Neutral Citation Number: [2024] EWHC 843 (Admin)

Case No: AC-2023-LON-001570

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2024

Before :

THE HONOURABLE MR JUSTICE LINDEN

- -

Between :

THE KING

(On the application of TTT, by her mother and litigation friend UUU)

Claimant

- and -

MICHAELA COMMUNITY SCHOOLS TRUST **Defendant**

-and-

LONDON BOROUGH OF BRENT

Interested Party

- -
- -

Sarah Hannett KC and Katy Sheridan (instructed by Simpson Millar LLP) for the Claimant
Jason Coppel KC and Tom Cross (instructed by Sinclairs Law Ltd) for the Defendant
Miriam Benitez (instructed by HKW Legal) for the Interested Party (written submissions only)

Hearing dates: 16 and 17 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.45am on 16 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE LINDEN:

INTRODUCTION

1. The Defendant ("the School") is a secular secondary free school for girls and boys located in Wembley, in the London Borough of Brent. It has around 700 pupils who are from diverse ethnic and religious backgrounds although half, including the Claimant, are Muslims.

2. The School is exceptionally academically successful and it attributes this success to its distinctive approach to the provision of education. This includes a very high level of control over the behaviour of the pupils, underpinned by a strict approach to discipline; and an ethos which encourages pupils to see themselves as part of a team. The "Team ethos" of the School means that the interests of the school community take precedence over the needs of the individual. It also involves, using the Headteacher's word, *"aggressively"* promoting integration between pupils from different faiths, cultures and ethnic backgrounds whilst they are at school as well as minimising social distinctions between them.

3. The principal challenge in this Claim is to the decision of the governing body of the School to prohibit its pupils from performing prayer rituals on its premises ("the prayer ritual policy", or "PRP"). That decision was taken on 23 May 2023, after the Headteacher had introduced the PRP as an interim measure on 27 March 2023. Whilst the PRP applies to all prayer rituals, regardless of religion, there is no evidence that pupils at the School of any religion other than Islam wish to perform prayer rituals during the school day.

4. The Claimant's objection to the PRP is a narrow one. Muslims are required to pray five times a day but, with one exception, she accepts that the requirements of the school day mean that she will not always be able to fulfil this obligation during the appropriate period of time. That exception is the *Duhr* or *Zuhr* prayer, which is required to be undertaken in a window of time from when the sun passes its highest point in the day to the opening of the window for the next of the five prayers: the *Asr* prayer. During the autumn/winter months the window for performing Duhr overlaps with the School lunch break. The Claimant wishes, during 25 minutes of this break which she characterises as *"free time"*, to perform Duhr.

5. The Claimant argues that the School's refusal to permit her to do this is a breach of her right to freedom to manifest her religious beliefs, which is protected under Article 9 of the European Convention on Human Rights ("ECHR") ("Ground 1"). She also says that the PRP indirectly discriminates against Muslim pupils, contrary to sections 85(2)(d) and/or (f) of the Equality Act 2010 ("the 2010 Act"), read with section 19 ("Ground 2"). And she says that, in introducing the PRP, the School failed to have *"due regard"* to the need to eliminate discrimination, to advance equality of opportunity and to foster good relations between Muslims and non-Muslims, contrary to the public sector equality duty ("PSED") under section 149 of the 2010 Act ("Ground 3").

6. Fourthly, the Claimant was also subject to a two day fixed term exclusion ("FTE") on 23 March 2023 and a five day FTE on 28 April 2023. Each FTE was followed by an equal number of days of "referral", or isolation. She contends that these FTEs were

procedurally unfair in that she was not given an opportunity to respond to what was alleged against her before the decisions were made by the Headteacher ("Grounds 4(a) and (b)").

7. The School's case is that the PRP does not *"interfere"* with the Claimant's freedom to manifest her religion or belief for the purposes of Article 9 ECHR. Nor does it subject her to a *"detriment"* for the purposes of section 85(2)(f) of the 2010 Act. Islam permits the Claimant to make up for missing Duhr by performing Qada prayers later in the day and, even if this were not so, she chose a secular school which she knew to have a strict behavioural regime and she is free to transfer to a school which would permit her to pray if she wishes to do so. The School argues that any interference with the Claimant's religious freedom is in any event justified, as is any indirectly discriminatory effect of the PRP itself, principally because the performance of ritual prayer would conflict with the School's ethos and its behavioural rules, and because the practicalities of pupils doing so mean that it cannot be accommodated by the School.

