Neutral Citation Number: [2023] EWHC 1398 (Fam)

Case No: FD23P00129

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

ARTICLE 39

Applicant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

SECRETARY OF STATE FOR EDUCATION

Interested Party

- -
- -

Ms Amanda Weston KC, Ms Naomi Wiseman and Professor Rob George (instructed by **Good Law Practice**) for the **Applicant**
Ms Fiona Paterson KC and Ms Lisa Giovannetti KC (instructed by **Government Legal Department**) for the **Respondent**
Ms Joanne Clement KC (instructed by **Government Legal Department**) for the **Interested Party**
Ms Maria Stanley attended on behalf of **Cafcass** as an **advocate to the Court**

Hearing dates: **18 April 2023**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published.

Mrs Justice Lieven DBE :

1. The Applicant, Article 39, is a registered charity which promotes and protects the rights of children in England who are in or entitled to the care of the state. By this application, it seeks to trigger the Court's inherent jurisdiction to make wardship orders in relation to a number of unaccompanied asylum-seeking ("UAS") children who have gone missing from Home Office run accommodation in Brighton and Hove. Neither the Respondent nor the Interested Party disputed that Article 39 had standing to bring this application.

2. Article 39 was represented by Ms Amanda Weston KC, Ms Naomi Wiseman and Professor Rob George, the Secretary of State for the Home Department was represented by Ms Fiona Paterson KC and Ms Lisa Giovannetti KC, and the Secretary of State for Education was represented by Ms Joanne Clement KC. Ms Maria Stanley attended on behalf of Cafcass as an advocate to the Court and made written submissions accordingly.

3. Ms Clement led the submissions on behalf of the Government as the statutory responsibilities for safeguarding children lie with the Department for Education rather than the Home Office. Ms Paterson adopted Ms Clement's submissions.

4. This matter came before me at an urgent hearing on 24 March 2023 and I made various directions at that hearing, including for the provision of evidence as to the cohort of children who had gone missing. I then heard the matter again for a substantive hearing on 18 April.

Background

5. In recent years, growing numbers of UAS children have arrived on small boats on the south coast of England. The vast majority of UAS children arrive in the area of Kent County Council. To ensure the equitable distribution of responsibilities to UAS children to local authorities, the Home Office introduced a National Transfer Scheme under s.72(3) of the Immigration Act 2016, which allows for the transfer between local authorities of their duties to individual children under the Children Act 1989 ("CA"). However, despite steps by the Home Office to strengthen the efficiency of the scheme in June 2021, it has been unable to remedy the mounting pressure on Kent County Council, which has now declared itself unable to look after a proportion of the UAS children.

6. In the light of these problems, the Home Office has taken steps to accommodate older UAS children in hotel accommodation pending a local authority accepting responsibility for them under the National Transfer Scheme. The Divisional Court in *R (Medway Council) v Secretary of State for the Home Department and Secretary of State for Education* [2023] EWHC 377 (Admin) said at [10]:

> *"The situation led to something of a crisis in south-east England, with Kent County Council declaring itself unable to look after any more UAS children. The voluntary scheme could not place all the new arrivals in other participating authorities. The Home Office was forced to place (older) UAS children in hotels pending a solution. That was not sustainable. It is local authorities who must discharge Children Act*

> *functions; the Home Office has no functions in relation to the care of UAS children and no infrastructure to provide it. The accommodation of UAS children in hotels, other than on an emergency or short-term basis, with no sustained care support or services, is plainly not a discharge of Children Act responsibilities and not in the children's best interests."*

7. The UAS children at the heart of this application went missing from a hotel in Brighton and Hove where they were being accommodated by the Home Office. Initially, Article 39 suggested that 76 children were identified as "missing". However, a number of these children have since turned 18 or been located. There are currently 23 children still missing.

8. I have been provided with a Schedule that sets out some limited information about the cohort in question. The names and any identifying features cannot be disclosed, however the broad parameters of the cohort are relevant to the matters I need to determine and do not allow for the identification of the individual children.

9. Of the original 76 who went missing, 22 are now 17 years old and one is 16. Therefore, 23 remain "children" for the purposes of the CA. Of those 23, 21 are Albanian citizens and all are males. The information included in the Schedule was provided by the UAS children themselves, but there is no obvious reason they would be giving a false nationality or would be saying that they were older than they were. I therefore consider this information likely to be reliable in this regard.

