

# Coronavirus (COVID-19) pandemic does not automatically extinguish a duty to consult (*R* (Article 39) v Secretary of State for Education)

This analysis was first published on Lexis®PSL on 25/11/2020 and can be found [here](#) (subscription required)

**Public Law analysis: The Secretary of State for Education (the SS) introduced the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 (the Amendment Regulations) in response to the outbreak of the coronavirus (COVID-19) pandemic. They temporarily amended ten sets of regulations related to children’s social care to help local authorities, services and providers manage the coronavirus outbreak. They were said to ensure that children’s social care providers and local authorities had sufficient flexibility to respond to coronavirus while still maintaining safe and effective care. Article 39, a registered charity, challenged the lawfulness of the Amendment Regulations on the basis that the SS had failed adequately to consult with various bodies representing the interests of children. The Court of Appeal decided that the SS had acted unlawfully in not consulting such bodies, particularly the Children’s Commissioner. As the Amendment Regulations were due to expire and new more limited regulations come into force, the court decided not to declare the Amendment Regulations ultra vires and quash them but rather granted a declaration that the SS had acted unlawfully (at paras [89]–[90]). Written by Jonathan Lewis, barrister, at Henderson Chambers.**

*R* (on the application of Article 39) v Secretary of State for Education [\[2020\] EWCA Civ 1577](#)

## What are the practical implications of this case?

This decision provides a very helpful distillation of the common law principles as to when a public body should consult stakeholders before making a decision and what that consultation should involve. While the emergency caused by the coronavirus pandemic undoubtedly affects public bodies’ ability to consult and limit the nature of consultation that can realistically be undertaken, it does not, without more, extinguish the duty to consult. Further, if a public body does consult, it has to do so properly. A consultation may be carried out informally (accepting brief email responses) and quickly (due to the need to respond to the emergency). However, it cannot be partial and selective in deciding who is consulted. A court will give close scrutiny to any claim that it was not possible to consult important stakeholders. Without a genuine, well-evidenced reason, such a selective approach risks being found to be unlawful.

## What was the background?

Article 39’s purpose is to promote the protection of children living in institutional settings in England and protect their human rights. When the coronavirus crisis arose, the children’s social care system was already facing significant pressures. There were concerns that the pandemic would have a disproportionate impact upon it.

The Department of Education sought the views of various bodies as to how best to cope with the crisis, including, among others, local authorities, adoption agencies, fostering agencies and the Association of Directors of Children’s Services. After schools were initially shut, it sent a list of potential amendments to children’s social care regulations to such bodies for their comment. It also carried out an Equalities Impact Assessment. It was only towards the end of this form of consultation that the Department gave the Children’s Commissioner advance notice of the Amendment Regulations. The Commissioner considered the amendments to be unnecessary, noting that children in care were already vulnerable and the pandemic only placed further strain upon them. She also set out a number of specific concerns, noting that only minimal consultation had been carried out and the Amendment Regulations had been laid before Parliament without complying with the usual 21-day rule of being published three weeks before coming into force.

Article 39 focuses upon three of the amended regulations: the Adoption Agencies Regulations 2005, the Care Planning, Placement and Case Review (England) Regulations 2010 and the Children’s

Homes (England) Regulations 2015. It challenged the Amendment Regulations on four grounds—(i) failure to consult, (ii) irrational failure to lay the regulations before commencement, (iii) breach of the *Padfield* principle, and (iv) breach of [section 7](#) of the Children and Young Persons Act 2008.

### What did the court decide?

At the outset, the Court of Appeal noted that ‘consultation about legislative and regulatory change is a significant feature of modern governance’ (at para [27]). In *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 Admin (cited at para [28]), the Divisional Court identified four main circumstances in which a duty to consult may arise:

- where there is a statutory duty to consult—‘where a statute imposes a duty to consult, the statute tends to define precisely the subject matter of the consultation and the group(s) to be consulted’. Article 39 relied upon the duty to consult imposed by [section 22\(9\)](#) of the Care Standards Act 2000. However, as this only applied to one set of the amended regulations which it had focused upon (at para [29]), it had additionally to rely on the other circumstances
- where there has been a promise to consult
- where there has been an established practice of consultation
- where, in exceptional circumstances, a failure to consult would lead to conspicuous unfairness

