THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings.

30 July 2021

PRESS SUMMARY

R (on the application of A) (Appellant) v Secretary of State for the Home Department (Respondent)
[2021] UKSC 37
On appeal from: [2016] EWCA Civ 597

JUSTICES: Lord Reed (President), Lord Lloyd-Jones, Lord Briggs, Lord Sales, Lord Burnett

BACKGROUND TO THE APPEAL

This appeal concerns the standards to be applied by a court on judicial review of the contents of a policy document or statement of practice issued by a public authority (together, "**policies**"). It is one of two appeals heard by the same panel of five Justices examining similar issues. It is being handed down and should be read together with the Court's judgment in *R (on the application of BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38.

A is a convicted child sex offender. The Secretary of State for the Home Department ("**the Secretary of State**") set up the Child Sex Offender Disclosure Scheme ("**the CSOD Scheme**") in 2010 in order to co-ordinate the approach of police forces responding to requests for information from members of the public about the sex offending history of a person who deals with children. The CSOD Scheme sits alongside other procedures governing the management in the community of child sex offenders who have completed their sentences and have been released.

The CSOD Scheme is set out in the Child Sex Offender Disclosure Scheme Guidance ("**the Guidance**") which was issued by the Secretary of State in exercise of her common law powers. The Guidance had been amended after a previous successful judicial review by A in 2012 to include a new para 5.5.4 to remind police to consider whether any person about whom disclosure might be made should be given the opportunity to make representations about that.

A has now challenged the revised version of the Guidance on the basis that it does not go far enough to explain the circumstances in which a police force, when approached for information regarding a person about whom concerns are raised relating to their contact with children, is obliged in law to seek representations from the person before disclosing any information. The Administrative Court held that the revised Guidance is lawful. A's appeal to the Court of Appeal was dismissed. A now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Sales and Lord Burnett give the judgment (with which Lord Reed, Lord Lloyd-Jones and Lord Briggs agree).

REASONS FOR THE JUDGMENT

The Gillick principle

The principal test to be applied when considering whether policies such as the Guidance are lawful is that set out in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ("***Gillick***"). A policy is unlawful if it sanctions, positively approves or encourages unlawful conduct by those to whom it is directed. In such cases the public authority will have acted unlawfully by undermining the rule of law in a direct and unjustified way **[30]-[38]**. The test is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy says regarding what a person should do **[41]**.

The Court of Appeal should have applied the *Gillick* principle rather than a more general test of whether the scheme set out in the Guidance is inherently unfair, derived from the case of *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 827 ("***Tabbakh***") **[27]**,**[30]**.

The *Gillick* principle is appropriate for a number of reasons. The intended role of policies in the law is to constitute guidance which a public authority chooses to issue as a matter of discretion to assist in the performance of public duties. Where there is only a discretion, and no obligation, to issue a policy, the *Gillick* principle sets the relevant standard of lawfulness **[39]**. Policies serve a useful function in promoting good administration, and a more demanding standard of review would deter public authorities unduly from using them. It is not appropriate to expect public authorities to have to invest large sums on legal advice in order to produce policies which constitute statements of law to the level of detail of a legal textbook. Further, to set such a standard would draw the courts into review of policies to an excessive degree, involving them in having to produce elaborate judgments to deal with hypothetical cases which might arise within the scope of a policy. Courts' resources should be directed to deciding actual cases rather than academic questions of law **[40]**.

The Court identifies three broad categories of case where a policy might be found unlawful on a *Gillick* basis: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty; (ii) where the public authority which issues the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the public authority decides to issue a policy and in doing so purports to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position **[46]**-**[47]**.

In the present case, the Court finds that the Guidance is lawful when assessed against the *Gillick* test. It informs police decision-makers to consider whether to seek representations from the subject of a potential disclosure before making such disclosure. This is in accordance with their obligations under Article 8 of the European Convention on Human Rights ("**the ECHR**") and the common law duty to act fairly. When reading the Guidance as a whole, no part of it can fairly be construed as giving a misleading direction. It is not unlawful simply because it does not spell out in fine detail how the police should assess whether to seek representations in a particular case **[42]**.

Article 8 ECHR (right to respect for private life): "in accordance with the law"

Article 8(2) ECHR provides that public authorities cannot interfere with this right except where this is, among other things, "in accordance with the law". The Court rejects A's submission that the Guidance is unlawful because it fails to comply with standards of certainty, predictability in application and accessibility which are implicit in the concept of 'law' as it is used in Article 8(2) **[49]**. The Guidance does not purport to replace the underlying law which governs the circumstances in which a disclosure

to the public about a child sex offender may be made and which satisfies the standard required by Article 8(2) **[50]**. Further, the concept of 'law' does not imply a requirement that the relevant domestic law should be free from all doubt as to its effect in particular cases **[51]**. The requirement is only that laws attain a reasonable degree of predictability and provide safeguards against arbitrary or capricious decision-making. The Guidance is in accordance with those standards **[52]-[53]**.

Challenges to policies based on other legal principles
The Guidance does not offend against other legal principles on which A sought to rely **[54]**,**[75]**.

Inherent unfairness / access to justice: A test of inherent unfairness is sometimes said to be derived from *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR ("***Refugee Legal Centre***") and *Tabbakh* **[55]-[57]**. However, the Court finds that this approach should not be treated as a freestanding test of unlawfulness, but is to be assimilated with the *Gillick* approach **[62]**,**[64]**.

Where the question is whether a policy itself (rather than an individual application of the policy) is unlawful, the issue must be addressed looking at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way **[63]**.

A test of unacceptable risk of unfairness, for which A contended, would be substantially wider than that set out in *Gillick* and inconsistent with it. There is no sound basis for separating out lawfulness due to unfairness from unlawfulness for any other reason. The test provides no criterion of what makes a risk count as unacceptable, would be a new departure in public law, and would represent an unwarranted intrusion by the courts into the executive's province. Moreover, it generates a risk that a court will be asked to conduct a statistical exercise to see whether there is an unacceptable risk of unfairness, which it not well equipped to do **[65]**.

The Court reviews and explains a number of cases following *Refugee Legal Centre* and *Tabbakh* which have treated them as authority for such a wider principle of review without considering its consistency with *Gillick*. They have also relied upon the separate principle of effective access to justice, but in a way which obscures the way in which that principle applies **[66]**,**[82]**. The Court analyses these cases in light of *Gillick* **[67]-[74]**,**[80]-[83]**.

Significant risk: The Court dismisses A's argument that the standard of review is whether a policy which gives risk to a significant risk of unlawful treatment. This is a rule of law which is specific to cases concerning Article 3 ECHR, which protects individuals against torture and inhuman or degrading treatment **[79]**.

Legislative rules and policies: The Court also does not need to consider A's submissions whether a different approach might be relevant to testing the lawfulness of a legislative rule. In the case relied on by A, the lawfulness of the relevant instrument was tested against the *Gillick* standard, which is in line with the Court's approach in the present case **[76]-[78]**.

References in square brackets are to paragraphs in the judgment

NOTE
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html