Legislating in the Time of Corona

By Caroline Stone

Caroline Stone examines the Administrative Court's recent decision in *R (Amber Shaw (a child, by her mother and litigation friend Deanne Shaw) and ABC (a child, by his mother and litigation friend XYZ)*[1]

A. *Summary*

1. As part of the Government's response to the coronavirus pandemic, measures were introduced in Spring 2020 which scaled back the duties of local authorities and healthcare providers in relation to children and young people in England with special educational needs and disabilities ('SEND').

2. In *R* (*Shaw and ABC),* the Claimants - two disabled children with education, health and care plans ('EHC plans') - sought to judicially review four decisions of the Secretary of State for Education ('Secretary of State') in relation to the secondary legislation and statutory notices by which the relevant changes to SEND provision had been implemented. The Claimants had not attended school since March 2020 and had only received limited special educational provision ('SEP') during the height of the pandemic. Though permission was granted in relation to two grounds of review, ultimately the Court decided at a rolled-up hearing that there was nothing unlawful about the Secretary of State's decision to lay a statutory instrument before Parliament a mere day before it came into force. Nor was formal consultation prior to its enactment necessary.

B. *Decisions subject to review*

3. Four decisions were challenged:

    - The first was the Secretary of State's decision to enact the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 ('the Amendment Regulations') which temporarily amended the Special Educational Needs and

[1] [2020] EWHC 2216 (Admin), hereinafter '*R (Shaw and ABC)*'.

Disability Regulations 2014 ('the SEND Regulations') by relaxing various time limits for the completion of steps to be taken in the preparation of EHC assessments and plans.

- The second, third and fourth were the Secretary of State's decisions to issue three statutory notices which modified s.42 of the Children and Families Act 2014 ('the 2014 Act'). The effect of these notices, made pursuant to the Coronavirus Act 2020 ('the 2020 Act'), was to replace the absolute duty on local authorities and responsible commissioning bodies *in England* to secure the SEP and health care provision provided for in an EHC plan with a duty to use "reasonable endeavours" to secure the necessary provision.

4. The judicial review was premised on five grounds, namely:

   (1) Breach of a common law duty to consult prior to making the Amendment Regulations and issuing the three notices;
   (2) Failing to comply with the *Tameside* duty of enquiry;
   (3) Irrationally laying the Amendment Regulations before Parliament the day before they came into force;
   (4) Irrationally deciding that it was "appropriate and proportionate" to issue the three notices; and
   (5) Breach of s.7 of the Children and Young Persons Act 2008 by failing to have in mind the aim of promoting the "well-being of children" when taking the impugned decisions.

   The first, second and fifth grounds of review related to all four decisions.

C. *The legislative changes in detail*

5. The statutory regime making provision for children and young people with SEND is contained in Part 3 of the 2014 Act. By virtue of s.36, a relevant local authority must consider whether a child[2] requires an EHC needs assessment in order to determine whether it may be necessary for them to have an EHC plan. Where the EHC needs assessment leads to the conclusion that SEP, health care or social care is necessary,

[2] Unless indicated otherwise, reference to a 'child' includes reference to a 'young person'.

the authority must secure that an EHC plan is prepared for the child (s.37). The EHC plan must thereafter be reviewed every 12 months (s.44).

6. Detailed rules governing the processes for (i) deciding whether to carry out an assessment, (ii) carrying out such assessments and (iii) making EHC plans are contained in the SEND Regulations which set out the procedures and time limits for each step of the process (including amendments to EHC plans following a review and compliance with orders made by the First-tier Tribunal on appeal). These processes invariably require reporting by expert professionals such as specialist teachers, educational psychologists, doctors and others able to contribute to assessing educational and health care needs. As the High Court noted in *R* (*Shaw and ABC)*, these decisions are "of vital importance to the children and young people concerned. They greatly affect their lives and futures, determining where and how they are to be educated and cared for."[3]

Relaxation of time limits contained in the SEND Regulations

7. The Amendment Regulations were made on 28 April 2020, laid before Parliament on 30 April 2020 and entered into force on 1 May 2020. Their effect is to temporarily amend four statutory instruments relating to SEND provision[4], largely in relation to the timing of processes relating to EHC needs assessments and plans. The Amendment Regulations automatically cease to have effect on 25 September 2020.[5]

8. The challenge in *R* (*Shaw and ABC*) focussed on the amendments to the SEND Regulations, most of which were achieved either by way of a 'glossing' provision (the new r.2A) which serves to relax the time limits contained in specific regulations or by direct amendment to the wording of other provisions. Depending on the regulation in question, the specific timescale can be modified if it is either not reasonably practicable[6] or it is impractical[7] for a local authority, health commissioning body or others to conclude a process within the usual timescale *for a reason relating to* the transmission or incidence of coronavirus.

