Date: 17 November 2021
Re: **Goodred -v- Portsmouth City Council -and- The Secretary of State for Education**

Executive Summary

1. On 16 November 2021, the High Court handed down a judgment in *Goodred -v- Portsmouth City Council -and- The Secretary of State for Education* concerning a judicial review against the policy and practices of the Portsmouth City Council (hereafter, "**PCC**", the defendant). The challenge was brought by a home educator who claimed that PCC had unlawfully and unfairly discharged its statutory responsibilities in respect of children not receiving education in school under section 7 of the Education Act 1996 (hereafter, "**the Act**"). The Department for Education acted as an intervener.

2. The claimant – a home educating mother – had been issued with a School Attendance Order (hereafter, "**SAO**") under section 437 of the Act because she had not provided satisfactory evidence of a 'suitable education' to her three children. Four grounds were argued, namely (i) that the Council had placed an unreasonable burden upon her to prove that her children were receiving a 'suitable education'; (ii) that PCC's own "Elective Home Education" guidance was unlawful; (iii) that the PCC's complaints process was unsatisfactory; and (iv) that the notice to serve an SAO was incorrect. The defendant refuted each Ground.

3. The Hon. Mr. Justice Lane ruled in favour of the defendant on all grounds and held that the local authority was entitled to have made an assessment about the unsuitability of education based on the claimant's refusal to provide samples of work or permit the children to be spoken to. He ruled that local authorities are entitled, under the law and Department for Education guidance, to ask for specific evidence of educational work as part of their informal inquiries to assess suitability, even prior to issuing a notice to serve a SAO.

a) Background

The law and guidance

4. Elective home education (hereafter, "**EHE**") is permissible in England under section 7 of the Act, which imposes a duty on parents of children within the compulsory school age to cause them to receive "efficient full-time education suitable to his age, ability and aptitude, and to any specifical educational needs or additional learning needs" by regular attendance at school or "otherwise". Section 9 of the Act requires the Secretary of State and local authorities to have regard to the wishes of parents who home educate when exercising or performing their duties. Under section 437, local authorities have a duty to make arrangements to identify children not receiving a suitable education, and to issue SAOs if, "in the opinion of the authority it is expedient that the child should attend school".

5. The Department for Education (hereafter, the "**DfE**") has issued guidance for local authorities in how to discharge the duties under the law. The "Children Missing Education" statutory guidance (2016) and the non-statutory EHE guidance (2019) outline to local authorities how to identify children not receiving a suitable education and respond to the "overriding objective…to ensure that the child's development is protected from significant harm". The guidance includes a summary flow chart (after the introduction) with steps for local authorities to identify whether a "suitable education" is being received.

6. The DfE has also issued guidance for parents (2019), which notes that there is no definition of "suitable education" under law, nor any legal requirement to follow specific standards and qualifications. Nonetheless, it states that an "appropriate minimum standard" should be taught if the National Curriculum or other external curricula are not taught. Parents are informed that local authorities have "no formal powers or duty to monitor the provision of education at home", although there is a statutory duty under section 436A of the Act to establish identities of children not receiving a suitable education (para.5.1). This includes through making informal enquiries (para.5.2).

7. While there is minimal previous case law in this area, *Phillips -v- Brown (unreported) [20 June 1980]* was cited by the judge as the precursor to the Education Act 1996. In Phillips, Donaldson LJ quoted, "it would be sensible for [parents] to [respond to requests for educational evidence]", and "if [they] refused to answer, [the local authority] could very easily conclude that prima facie the parents were in breach of their duty".

The facts of the case

8. The claimant is a mother who educates her children at home. On 17 July 2020, PCC wrote to her and her husband to review the EHE provision for her children, to which she submitted a written report containing a brief description of the education activities. The PCC representative, Mr. McIntyre, replied by stating that he would "welcome the opportunity" to meet with the claimant and go through some of the aspects "in a little more detail", or that more evidence should be submitted to "assist [the Council]…make the judgement in relation to the suitability".

9. The claimant replied by saying that the DfE guidance did not require her to mark work, date or sign work, or formally assess development objectives. Mr. McIntyre responded by affirming that PCC was satisfied with their "interpretation of the [DfE's] guidance and the measures" put in place to assess suitability of education. He stated that in-person meetings with parents helped to demonstrate suitability of education and could assist the Council obtain a "much more comprehensive picture", and that based on the report provided by the claimant alone, he could not discharge his duty to ensure that a suitable education was taking place.

10. The exchange of communications continued until 29 September, when Mr. McIntyre stated that "unfortunately [the PCC had] been unable to ascertain" the educational provision of the children, and a School Attendance Notice would be sent. A subsequent SAO under section 437(1) of the Act was served on 14 December. On 11 January 2021, the PCC stated that since the children had not been registered at the schools named in the Order, the case would be referred to the Legal Services Department for breach. The Portsmouth Home Education Group collectively sent a letter before action on 18 January.

