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WHERE a court finds a public authority has acted unlawfully in judicial review proceedings, it has discretion to decide what remedial response, if any, is appropriate by selecting from a range of different types of order. In the vast majority of cases, the court will do one of two things: quash the relevant decision or declare it unlawful. These remedial responses have much in common. They are primarily backwards looking, in the sense that they focus on addressing past unlawfulness rather than prescribing specific steps to be taken moving forwards. They also place responsibility for responding to the finding of unlawfulness exclusively on the public authority: having clarified what went wrong in the past, the reviewing court drops out of the picture, unless further judicial review proceedings are initiated in relation to a future decision.

The recent *ECPAT* litigation, however, is an illustration of how a court can use its remedial discretion to do something very different. The background to the case is a significant rise in the number of unaccompanied asylum-seeking children (UAS children) arriving in Dover. The Children Act 1989 (CA) makes clear what should happen in such a situation. The port of Dover is located within the area of Kent County Council (KCC). When notified of the arrival of an UAS child, KCC is required to provide them with accommodation (s. 20). After 24 hours, the child acquires the status of being "looked after" (s. 22). At this point, KCC becomes the child's "corporate parent" (Children and Social Work Act 2017, s. 1) and acquires a range of statutory duties to safeguard and promote their welfare (CA, s. 17(1)(a)), including an obligation to arrange an appropriate care placement (CA, s. 22C). The Immigration Act 2016 (IA) enables KCC to make an "arrangement" to transfer its responsibility towards a child to another willing local authority (s. 69), if it is able to find one.

Despite this clear statutory regime, from July 2021 a very different scheme began to operate. In clear breach of its statutory duties, KCC declined to accept any more UAS children. Fraught discussions between KCC and the Home Office ensued, and a set of practices emerged to fill the gap. The key features of those practices included a cap on the number of UAS children accepted by KCC, the arrangement of transfers of UAS to other local authorities directly by the Home Office and the routine use of hotels, commissioned by the Home Office, to house children pending transfer. In *R. (ECPAT) v KCC* [2023] EWHC 1953 (Admin), Chamberlain J. found these practices and the documents which formalised them (known as the "Kent Protocol" and the "National Transfer Scheme (NTS) Protocol") unlawful. The cap was flatly inconsistent with KCC's duties under the CA (at [158]–[160]). The Home Office's arrangement of transfers was inconsistent with the IA which conferred this responsibility on local



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authorities (at [178]). Finally, while the Home Secretary had statutory (CA, s. 3(5)) and common law (at [194]) powers to accommodate UAS children in an emergency, the use of hotels had become routine in a manner plainly inconsistent with the CA (at [204]).

Public lawyers will find much of interest in Chamberlain J.'s substantive judgment in *ECPAT (No 1)*, including his endorsement of the proposition that the Crown has the legal powers of a natural person (at [193]: for a more cynical view see Carnwath L.J.'s judgment in *Shrewsbury & Atcham BC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148). The most interesting aspect of the case, however, is the way in which the court exercised its remedial discretion. In *ECPAT (No 1)* Chamberlain J. made orders quashing the Kent Protocol and aspects of the NTS Protocol. These orders were suspended, subject to conditions, for three weeks. He also set a date for a relief hearing to consider whether further orders were necessary. In *R. (ECPAT) v Secretary of State for the Home Department* [2023] EWHC 2199 (Admin) (*ECPAT (No 2)*), Chamberlain J. gave detailed reasons for those remedial choices, extended the suspension of the NTS quashing order, issued mandatory orders and set another further relief hearing date. At the second relief hearing, Chamberlain J. made a further mandatory order (*R. (KCC) v Secretary of State for the Home Department* [2023] EWHC 3030 (Admin), at [3]). This exercise of remedial discretion is a far cry from what usually happens following a successful judicial review. Through its orders, the court retained a central role in structuring and supervising the public authorities' response to its judgment.

Two specific remarks are especially worth making. First, *ECPAT* appears to be the first use by a court of section 1 of the Judicial Review and Courts Act 2022 (JRCA) which (depending on one's view: see *Ahmed v HM Treasury (No 2)* [2010] UKSC 5) either conferred or concretised the court's discretion to suspend a quashing order by inserting a new section 29A into the Senior Courts Act 1981 (SCA). A particularly striking feature of Chamberlain J.'s order is his extensive use of the power to impose conditions (s. 29A(2)). Four and six conditions were attached to the orders quashing the Kent Protocol and the NTS Protocol respectively (see https://insights.doughtystreet.co.uk/post/102in1p/suspended-quashing-orders-and-rolling-judicial-review-as-a-means-of-monitoring-co (last accessed 4 January 2024)).

Interestingly, section 29A does not directly prescribe what consequences follow if conditions in a suspended quashing order are breached. The Independent Review of Administrative Law (March 2021) (IRAL), which preceded the JRCA, very clearly envisaged conditions as a mode of providing legal escape routes through which public authorities could avoid the quashing of a measure (see especially the discussion of *R. (Hurley & Moore) v Secretary of State for Business, Innovation &*

*Skills* [2012] EWHC 201 (Admin), at [3.54]). On this view, breach of a condition causes a public authority to bypass a possible escape route, bringing the quashing order into effect on the stipulated date.

In legislating for conditions, however, Parliament used different language to that proposed in the *IRAL* (at [3.68]). Section 29A(2) simply states: "provision included in a [suspended] quashing order … may be made subject to conditions." A plausible reading of the language of section 29A is that conditions operate as prerequisites for a *suspension* remaining operative. On this interpretation, breaching a condition would negate the decision to suspend, bringing the quashing order into effect immediately. This reading would, however, give rise to practical difficulties and uncertainty, especially in determining the point at which the breach took place. Another possibility is that breach of a condition could amount to contempt of court (see generally Civil Procedure Rules 1998, Part 81; *M v Home Office* [1994] 1 A.C. 377 (H.L.)).

In *ECPAT*, Chamberlain J. gave teeth to the conditions in a different way, namely, through ordering further relief hearings in which parties were required to provide evidence. This provided the court with periodic opportunities to review progress. This was an effective solution in its context but may not be suitable in all cases and certainly will require careful thought to be given to the question of who should be invited to participate in a further hearing and how. Ensuring that a public authority's evidence is properly probed is important and, for that reason, it may often be proper to invite the applicant to take part. Their participation may, however, add considerably to the authority's legal costs. For this reason, Chamberlain J. made clear that the applicant non-governmental organisation's "responsibl[e] and proportionate" mode of conducting the litigation to date was an important factor (*ECPAT (No 2)*, at [16]).

A second important point concerns transparency. Decisions about remedies in judicial review are too often taken in a black box. It is remarkably common for courts either to say nothing about remedy or to direct the parties to agree the terms of an order between themselves post-judgment. This makes it difficult for anyone other than the parties to access both the terms of and reasons for orders. Lack of transparency works against the emergence of a consistent approach to the use of remedial powers. It also undermines judicial accountability for their deployment. All of this is perhaps particularly concerning when courts are exercising new and controversial discretions such as those in the JRCA.

Chamberlain J.'s provision of detailed reasons in *ECPAT (No 2)* for his most important remedial decisions is therefore highly welcome. Even in this case, however, important details remain hidden from view. The terms of the suspended quashing order have been made available through a chambers website (link above) but do not appear in the published judgments. Details regarding the mandatory orders are also

sparse. Reviewing courts sometimes provide the full text of orders as annexes to judgments. It would be desirable if this were to become the general practice.

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