[3] *R* (*Shaw and ABC)* at [13].
[4] Special Educational Needs and Disability Regulations 2014 (SI 2014/1530), The Special Educational Needs (Personal Budgets) Regulations 2014 (SI 2014/1652), The Special Educational Needs and Disability (Detained Persons) Regulations 2015 (SI 2015/62) and The Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 (SI 2017/1306). See Annex A of the Guidance for a summary of the amendments.
[5] Amendment Regulations, r.2(2)
[6] See, for example, r.2A(3)(c) of the SEND Regulations, modifying r.20(9) (provision of a written report following a review of an EHC plan) and r.20(10) (determining the outcome of the review).
[7] See, for example, r.5(4) of the SEND Regulations (decision whether or not to conduct an EHC needs assessment).

9. The modified duty will then, depending on the process, be:

- for the body to discharge the relevant duty "as soon as reasonably practicable".
  See, for example, rr.21(7), (8) and (9) of the SEND Regulations (review of an EHC plan where the child or young person does not attend a school or other institution);
- to discharge the relevant duty "as soon as practicable".
  See, for example, r.5 of the SEND Regulations (decision whether or not to conduct an EHC needs assessment). By virtue of the new provision in r.5(4)(e), the 6-week backstop for completion of this process is disapplied where it is impractical to comply with it due to coronavirus; or
- in other instances, where the governing provision only calculates the timescale for completion of a step by reference to a certain number of weeks (i.e. there is no reference in the alternative to a "practicable" period), the Department for Education's ('DfE') Guidance suggests that the requirement "is to respond in a timely manner".[8]
  See, for example, r.8(1) of the SEND Regulations, regarding the duty to co-operate in EHC needs assessments.

10. On 30 April 2020, the Secretary of State published non-statutory guidance on the changes to the law entitled "Education, health and care needs assessments and plans: guidance on temporary legislative changes relating to coronavirus (COVID-19)"[9] ('the Guidance'). This Guidance provides further explanation as to how the amended timescales are to operate in practice, e.g. the effect of cumulative delay and the ability to apply the coronavirus exceptions more than once in the assessment and planning process. The Guidance also speaks of the need for decision-makers to adapt their processes regarding EHC assessment and plans, e.g. by use of virtual meetings and information-sharing platforms.

Watering down of the s.42 absolute duty

11. Unless a child's parent or the young person concerned have made suitable alternative arrangements, a local authority "must secure" the SEP specified in their EHC plan: ss.42(2) and (5) of the 2014 Act. If the plan specifies health care provision, the responsible commissioning body "must arrange" the specified health care provision for

[8] See Annex A. The other such regulations are r.44(2)(b) (in relation to the 2-week requirement in the header to 44(2)(b) - the time limit for notifying a child's parent or young person about the making of an assessment or reassessment); r.44(2)(c); r.45(3) and r.45(6).
[9] The original version of the Guidance can be found here; the version of the Guidance in force at the time of writing was updated on 26 August 2020.

the child or young person, again unless suitable alternative provision has been made: s.42(3)[10] and (5). As noted by Kerr J in the Judgment, s.42 is an "unqualified" or absolute duty.[11] The responsible authority cannot obviate their duties due to financial or other practical difficulties.[12]

12. One of the innovations provided for in the Coronavirus Act 2020 is the power for a Secretary of State to issue notices which disapply or modify certain enactments. By virtue of Schedule 17, paragraph 5 of the 2020 Act, this includes the power to modify s.42 of the 2014 Act for a specified period not exceeding one month[13] so that the duty "is to be treated as discharged if the person has used reasonable endeavours to discharge it". A notice disapplying or modifying an enactment "must state why the Secretary of State considers that the issuing of the notice is an appropriate and proportionate action in all the circumstances relating to the incidence or transmission of coronavirus"[14].