11. Subsequent to the communications, the claimant had made an official complaint to PCC on 9 October on the basis that the local authority's guidance had been broken and the DfE's guidance had been ignored. The PCC stated that the heightened "professional curiosity" of Mr. McIntyre was justified, and that a guidance note would be added to their policy to "provide further clarification" on their position. The complaint was escalated to stage 3 and the Chief Executive of the PCC concluded the investigation by stating that a balance of probabilities test, "to convince a reasonable person that a suitable education is being provided" would be the determinant for the Council. Moreover, by reference to other examples of parents "not providing suitable education…that may result in safeguarding risks", the PCC rejected the complaint.

12. The claim for judicial review was issued by the claimant on 22 February 2021.

b) The Decision of the Court

The assessment of the Grounds

13. Mr. Justice Lane reviewed each ground submitted by the claimant. Turning to the first ground at para.65, he reviewed whether the burden of proof placed on parents to demonstrate a "suitable education" by PCC prior to the Notice to Satisfy (hereafter, "**NTS**"), under section 437(1) of the Act, was lawful. The claimant stated that the DfE's guidance (2019) did not place a burden of proof on parents at the first stage of "informal inquiries".

14. In para.69, PCC responded by outlining four elements to the duty in section 7 duty on parents, namely, to (i)cause the child to receive, (ii) an efficient, (iii) full-time, and (iv) suitable education, having regard to the age, ability, aptitude, and any specifical educational needs. At para.70, the judge concurred with PCC in agreeing that if any element is absent, the duty for the local authority is not discharged; and that the duty is objective in nature. Crucially, the judge stated that "the parent is not the ultimate arbiter of whether…the education being received by the child is suitable", and that section 9 of the Act did not refute this point.

15. The judge next reviewed the duty of the local authority under sections 436(A) and 436(1) of the Act and stated in para.72 that the local authority was not bound by only referring to DfE statutory guidance in undertaking its assessments. He noted, under section 436(1), that where "it appears to a local authority" that a child is not receiving a suitable education, there is a duty for a parent to satisfy the authority, and he rejected the claimant's assertion that this placed a wrong burden on parents prior to an NTS being served. He said this process was not "remotely problematic", at para.76.

16. The judge noted that PCC's own guidance was compatible with law and DfE guidance, and that the opinion in the education not being suitable based on a lack of evidence, was legitimate. At para.84, the judge concurred with Counsel that this bar was low; with a view to be taken by the local authority which can be challenged only on public law grounds.

17. As for ground 2 about the PCC's policy and approach to serve an NTS prior to having concerns, the judge ruled in favour of the defendant. At para.89, he said that the PCC had discretion under *R -v- Secretary of State for the Home Department, Ex p Venables [1997] 3 All ER 97*, and that the claimant could not unlawfully fetter this.

18. Next, the judge considered whether the PCC was required to provide "specific concerns" to the claimant about the education. He stated that the merits of each case should be viewed separately, and that since the claimant's reports did not contain evidence of work by the children, it did not matter that the claimant and her husband had signed an affidavit to testify to 'progress'. At para.93, he noted that this position aligned with para.6.12 of the DfE guidance whereby "[the evidence provided by parents as to suitability] should not be simply a statement of intent about what will be provided, or a description of the pedagogical approach taken".

19. As to ground 3, the complaint about the PCC's request for specific 'evidence' and the marking of books, the judge again agreed that the defendant was acting reasonably. At para.99, he advised, "without intending to be prescriptive, what may be needed…could well involve a meeting with the child and/or an examination of the child's work". He summarised that the claimant was "simply unwilling" to provide what was "needed".

20. As to ground 4, the judge noted that the PCC's policy and approach to NTS notices were legitimate. He therefore rejected all of the claimant's grounds for challenge.

c) Conclusion

21. Mr. Justice Lane gave the PCC a wide margin of discretion in how they thought it best to discharge their statutory duties under section 436A of the Act. He agreed that, even absent any safeguarding concerns, the entitlement to request "sufficient information" about

education could be interpreted widely by the local authority and that if the claimant refused, the safeguarding processes could be triggered. In doing so, he intimately linked section 7 with section 436 of the Act. At para.27, he drew reference to para.7.3 of DfE guidance to local authorities, which, while it does not state a proven correlation between home education and safeguarding risk, it nonetheless infers a "logical increase" of the safeguarding chances in the home if parents "avoid independent [local authority] oversight".

22. In para.102 the judge noted that while parents are legally entitled not to respond to a local authority's initial or informal inquiries for evidence, they consequently risk the adverse consequences of an NTS notice if they fail to respond "meaningfully". In doing this, he gave the PCC discretion to decide what samples of work or methods of checking they wanted. Thus, he placed the burden on parents, if requested, to satisfy any request from a local authority to prove that education is suitable. He also appeared to find Mr. McIntyre's heightened "professional curiosity" in the claimant's children's education to be reasonable, based on concerns about other EHE children's education in the locality.