10. In all the cases, the children went missing very shortly (a few days) after they were placed in the hotel, and before they were referred to a local authority under the National Transfer Scheme.

Submissions

11. Ms Weston points to the fact that these are highly vulnerable young people, being unaccompanied by parents or other family members, and having crossed the Channel. In particular, they are highly vulnerable to trafficking and exploitation. The fact that they have gone missing, with the various State agencies who have responsibilities having no idea where they are, is deeply troubling.

12. She says that Article 39 is not making an application to the Court for any specific orders, such as location orders, in respect of the children. What Article 39 wants to achieve is for the Court to ensure that it has the relevant information about the children and to consider whether it should make further orders in respect of them under its wardship jurisdiction.

13. She relies on a witness statement from Ms Willow of Article 39 which sets out the concerns about unaccompanied children being placed by the Home Office in hotels with very little oversight and without the statutory protections that they would have if they had been taken into care by a local authority. She points to the particular consequences of the children not having been made subject to care orders (or being accommodated under s.20 CA) as being the lack of oversight by an Independent Reviewing Officer; lack of access to independent advocates; and the fact that the hotels are not registered as children's homes, which would bring regulatory oversight by Ofsted. Effectively, she says, there is no safeguarding regime in respect of these children.

14. Both the Applicant and the Respondents draw attention to a Scrutiny Report commissioned by Brighton and Hove Safeguarding Children Partnership and published on 28 February 2023. This report was commissioned to consider the issue of the Partnership's response to "missing migrant children" which had received extensive media coverage. The Report focuses on the same original cohort of 76 children.

15. There are a number of interesting points in the Report, and ones that plainly go to the broader issues concerning both what has happened to this cohort of children and the handling of UAS children arriving in Kent more generally. However, it is important that the Court focuses on the issues that are before me. I am not hearing a judicial review of decision making by the Home Office, the local authorities or the police. I am simply determining whether there is any proper basis for making all or some of the cohort wards of court.

16. The Report states:

> *"**3. What is the status of the missing children?***
>
> *I have been informed that both the Local Authority and the Home Office are currently seeking legal advice on this incredibly important issue. At the time of writing this report the status of UASC children remains 'in limbo'. They do not have looked after children or child in need status with the Local Authority and the Home Office has no statutory responsibility for their care. This creates a significant statutory gap in provision and leaves the child with no corporate parent. Statutory agencies have no specific guidance and the longer a child waits to be placed in the care of a Local Authority via the National Transfer Scheme the greater the risk to them.*
>
> *The system that has been introduced has been led by the Home Office who maintain they have no direct statutory provision to deal with the children in these circumstances, but that they have the power to put arrangements in place which are borne out of necessity in the absence of appropriate facilities to house children at the point of entry. Local safeguarding agencies have responded to the situation with advice, training, consultation and full engagement in safeguarding referrals made on a case-by-case basis. The Local Authority have maintained that the primary responsibility for the welfare of the children in the hotel remains that of the Home Office. They are clear that the Local Authority in whose area the Home Office places UASC before they are transferred to care cannot be expected to treat them as looked after children for that period. In the case of Brighton & Hove City Council, at the time of writing this report, were the authority to have triggered duties to accommodate the children under section 20 of the Children Act it would have meant providing accommodation for in the region of 1700 children since July 2021.*
>
> *The Local Authority recognises UASC are likely to be children in need but maintain that the Home Office are primarily [responsible] for meeting these needs until such time as the child is placed in the care of a Local Authority under the National Transfer Scheme.*

> *Local safeguarding agencies have responded to the situation, but the Local Authority remain clear that the children do not have 'looked after' or 'child in need' status. They are clear that they will respond to specific safeguarding issues / concerns when they are raised regarding children placed in the hotel."*

17. The Comment on this section states that *"A clear legal position should be clarified regarding the status of UASC placed in hotels in these circumstances."*

18. The Report then goes on to set out the steps that Sussex Police (the relevant local police force) are taking to find the missing children, including stating that in each case there is a police inquiry which uses all available avenues to find the children. This links into national law enforcement agencies who deal with tackling organised exploitation, and to Home Office staff in Albania who can offer assistance in tracing the children, presumably through their families in Albania.