13. Pursuant to these powers three separate notices were issued, covering the months of May, June and July 2020 respectively, modifying the s.42 duty during that three-month period. On 2 July 2020, the Secretary of State announced that unless the evidences changes, he does not intend to issue further notices modifying s.42.[15]

14. The original version of the Guidance (issued prior to the notices expiring) made clear that (a) the notice did not absolve local authorities or health commissioning bodies of their responsibilities under s.42 and (b) what constituted "reasonable endeavours" would vary according to the specific needs and circumstances of each child and the specific local context.[16] In some instances, this may have equated to full provision of all the elements of the EHC plan; in other circumstances it might have been necessary to make alternative arrangements. The Guidance set out a lengthy list of potential alternative arrangements including alterations to the frequency and timing of the delivery of

[10] s.42(4) of the 2014 Act provides that "the responsible commissioning body" in relation to any specified health care provision means the body (or each body) that is under a duty to arrange health care provision of that kind in respect of the child or young person.
[11] *R* (*Shaw and ABC)* at [125].
[12] See *R (N) v North Tyneside BC* [2010] EWCA Civ 135. Though this decision relates to the former provision found in the Education Act (s.324(5)), its wording was materially similar to the 2014 Act.
[13] See s.38(1)(b) of the 2020 Act and Sch.17, paragraphs 5(1)(b), 5(6) and 5(7).
[14] Though not the route the DfE chose to adopt, a notice under the 2020 Act disapplying or modifying an enactment may be limited by reference to a specified person or description of persons, a specified area or any other matter (Sch. 17, paragraph 5(2)).
[15] The Guidance was updated on 6 July in this regard and states: "To help ensure that children and young people receive the support they need to return to school, we will not be issuing further notices to modify this duty unless the evidence changes."
[16] See the following sections of the original Guidance in particular: 'Local authorities' and health bodies' decision-making process'; 'Securing or arranging provision in an EHC plan under the modified s42 duty' and 'Examples of alternative arrangements'. In considering the specific local circumstances, relevant factors may have included: workforce capacity and skills and the availability of others whose input is needed in EHC needs assessments and planning processes; temporary closures of education settings; guidance on measures to reduce the transmission of coronavirus; and other resource demands of the outbreak.

provision in school; a temporary placement in another school; an occupational therapist or a physiotherapist video linking to a child's home and modelling exercises that the parents could do with their child; and loaning parents school equipment, such as specialist support equipment (seating equipment, IT equipment used at school etc.) to be used at home to support learning.

Rationale underlying these changes

15. In the Explanatory Memorandum accompanying the Amendment Regulations, the Government noted that the statutory instrument would come into force on 1 May 2020 "in order urgently to reduce pressure on local authorities, health commissioning bodies and others involved in EHC needs assessment and plan processes; thereby allowing them to focus on the response to coronavirus (COVID-19) and directed their resources where most needed." Local authorities in particular had asked for the changes to take effect as a matter of urgency.[17]

16. In relation to the statutory notices, the May 2020 notice, for example, listed various reasons why issuing the notice constituted "appropriate and proportionate action" including the fact that:
    - Local authorities had reduced staff resources working on SEND administration due to the coronavirus outbreak and had also directed some of their available staff to respond to the pressures generated by the outbreak itself (for example, emergency planning), thereby limiting the resources available to secure provision in accordance with EHC plans.
    - Although those with EHC plans were classed as 'vulnerable' for the purpose of continued school attendance during lockdown, many were in fact at home[18] making it impossible for local authorities and health commissioning bodies to continue to deliver the SEP that would normally be delivered in an educational setting.
    - The modification allowed local authorities and health commissioning bodies in England to adapt to the changing situation in their specific area, based on the nature and demands of the outbreak locally, workforce capacity and skills, and the needs of each individual with an EHC plan.

[17] *R* (*Shaw and ABC)* at [56]-[57].
[18] An internal DfE document from April 2020 indicated that only about 3.9 per cent of children with EHC plans were attending school at that time.

D. *Relevant factual matrix*

17. The key facts, in summary, are as follows:

(a) As noted by Kerr J, prior to the pandemic there had been "serious failures in delivery of SEND provision."[19] (Note, according to statistics on the Children's Commissioner website, in 2018, just 60% of new EHC plans were issued within the 20 week limit - a decrease from 65% in 2017. The Local Government and Social Care Ombudsman reported delays of up to 90 weeks, and regularly more than a year.)

