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R v (1) Secretary of State for Health (Respondent) (2) Kent County Council (Intervener), Ex Parte C B (Minors by their Guardian Ad Litem & Next Friend David Pearson) (Applicants) (1998)

[1999] 1 FLR 656 : [1999] 3 FCR 162 : (1999) 1 LGLR 477 : [1999] Fam Law 77 : (1998) 95(45) LSG 37 : (1999) 143 SJLB 13 : Times, November 11, 1998 : Independent, October 29, 1998

27/10/1998

Barristers
Dermot Main Thompson

Court
QBD

Practice Areas
Public Children Law

Summary
The Children (Protection from Offenders) (Miscellaneous Amendments) Regulations 1997 did not collide with the primary legislation and must be followed. The legislators were entitled to a policy that the good of the many should prevail over the detriment to the few but were urged by the judge to consider an amendment adding an "exceptional case" discretion.

Facts
An application as to whether or not the Children (Protection from Offenders) (Miscellaneous Amendments) Regulations 1997 were ultra vires. The Regulations amended earlier regulations and in short left local authorities and adoption agencies with no discretion to permit individuals to act as foster or adoptive parents if they had been convicted or cautioned for certain specified offences. The Regulations also caught instances where an offender, although not the carer, was living in the same household. The applicants contended that the effect of the Regulations was very serious and meant that one child's future would, of necessity, have to be decided without regard to the welfare principle and indeed against the child's best interests. B was 7 years old and C was 6. They lived with their parental grandparents and had done so for about two years. Their parents were drug users who lived chaotic lives and who had been in and out of prison. The parents were unable to offer satisfactory or appropriate care

for the applicants. The local authority formulated a care plan which involved the children living long term with the parental grandparents. Care orders were thought necessary to provide social services input and to support the grandparents against the manipulative attentions of the parents. The guardian ad litem endorsed the care plan. Full care orders were made in July 1997. By that time, the social services were aware that the grandfather had been convicted in 1962 of unlawful sexual intercourse with a girl aged 15. He had been 29 at the time and had been sentenced to three months' imprisonment. However all the professionals involved took into account the period that had elapsed since then and felt that there was no risk to the children. They too supported the care orders as in the best interests of the children. Three months later the Regulations came into force. The local authority felt that it could no longer leave the children with the grandparents under the aegis of a care order. However neither the removal of the children nor the discharge of the care order were in the best interests of the children. In December 1997, meanwhile, the grandparents applied for a residence order. The county court considered that to remove the children from the grandparents was unthinkable yet to use a residence order was a poor second best. The application was adjourned pending the outcome of this application and the care orders continued. The judge was referred to 11 other cases where similar difficulties had arisen.

Held

(1) The Regulations were designed to protect the 35,000 children in some 28,000 foster families in England and Wales and had been enacted as a matter of urgency following cases in which children had been placed with people with convictions and who had subsequently been abused by their foster carers. (2) No one could doubt the need to protect vulnerable children but the hastily drawn legislation had caused a backwash of cases where decision makers were left with no discretion and where some existing and good placements that were considered safe were to be subjected to unwanted and detrimental upheaval. (3) A discretion had been preserved where the offender was under 20 at the time of the offence but even the Department of Health that had drawn up the Regulations recognised that as being insufficient. The Department's view was that local authority discretion should be re-instated in a limited number of cases and that an amendment would need to be made but the planned amendments would not take effect in the present case nor would they affect the question of whether the present Regulations were ultra vires. (4) There could be no doubt that the Regulations were within the ambit of the enabling statutory words. The applicants therefore argued that the underlying parliamentary intention was to meet the best interests of individual children whereas the Department argued that the intent was the welfare of children generally. There could be no doubt that in fact the Regulations were designed for the protection of children and therefore had a welfare purpose directed towards children generally. (5) The question was therefore whether the absence of discretion rendered the Regulations ultra vires because they did not permit in individual cases the best interests of the child to be considered. The facts of those cases would vary enormously. At one end of the scale were cases where no right-thinking person would allow a specified offender near a child. At the other end were cases where the facts would lead anyone to conclude that there was no appreciable risk. It was suggested that in the huge range of cases in between, the local authority and the courts must have a discretion and that the secretary of state had no power to take that away by regulations; that step would have to be taken by Parliament. (6) There was however nothing inherently objectionable in secondary legislation specifying matters which disqualify a person from holding a particular power or position. The Regulations concerning offenders and care for children did not collide with the primary legislation. The legislators were entitled to conclude as a matter of policy that the good of the many should prevail over the detriment to the few. (7) The judge urged the Department of Health in considering amendments to consult the President of the Family Division before reaching a final view of any amending regulations. A tightly drawn phrase such as "save in exceptional circumstances" would give an opportunity to avoid doing a serious disservice to a number of children particularly those who, as in the instant case, had been in a placement for some time. The same was applicable to Adoption Agency Regulations. (8) There was considerable sympathy for the local authority's

position but it could not dictate the vires of the Regulations which were intra vires and must be complied with. The escape route of a residence order was the only realistic solution to this case if the Regulations remained in their existing form.
Application for judicial review dismissed.

Permission

Lawtel