19. The Report states that there is some evidence of children who go missing being criminally exploited, but the numbers involved are said to be small. There is no evidence of a specific threat or known organised network which is trafficking or exploiting these children.

20. The Report says that there are three agencies in Brighton charged with safeguarding children and who are involved, namely the Local Authority, the police and health bodies, and these are said to be working well together.

21. In respect of the role of the Home Office, the Comment states:

> *"Whilst it is absolutely clear that the Home Office take the issue of safety and wellbeing seriously, investing in staff and partnership engagement, I am unable to offer appropriate reassurance regarding many aspects of safeguarding within the hotel. Whilst an inspection has been carried out by the Independent Chief Inspector of Borders and Immigration, I am concerned that a more thorough inspection process should take place if the use of this and other hotels continue. I understand that this accommodation would fall out of the regulated inspection frameworks which currently exist; but it is clear they are housing extremely vulnerable children and as such should be the subject of scrutiny. An OFSTED led inspection process would provide reassurance and support improvements that would benefit children and professionals involved."*

22. Ms Clement referred to the Local Authority response to the Scrutiny Report in which it is made clear that every child who goes missing is the subject to a strategy meeting with a dedicated practice manager who oversees the process.

23. Ms Weston also relied upon a report by the Independent Chief Inspector of Borders and Immigration on the use of hotels for housing UAS children dated October 2022.

24. Ms Weston's broad submission was that there is a lacuna in the protection of children which is exposed by this cohort of children and what has happened to them. It is therefore appropriate for the High Court to use the inherent jurisdiction to ensure the

children's welfare. She referred me to the following relevant extracts of caselaw on the breadth of the inherent jurisdiction and its role in protecting children.

25. Waite LJ defined the Court's inherent jurisdiction in *Re M & N (Minors)* [1990] 1 All ER 205 (at 537) as follows:

> *"… the prerogative jurisdiction has shown striking versatility throughout its long history in adapting its powers to the protective needs of children, encompassing all kinds of different situations. Although the jurisdiction is theoretically boundless, the courts have, nevertheless, found it necessary to set self-imposed limits upon its exercise, for the sake of clarity and consistency and of avoiding conflict between child welfare and other public advantages."*

26. Lord Donaldson MR in *Re J (A Minor) (Wardship: Medical Treatment)* [1991] (Fam) 33 at [41D] observed that:

> *"The parents owe the child a duty to give or to withhold consent in the best interests of the child and without regard to their own interests.*
>
> *The Court, when exercising the parens patriae jurisdiction, takes over the rights and duties of the parents, although this is not to say that the parents would be excluded from the decision making process. Nevertheless, in the end, responsibility for the decision, whether to give or withhold consent, is that of the Court alone".*

27. The former President of the Family Division, Munby P, in *Re M (Children) (Wardship: Jurisdiction and Powers)* [2015] EWHC 1433 (Fam), considered the role of the wardship jurisdiction in relation to children outside the jurisdiction. However, his comments are relevant to the overall breadth of the jurisdiction and the Court's powers. He held that:

> *"32. This is not the occasion, and there is no need for me, to explore the range of circumstances in which it may be appropriate to make a child who is outside the jurisdiction a ward of court. I merely observe that cases such as this demonstrate the continuing need for a remedy which, despite its antiquity, has shown, is showing and must continue to show a remarkable adaptability to meet the ever emerging needs of an ever changing world. I add that the use of the jurisdiction in cases where the risk to a child is of harm of the type that would engage Articles 2 or 3 of the Convention - risk to life or risk of degrading or inhuman treatment - is surely unproblematic. So wardship is surely an appropriate remedy, even if the child has already left the jurisdiction, in cases where the fear is that a child has been taken abroad for the purposes of a forced marriage (as in Re KR and Re B) or so that she can be subjected to female genital mutilation or (as here) where the fear is that a child has been taken abroad to travel to a dangerous war-zone….*
>
> *33. In the Tower Hamlets case, Hayden J recognised (para 11) that the relief he was being asked to grant arose in circumstances without recent*

precedent, but rightly saw that as no obstacle. Hesaid (paras 57-58), and I entirely agree:

"57. The family court system, particularly the Family Division, is, and always has been, in my view, in the vanguard of change in life and society. Where there are changes in medicine or in technology or cultural change, so often they resonate first within the family. Here, the type of harm I have been asked to evaluate is a different facet of vulnerability for children than that which the courts have had to deal with in the past.