(b) On 18 March 2020, the Prime Minister announced the closure of nurseries, schools and colleges from 20 March, except for the children of key workers and vulnerable children. DfE Guidance issued on 22 March 2020 made it clear that vulnerable children and young people for the purposes of continued attendance during the coronavirus outbreak *included* children or young persons in any year who had an EHC plan and for whom it was determined, following a risk assessment, that their needs could be as safely or more safely met in the educational environment.[20]

(c) No formal consultation was conducted prior to the SEND Regulations being amended and the notices being issued. The DfE did, however, both receive and deliberately solicit the views of various stakeholders. This included discussing the proposed legislative changes with a number of specialist SEND and children's rights organisations (including the Council for Disabled Children, the National Network of Parent Carer Forums and the Independent Provider of Special Education Advice) and representative bodies for local authorities (for example, the Association of Directors of Children's Services and the Local Government Association).

(d) Amongst the material considered by the DfE were accounts of medical and clinical officers responsible for health care provision who were being redeployed to undertake Covid-related work. Others were working remotely or in different settings which was diminishing their availability to do work on EHC assessments and plans.

(e) Prior to the relevant decisions being taken, various ministerial submissions were made. These noted the potential reasons justifying the forthcoming amendments to the SEND legislation[21], whilst also drawing to the Minister's attention to the negative findings of an equality impact assessment and a Children's Rights Impact Assessment conducted during the relevant period. The former report had recognised the temporary disadvantage that would be caused to some disabled children and that

[19] *R* (*Shaw and ABC)* at [104].
[20] Supporting vulnerable children and young people during the coronavirus (COVID-19) outbreak - actions for educational providers and other partners. See, in particular, section 2.3. This guidance was withdrawn on 4 August 2020.
[21] See, for example, *R* (*Shaw and ABC)* at [43]-[45] and [51].

boys are twice as likely as girls to have EHC plans;[22] the latter noted the negative impact on those with EHC plans who were not receiving full provision.[23] The recommendations as to what could be considered "appropriate and proportionate" action also took into account the evolving picture regarding the limited return of some pupils to school during the period that the notices were in force.

(f) In a public statement on 12 May 2020, the Children's Commissioner responded to the initial changes by expressing her "serious concerns" about the amended SEND Regulations, stating that she was "of the view that the downgrading of key duties towards children with SEND is disproportionate to the situation." These concerns were echoed by representatives of 45 charities and SEND organisations who wrote jointly to Vicky Ford MP, Minister for Children and Families, on 29 May 2020, stating "we have significant concerns about the disproportionate impact on this group of children, who already experience poorer outcomes than their peers. In particular, we are concerned about the modification of Section 42 of the Children and Families Act and the variability in the interpretation of 'reasonable endeavours'".

E. *Administrative Court's Judgment*

Academic challenge?

18. The first question for the Court to address was whether the challenge to the statutory notices was academic given that the May and June notices had expired by the time of the hearing and the July notice was due to expire the following day. Whilst the Administrative Court has a discretion to determine hypothetical questions, ordinarily it will not address purely academic matters unless there is a good reason in the public interest for so doing. Such circumstances may arise where, for example, other similar cases exist or are anticipated and the decision the Court is asked to determine is not fact-sensitive.[24]

19. The Claimants argued, amongst other matters, that the issues were not academic as the Secretary of State may issue further notices during the lifespan of the 2020 Act; further, that justice should not be defeated by adopting short term measures which expire before the court can review them.

[22] Ibid at [46]and [52].
[23] Ibid at [71]-[72] and [80]-[82].
[24] *R (Zoolife International Ltd) v. Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin) at [32]-[36]. For another example of a Covid-related case in which this question arose (in this instance, as a result of the pace of legislative amendments), see *R (Dolan) v. Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin) at [28]-[33]. This decision is being appealed.

20. Ultimately Kerr J adopted a pragmatic approach, determining that as he had to address four of the five grounds of challenge in relation to the Amendment Regulations in any event, it was proportionate to address the totality of the grounds of challenge in case of an appeal. The Judge indicated that were it otherwise he would have declined to hear the challenge to the notices, which the Secretary of State had argued was academic not least as the legality of any future notices would be fact-sensitive (including regarding any duty to consult). Kerr J did, however, note that "short term mini-laws should not be used in future as a way of eluding justiciability".

