consultation didn't take place. Despite this, Mrs Justice Lieven found the process had been lawful because of the pandemic:

In anything less than a national crisis of quite such urgency I would have been minded to find that the consultation was not lawful if the Commissioner was not consulted. [83]

The judge found that the coronavirus emergency legitimately prevented any form of consultation with children, children's rights groups and the Children's Commissioner:

In normal circumstances there can be no possible doubt that the Defendant would have had to ensure that he was consulting a range of people in order to ensure that he was getting a full answer to the question posed. In particular I have no doubt that in normal circumstances he would have been under a duty to consult the Children's Commissioner whose very statutory purpose was to put forward the views of children and promote their welfare. [79]

Article 39 is deeply disappointed that the court found a total absence of consultation with children, children's rights organisations and the statutory children's rights body, the Children's Commissioner for England, was lawful in the circumstances of the coronavirus pandemic. Carolyne Willow, Article 39's Director, said:

"These were not split-second decisions the government had to make. The process of reviewing all children's social care regulations started in February and it wasn't until the third week of April that the final plans were laid before Parliament. Of course these were extraordinary times, and normal consultation processes couldn't be expected, but not to have engaged at all with children and young people, and organisations which promote and protect their rights, makes no rational sense. There wasn't even a government announcement that deregulation was being considered, and discussions that did take place were deliberately held in secret. This is no way to make national policy about very vulnerable children. The judge has been crystal clear in rejecting the government's narrative that this whole process concerned minor, low risk changes to administrative burdens. The court accepted Article 39's arguments about the significance of the safeguards, so this should surely have pointed to a greater need for a fair consultation process.

"We firmly reject the implication of this judgment which is that in times of emergency, despite having a period of two months to make decisions, the only voices government must listen to are public bodies and service providers. It is with a heavy heart, because we know the cost risk and the work involved for everyone, that we have instructed our legal team to seek an urgent appeal. We just cannot risk this judgment taking us back decades to a time of paternalism and worse, when children had no separate status and rights to be considered. One of the primary reasons the Children's Commissioner post exists is to ensure children have a voice and presence in the corridors of power.

"Here we had a government department which considered and planned over a period of two months the radical deregulation of children's safeguards and never once sought to hear the views of children themselves or the organisations solely representing their interests. Apart from anything else, what does this tell other government departments about the importance of children's rights – the Home Office or the Department for Work and Pensions for example – when the Department for Education decided not to

consult the Children's Commissioner whose office pre-lockdown was just several floors down from Ministers?"

Oliver Studdert, partner at Irwin Mitchell, representing Article 39 said:

"*This is a very disappointing decision. In giving judgment, the judge recognised the importance of the safeguards which have been removed by the regulations as 'fundamental parts of a scheme of protecting vulnerable children'. She also stated that she entirely accepts the Claimant's case 'as to the importance of hearing from both children themselves and those advancing their rights and that local authorities and providers do not represent those children'. Despite this, the judge found the Secretary of State for Education's failure to consult the Children's Commissioner (who has vociferously opposed the regulations), children's rights charities (many of whom are calling for the regulations to be scrapped) and those affected by the regulations to be lawful, because of the urgency caused by the pandemic. This is notwithstanding the fact that it was found that there was sufficient time to consult. Article 39 is seeking permission to appeal the judgment on this ground to the Court of Appeal.*"

Notes

1. Article 39 is represented by Oliver Studdert from Irwin Mitchell, Jenni Richards QC and Steve Broach from 39 Essex Chambers, and Khatija Hafesji from Monckton Chambers.
2. The judgment can be found here.
3. The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 is known as Statutory Instrument 445 (the 445th statutory instrument to be laid before Parliament in 2020).
4. The powers and duties of the Children's Commissioner for England are set out in Part I of the Children Act 2004. The Commissioner's specific obligations relating to children in care and care leavers (and others in regulated settings) were inserted into the legislation in 2014, when Ofsted's Children's Rights Director post was simultaneously deleted. That statutory post had been created in 2001 following serious and widespread abuse in the care system. When its functions moved to the Children's Commissioner's office, it was with the express policy intention that this role would now champion the rights and protection of vulnerable children in regulated settings.
5. The Department for Education recently held a public consultation on allowing the vast majority of the regulatory changes to expire on 25 September. Following previous failed attempts to deregulate children's social care – most notably in 2016/17 when Ministers sought to allow councils to opt out of their statutory duties for up to six years as a trial for removing them nationwide – Article 39 feared that COVID-19 was being used as an excuse for radical deregulation, and that this expiry date would be extended beyond September. Official documents and Ministerial statements about Statutory Instrument 445 further contributed to this fear.
6. Over 60 organisations and several hundred care experienced people, social workers and others are calling for Statutory Instrument 445 to be scrapped immediately. See the full list here.
7. Article 39 is re-opening its crowdfunding page to help raise funds for our appeal.