58. What, however, is clear is that the conventional safeguarding principles will still afford the best protection.""

28. It is, however, very important to keep in mind the limits on the use of the inherent jurisdiction. In *A v Liverpool CC* [1982] AC 363 the House of Lords set out the basic principle that the inherent jurisdiction cannot be used to cut across a statutory scheme. At p373 Lord Wilberforce made clear that the inherent jurisdiction, again in that case the use of wardship, could not be used to review the exercise of a discretionary decision of a local authority under what would now be the Children Act 1989. As Lord Wilberforce said, such a decision could be challenged by way of judicial review (although such a claim would be unlikely to succeed), but the Court did not have some general reviewing power by reason of the wardship jurisdiction.

29. Ms Clement submitted that the position here was analogous to that in *A v Liverpool CC*. The facts of this case show that there is no lacuna in the statutory scheme and what Article 39 are trying to do is to persuade the Court to review the decisions of the statutory authorities, in particular the decision not to apply for care orders in the period before the children go missing. Further, she submits, there is no step that the Court could take under the inherent jurisdiction which cannot already be taken by those authorities under their existing powers.

30. Ms Clement points to the following aspects of the statutory scheme in the CA which give local authorities full powers to protect children:

    a. Section 17 which gives the general duty in respect of children in need. She accepted that it was likely that UAS children would be children in need given their situation when they arrive in the UK.

    b. Section 20 which gives a duty to accommodate children in need if they require it.

    c. Section 22 which sets out the duties to children looked after by the local authority.

    d. Section 31 setting out the power to make care and supervision orders.

    e. Section 47 setting out the duty to investigate if there is reason to believe that a child in their area is suffering or is likely to suffer significant harm.

f. Section 11 of the Children Act 2004 is the duty on local authorities to make arrangements to safeguard children.

31. Section 100 CA sets out the restrictions on the use of the inherent jurisdiction, in particular that the Court cannot use the inherent jurisdiction to require that a child be placed in local authority care or require a child to be accommodated by or on behalf of a local authority.

32. She points out that neither the Local Authority nor the police have suggested that they need extra powers in order to safeguard these children. Therefore, the bodies with the statutory duties to protect children do not themselves feel they would be assisted by the intervention of the Court.

33. I accept Ms Clement's submissions. Although the inherent jurisdiction is a very broad one which can be used flexibly to protect children in very different circumstances, it cannot and should not be used where there are statutory powers in place that can essentially do the same job. Lying behind this proposition is the fundamental constitutional principle that where there is a statutory scheme, the Court should only use the inherent jurisdiction if there is a lacuna.

34. Here, the CA sets out a comprehensive scheme for the protection of children in need in a local authority area. The provisions that I have set out above show the breadth of that statutory scheme. If the children were present in Brighton and Hove and met the statutory criteria then they would be the responsibility of a local authority, in all probability Brighton and Hove.

35. The difficulty that arises on the facts of this case is that the children are missing. Therefore, it is not possible to know whether at the present time they are living in Brighton and Hove or elsewhere, and therefore which local authority is responsible for them. However, this difficulty does not arise because of a lacuna in the statutory scheme, it arises because the children have gone missing.

36. The agency that then has responsibility for finding the children and thus allowing them to fall within a specific local authority's powers and duties is the police, both the Sussex Police and any national police bodies that can be engaged. The Sussex Police are, from the evidence and the Safeguarding Report, engaged in trying to trace the missing children. The Report suggests that the Police and the Local Authority are fully engaging in this task and working together to try to find the children. The Local Authority has appointed a practice manager to oversee the process.

37. However, I should make clear, that even if there were issues around how actively efforts were being made to find the children, this would not give a proper basis for the Court to exercise the inherent jurisdiction. If the relevant agencies were not exercising their statutory powers correctly, and there is no evidence that is the case, then the remedy would be judicial review and not the use of the inherent jurisdiction. There is no lacuna in the statutory scheme which would justify the exercise of that jurisdiction.

38. For these reasons I am of the view that this is not an appropriate case in which the Court should or could exercise its wardship jurisdiction.