Arguable but ultimately unsuccessful grounds

No duty to consult

21. There is no general duty to consult at common law. The three typical circumstances in which a duty to consult may arise are: (i) where there is a statutory duty to consult; (ii) where there has been a promise to consult and (iii) where there has been an established practice of consultation: see *R (Plantagenet Alliance Ltd) v. Secretary of State for Justice)*[25] (*'Plantagenet'*) at [98] for a helpful summary of the law in this regard[26]. Though in *Plantagenet* there was also said to be a fourth circumstance in which the duty to consult may arise, namely "where, in exceptional cases, a failure to consult would lead to conspicuous unfairness*"*, the notion of unfairness as a free-standing principle of review was criticised by the Supreme Court in *R (Gallaher Group Ltd) v. Competition and Markets Authority,*[27] with Lord Carnwarth preferring more firmly-grounded principles of review such as irrationality and legitimate expectation.[28]

22. Where a decision-maker decides to conduct a formal consultation (whether under an obligation to do so or otherwise), the scope of the consultation must adhere to the principles set out in *R v Brent London Borough Council, ex p Gunning*,[29] as endorsed and expanded upon by the Supreme Court in *R (Moseley) v. London Borough of Haringey.*[30] These principles include that:

[25] [2014] EWHC 1662 (QB)
[26] At paragraph 98(9), the Court stated: "The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was be cast upon them (*In Re Westminster City Council* [1986] AC 668, HL, at 692, per Lord Bridge)."
[27] [2018] UKSC 25
[28] See [31]-[41].
[29] (1985) 84 LGR 168.
[30] [2014] 1 WLR 3947. See [23]-[28].

- consultation must be at a time when proposals are still at a formative stage;
- the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response; and
- adequate time must be given for consideration and response.

23. In *R (Shaw and ABC),* the Claimants asserted that there was a common law duty to consult with families whose children had SEND and representative organisations before making the Amendment Regulations and issuing the notices. They sought to argue that it was conspicuously unfair or irrational not to consult them given the abrupt removal of their right to receive SEP and the need for timely EHC assessments. In terms of past conduct, they pointed to the legislation that had been in force and unchanged for decades and the previous consultation conducted before the 2014 Act had been extended.[31]

24. The Secretary of State, by contrast, contended that there was no relevant past conduct: the right to an EHC plan arose from primary legislation, not a policy or practice. Further, the Secretary of State was exercising powers in circumstances where the pool of those affected was very substantial and the circumstances of the national emergency were very pressing.

25. The Judge granted permission for this ground, noting that the impact on parents and their children with SEND was "sudden and severe" and came at a time when there had already been serious failures in provision. That having been said, he did not consider that a duty to consult arose on the facts. Having considered both the urgency of introducing the necessary legislation and the extent to which a formal consultation would (or would not) have been possible before legislating, Kerr J concluded that there was nothing irrational or unfair (conspicuously or otherwise) about deciding instead to go down the path of information gathering, research and dialogue rather than formal consultation. Though informal, the chosen method of proceeding – i.e. making calls, sending emails, gathering evidence and receiving representations – had not, in fact, shut out the voices of interested parties and stakeholders. Rather representations had been received from both sides of the debate[32].

[31] See *R* (*Shaw and ABC)* at [91]. [95]-[97] and [100].
[32] Ibid at [104], [105] and [111]-[115].11

Lack of Parliamentary scrutiny not unlawful

26. The Claimants submitted that it was irrational to decide to lay the Amendment Regulations before Parliament only a day before they came into force, breaching the parliamentary convention that 21 days should be allowed between laying of regulations and their entry into force and thereby avoiding all but the most cursory parliamentary scrutiny. The Secretary of State contended that this decision was neither justiciable[33], nor irrational. Permission was granted to advance this ground on the basis that both the justiciability and irrationality issues were arguable. As the Court noted regarding the latter, the decision to lay the Amendment Regulations before Parliament only a day before they came into force "curtailed nearly to vanishing point any practical opportunity for Parliament to scrutinise the 2020 Regulations before they came into effect".