23. It is important to note that the judge did not seek to diminish the rights of parents to home educate their children in accordance with their wishes. At para.28, he noted the DfE's reference to Article 2 of Protocol 1 to the European Convention on Human Rights in their guidance to local authorities, although he qualified this by saying "that does not, however, mean that parents are the sole arbiters of what constitutes a suitable education".

d) Analysis

24. This case raises several issues of interest and further avenues of legal clarification for the EHE community.

25. **Who decides what a "suitable education" is?** The judge identified that the claimant's submissions of PCC-overreach were based on the belief that parents were to be the final authority on the question of suitability.
    a. The non-statutory DfE guidance to parents (2019) had implied that both parents and local authorities were both responsible for determining suitability, pursuant to paras. 2.10c, 2.12, 4.5, 5.1, and 5.2. A hierarchy of responsibility is not written into the guidance. Yet, in para. 70 of the judgment, the judge stated that the local authority, not the parent, was the ultimate arbiter of what constituted a "suitable education", and that their duty to be satisfied in this was "plainly objective".
    b. Whereas statute does not designate a specific education approach for EHE, Mr. Justice Lane's ruling supposes that parents can be required to *prove*, instead of *affirm*, suitable education during the 'informal inquiries' stage. This assumes that section 7 of the Act is subject to a *prior* definition of suitability by the local authority.
    c. As to the question of "what" constitutes sufficient evidence, PCC had requested evidence of academic 'progress'. This could impact EHE parents who wish to

contest the local authority's 'perceived progress parameters' ("PPP"). The PPP of pupils, as previously raised in *Phillips -v- Brown* continues to be a grey area and is now assumed to fall within the discretion of the local authority to decide.

d. There may be further scope to clarify which types of 'assessment' or 'progress' are permissible to local authorities and whether the differences in pedagogies, curricular and assessments across different EHE families will be respected. On the current evidence, it is assumed that the local authority will consider each EHE case on its own merits.
e. *Goodred* raises unanswered questions about the "purpose" of education, and whether this purpose will be assessed by a local authority when determining suitability. There is further scope outside the case to advocate for EHE against the concepts of 'education as a public good' and 'states as duty bearers', as iterated by UNESCO.
f. The judge noted that PCC drew an inference about a potential lack of suitability by reference to other examples of unsuitable education across the locality. This inference may allow local authorities to review individual cases of home education in light of wider patterns across the entire borough, devoid of any particular concerns in the specific case. It may be that this point should be further clarified as potentially resulting in a discriminatory approach to certain EHE families.

26. **How far can local authority discretion stretch?** The judge gave PCC a wide margin of discretion in exercising its functions, relying on the discretion afforded to the Home Secretary regarding the release of mandatory life prisoners in the case of *R -v- Secretary of State for the Home Department, Ex p Venables*. In this ruling, the judge referred to the range of circumstances and considerations surrounding the discretion, and in particular to the "public clamour" impacting a high-profile case.
    a. By citing the case of *Venables*, the judge in *Goodred* appeared to frame the decision about a home educated child's 'suitability of education' into a matter of 'public interest'; thereby widening a local authority's discretion to include considerations of how 'others' educate children. There is scope to clarify whether the 'public interest test' relating to local authority duties and EHE.

27. **Can in-person child assessments be contested?** Mr. McIntyre suggested arranging an in-person assessment with the children, which the judge said was reasonable. This in turn raises significant questions about whether 'suitability' can rest upon evidential proof or whether local authorities will be more empowered to request face-to-face assessments in the future.
    a. It is to be noted that the Children's Commissioner in Wales has recently advised the Senedd that Article 12 of the United Nations Convention on the Rights of the Child ("UNCRC") required local authorities to speak to children at least annually, to ask about education preferences. While this claim ignores fundamental human rights, it illustrates that a "right to be heard" is gaining greater traction as acting as legal persuasion to perform at-home assessments. There is scope for this point to be contested.

28. **Can the presumption of a safeguarding risk absent evidence be contested?** While 'safeguarding' was not referred to in depth by the judge, a clear link was drawn between section 436 (a safeguarding duty on local authorities) and section 7 (a duty on parents). The judge also referenced para.7.3 of the DfE guidance to local authorities (2019), interpreting the non-statutory advice as being legitimate in linking a lack of 'evidence' about education with an increased 'risk' of safeguarding concerns. It was implied that only children whose work can be seen, or seen themselves by a 'professional', can be at a lower risk of safeguarding concerns.
    a. The supposition in "safeguarding risks absent state supervision" does not align with the 2015 quantitative data from Freedom of Information requests about Serious Case Reviews and Child Protection Plans from children educated at home verses in school. See the ADF UK consultation response to the government for more information.
    b. On the matter of "trust", this case, along with the DfE guidance (2019) has swung the balance away from parents and towards a "professional". There is scope for this to be contested on the basis of robust evidence to the contrary.

29. The claimant has indicated that they will not appeal the judgment.