The Court of Appeal set out the following key principles:

- in *R (Bhatt Murphy and others) v Independent Assessor* [2008] EWCA Civ 755, Laws LJ discussed the nature of legitimate expectations and how they may give rise to a duty to consult: where a promise to consult has been made (the paradigm case) and where there is a policy distinctly and substantially affecting a specific person or group who in the circumstances was within reason entitled to rely on its continuance and did so (the secondary case)
- for a practice to give rise to a legitimate expectation, it must be ‘so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a group...of treatment in accordance with it’ (*R (Davies) v Revenue and Customs Commissioners* [2011] UKSC 47 at para [49], cited at para [32])
- a party seeking to establish a legitimate expectation must identify ‘practice of the requisite clarity, unequivocal and unconditionality’ (*Plantagenet* at [98(10)], cited at para [32])
- if consultation is embarked upon it must be ‘carried out properly’ (*R v North and East Devon Health Authority ex p Coughlin* [2001] QB 213 at [108], cited at para [33]). Lord Woolf MR said in *Coughlin* that ‘To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken[...].’
- ‘[...]consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice’ (*Coughlin* at para [112])
- ‘[...]irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted’ (*R (Moseley) v Haringey LBC* [2014] UKSC 56 at [23], cited at [34])
- once a duty to consult has been found to arise, it is for the decision-maker to determine who should be consulted (*R (Liverpool City Council) v Secretary of State for Health* [2003] EWHC 1975 Admin, cited at para [35]). However, such a decision is open to challenge on grounds of irrationality
- the purpose of consultation has various strands (at para [37]). First, fair and broad consultation improves the quality of decision-making. Second, those who have a right to be consulted may feel a sense of injustice if they are not. Third, consultation about regulatory change is part of a wider democratic process

The Court of Appeal made reference to an earlier coronavirus case, *R (Christian Concern) v Secretary of State for Health and Social Care* [2020] EWHC 1546 (Admin), in which the Divisional Court found that there had not been a practice of consultation but said that if there had ‘[...]that would

clearly have been capable of being overridden by the need to act swiftly in the context of the current emergency' (at para [74], cited at para [37]).

After considering the amendments made to key sets of regulations (at paras [61]–[75]), the Court of Appeal found that the changes effected by the Amendment Regulations 'were unquestionably substantial and wide-ranging and, when implemented, had the potential to have a significant impact on children in care' (at para [79]). It accepted that the coronavirus pandemic created an urgent and very difficult problem for agencies and practitioners in children's social care but said that 'the urgency was not so great as to preclude at least a short informal consultation' (at para [77]). Presented with difficult decisions, it was important that the SS should receive as wide a range of advice as possible (at para [77]). Further, the SS did consult informally over a short period, which meant that the dicta in *Christian Concern* was not relevant: if the SS chose to consult, he had to do so properly (at para [78]).

The Court of Appeal found that the SS was under a duty consult for three reasons (at paras [82]–[85]). First, in respect of some regulations, there was a statutory duty to consult and it was irrational not to consult the Children's Commissioner and other bodies representing children's rights. The SS had conducted the consultation on 'an entirely one-sided basis and excluded those most directly affected by the changes' (at para [83]). Second, there was an established practice of consulting the Children's Commissioner and other bodies representing children's rights when considering regulatory changes of this sort. Third, given the impact of the proposed amendments on vulnerable children it was conspicuously unfair not to include those bodies representing their rights and interests within the informal consultation. Further it set out a number of 'good reasons' why they should have been consulted. It could see 'no argument' why the Children's Commissioner and the other representative bodies could not have been consulted in the same relatively informal way (by email) as was adopted by the SS (at para [87]).

#### Case details

- Court: Court of Appeal, Civil Division
- Judges: Lord Justice Underhill (Vice President of the Court of Appeal, Civil Division), Lord Justice Henderson and Lord Justice Baker
- Date of judgment: 24 November 2020

Jonathan Lewis is a barrister at Henderson Chambers, and a member of LexisPSL's Case Analysis Expert Panels. If you have any questions about membership of these panels, please contact [caseanalysis@lexisnexis.co.uk](mailto:caseanalysis@lexisnexis.co.uk).

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