27. The competing arguments regarding justiciability were as follows:
    - The Claimants argued that the decision as to the timing of laying the Amendment Regulations was an exercise of executive discretion. Reliance on Art.9 of the Bill of Rights and parliamentary privilege was misplaced as the manner of exercising a power to lay regulations under a statute was a procedural choice which was a government decision, not a proceeding in Parliament.
    - The Secretary of State contended that the Claimants' approach would have inhibited or prevented the Minister from laying the Amendment Regulations and as such fell within a "judicial exclusion zone". It would be an impermissible interference with proceedings in Parliament for the court to grant a declaration which had the effect of requiring a minister to introduce, or prohibiting a minister from introducing, draft legislation to Parliament, other than on terms laid down by the court[34].

28. Finding in favour of the Secretary of State on this issue, the Court held that the judicial exclusion zone applied to decisions to lay delegated legislation (as well as primary legislation) before Parliament, except in cases where statute and not merely parliamentary convention bestowed upon the court authority to intervene. Unless there is some specific statutory obligation affecting the laying of secondary legislation, the decision *when* to lay an instrument was as much taken in the political capacity of a Member of Parliament as the decision *whether* to lay one. To hold otherwise would be to interfere with a minister's political functions. The Court concluded that the proper remedy

[33] Relying on the alleged infringement of Art.9 of the Bill of Rights Act 1689 which provides "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."
[34] See *R (Gill) v. Cabinet Office* [2019] 3407 (Admin) at [95] and *R (Scott H-S) v. Secretary of State for Justice* [2017] EWHC 1948 (Admin) at [38]-[53].

for inadequate parliamentary time for scrutiny is a negative resolution under s.5(1) of the Statutory Instruments Act 1946 within the 40-day period[35].

29. Kerr J went on to consider the rationality of the Secretary of State's decision. Noting that a Minister can, if essential, lay statutory instruments before Parliament after they have *already* entered into force,[36] he considered that the absence of the usual 21 days for parliamentary scrutiny had to be viewed in light of the pandemic. Observing the 21-day convention would have either required the Amendment Regulations to be drafted weeks earlier, i.e. during the period of informal consultation, or that they come into force weeks later, by which time some deadlines relaxed by the Amendment Regulations would have expired and local authorities placed in further breach of duties it was impossible for them to perform. Not only did local authorities and health bodies need the pressures on them reduced, but families of children with SEND needed greater clarity about what they could reasonably expect. They no doubt disagreed with the outcome that EHC assessment, planning and reporting deadlines were relaxed, but they still needed to know with clarity what the position was.[37]

Unarguable grounds of review

No failure to comply with Tameside duty of enquiry

30. Part and parcel of the duty to make decisions that are rational is the duty to carry out a sufficient enquiry before taking a decision. The obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Subject to a *Wednesbury* challenge, it is for a public body, not the court, to decide upon the manner and intensity of enquiry to be undertaken: see *Plantaganet* at [99]-[100], endorsed by the Court of Appeal in *R (Balajigari) v. Secretary of State for the Home Department.*[38] As the High Court noted in *R (Christian Concern) v. Secretary of State for Health and Social Care*,[39] another case related to the pandemic, "Ministerial submissions never include every piece of background information... The omission of particular details will cause a submission to be "misleading" only if those details are so critical that, without them, the court cannot be confident that the Minister took into account every legally mandatory consideration... delaying a decision to gather more information may itself have an impact on the public

[35] *R* (*Shaw and ABC)* at [150]-[153].
[36] s.4(1) of the Statutory Instruments Act 1946.
[37] *R* (*Shaw and ABC)* at [153]-[155].
[38] [2019] 1 WLR 4647
[39] [2020] EWHC 1546 (Admin)

interest, particularly in a situation where it is said that urgent action is required; and in our constitutional system it is Ministers, not judges, whose function it is to weigh and balance these potentially competing public interests….".

31. The Court firmly rejected the Claimants' submissions that there had been insufficient enquiry made before taking the relevant decisions and that the advice to Ministers had accordingly been "incomplete, inaccurate or misleading", holding:[40]
    - It was obvious that performance of the full s.42 duty was unachievable during lockdown conditions, with a medical emergency diverting many health workers to more urgent and dangerous work, and with schools and colleges closed. (The Claimants had suggested that the DfE should have investigated whether the local authorities' expressed concerns about meeting EHC timescales were, in fact, well-founded).
    - Further, the unqualified nature of the s.42 duty meant that "the impossible conditions engendered by the pandemic, lockdown and school closures would provide no excuse for its non-performance and no defence to a claim to enforce its performance". Similar reasoning applied to assessment and reporting deadlines in the SEND Regulations. No extensive enquiries were required to recognise that unless changes were made, the law would be impossible to obey.
    - The pre-pandemic levels of compliance with the s.42 duty were not of direct relevance to the situation on the ground from late March 2020. The historic position was not a mandatory relevant consideration, i.e. one which no reasonable decision maker could ignore.
    - Finally, the written submissions to Ministers had not painted an unreasonably optimistic picture which trivialised the adverse effect of the measures on children with SEND. The equality impact assessments and the CRIA squarely faced up to the disproportionate adverse impact the measures would have on children with SEND, compared to other children missing out on their schooling; and, within the SEND group, on those who were boys, being twice as likely as girls to have an EHC plan.

Issuing the statutory notices not irrational

32. This ground of challenge required the Court to consider whether it was arguable that the reasons in the ministerial submissions, replicated in the three notices, were incapable of supporting a lawful decision by the defendant that it was "appropriate and proportionate

[40] Ibid at [120]-[129].

action in all the circumstances relating to the incidence or transmission of coronavirus" to issue them. Kerr J had little hesitation in concluding that the criticisms of the reasoning supporting the three notices did not arguably come near the threshold of irrationality: see [157]-[173] of the Judgment. Rather, the criticisms, individually and cumulatively, did no more than express strong disagreement with the Secretary of State's assessment of what was "appropriate and proportionate".

No breach of the s.7 duty to promote the well-being of children

33. Section 7(1) of the Children and Young Persons Act 2008 states that it is the general duty of the Secretary of State "to promote the well-being of children in England". This includes having regard to the aspects of well-being in s.10(2)(a)-(e) of the Children Act 2004, i.e. physical and mental health and emotional well-being; protection from harm and neglect; education, training and recreation; the contribution made by children to society; and social and economic well-being.

34. Whilst side-stepping the question of whether a breach of this target duty could found a judicial review by an individual child, the Court held that it was not arguable that an actionable breach had occurred on the facts of the case. Though the general duty in s.7(1) makes promoting the well-being of children a mandatory relevant consideration when considering measures that may affect their well-being, beyond that it does not provide a vehicle for the court to interfere with decisions affecting children taken in the exercise of a Minister's judgment. Further, s. 7 need not always be expressly mentioned when recording the reasons for such decisions.

35. On the facts of the case, Kerr J held that it was obvious that the Secretary of State knew the first to fourth decisions would impact adversely and disproportionately on the well-being of children with SEND, but he judged that the measures should be taken nonetheless. It was idle to contend on those facts that the Minister did not have the well-being of that group of children in mind. The s.7(1) duty does not mean that decisions can never be taken which are adverse to the well-being of children in England.[41]

[41] Ibid at [176]-[182].

F. *Conclusion*

36. The outcome of this case will be a significant disappointment to the many families who are struggling to secure the SEND provision their children need – particularly given the additional social and emotional difficulties their children are likely to have experienced during the lockdown. The Claimants have indicated their intention to appeal the decision.

37. On the basis of the facts and reasoning set out in the Judgment,[42] none of the determinations appear wide of the mark. This is particularly so when one bears in mind that (a) the function of judicial review is predominantly to scrutinise the decision-making *process*, not the merits of the decision itself and (b) the finely-balanced judgments any government faced with a national health emergency is called upon to make. The test of *Wednesbury* unreasonableness can be a difficult one to satisfy at the best of times; in a time of pandemic, it seems likely that the Court will be all the more reluctant to interfere with the exercise of executive discretion, save in obviously erroneous cases.

38. This case aptly demonstrates some of the very real challenges a government faces when enacting emergency legislation, set against the steep hurdles litigants may face in seeking to displace any such measures. For the additional reasons explored in my article *"SEND provision beyond 24 September 2020 - a brewing storm?"*, the controversy surrounding the Amendment Regulations may yet rumble on.

9 September 2020

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[42] And with a typical lawyer's caveat that it is perhaps folly to comment without sight of the papers and hearing transcripts!