8. As for Grounds 3 and 4, the School says that it did have *"due regard"* to the required considerations under section 149 of the 2010 Act when the PRP was introduced. The allegation of breach of the PSED is therefore denied. Moreover, there was no breach of the duty to act fairly in the decision making which led to the FTEs of which the Claimant complains. In relation to these Grounds of challenge, the School also contends, in the alternative, that it is highly likely that the outcome would not have been substantially different had a compliant approach been adopted. Relief should therefore be refused pursuant to section 31(2A) of the Senior Courts Act 1981.

THE PROCEEDINGS

Permission

9. Proceedings were issued on 19 May 2023, and permission to bring the Claim was given by Lang J on the papers on 4 July 2023.

The evidence

10. The substantive evidence on which the Claimant relies is contained in witness statements which she made on 19 May 2023 and 13 October 2023, as well as statements made by: her mother on 19 May 2023; Ms Huda Osman of the Islamophobia Response Unit, dated 19 May 2023; and Ms Kowser Hassan, a former sixth former at the School, dated 12 October 2023. With the permission of Lang J, the Claimant also relied on a report by Professor Mona Siddiqui OBE dated 9 June 2023. She is Professor of Islamic and Interreligious Studies Assistant Principal for Religion and Society at the University of Edinburgh, and her report gives an account of the doctrines of Islam in relation to prayer, focussing largely on Sunni Islam.

11. The School relied on witness statements from its Headteacher, Ms Katharine Birbalsingh, dated 22 May, 23 August, 29 September and 4 December 2023. There was no witness statement from any member of the Governing Body.

12. The School also applied to admit a witness statement made by Mr A, a teacher at the School. This was dated 5 January 2024 and therefore served very late in the proceedings, and long after the deadline for serving evidence. Mr A addresses the

second FTE of the Claimant, on 28 April 2023, which is the subject of Ground 4(b). He was one of two teachers who conducted an investigation into the matter and he spoke to various pupils at the time and asked them to write down what had happened. He exhibits the statements of three of them, which he produces for the first time in the proceedings.

13. Ms Sarah Hannett KC did not object to [1]-[7] of Mr A's statement and the exhibits being admitted in evidence, although concerns were expressed that the School had failed to comply with its duty of candour. The School had been asked for disclosure in relation to the investigation of this matter on 8 September 2023, and Ms Birbalsingh had responded to this request (amongst others) in a witness statement dated 29 September 2023, but the documents had not been disclosed when they should have been. Objection was, however, taken to [8]-[13] of Mr A's statement on the grounds that it was a commentary on the evidence which was irrelevant and prejudicial, and was produced too late to allow time for the Claimant to respond.

14. At the hearing I said that I would consider these paragraphs de bene esse. Having done so, I have concluded that, save for [12] and [13], it would not be unfair to the Claimant for them to be admitted in evidence. [8]-[11] essentially comprise a summary of what the three exhibited statements say, Mr A's statement that he believed the Claimant's main accuser, evidence about the investigation of this matter and evidence that there was a reintegration meeting between Mr A, Mr B (another teacher) and the Claimant and her mother on 15 May 2023.

15. However, [12] and [13] are an account of Mr A's recollection of the meeting of 15 May 2023, with a particular focus on evidence about the Claimant's body language, responsiveness to questions and manner. It appeared that he was suggesting that one could infer from this evidence that the allegations against her were well founded and that the outcome would therefore have been the same had she been given an opportunity to respond to them before the decision was taken. There is a note of this meeting in the School's behaviour log for the Claimant which was disclosed at an appropriate point, and it provides an adequate account of what happened. Insofar as Mr A was seeking to add to it from his recollection, which he was, I accepted Ms Hannett's submission that he could and should have given this evidence a good deal earlier in the proceedings, for example within 35 days of Lang J giving permission as directed, or when the Claimant's request for the notes of the investigation was addressed by Ms Birbalsingh in September 2023. At that point, memories would have been fresher and the Claimant would have had a fair opportunity to respond.

16. These considerations were sufficient for me to decide to exclude [12] and [13] of Mr A's witness statement but, in addition to this, Ms Birbalsingh rather than Mr A or Mr B made the decision to exclude the Claimant. Moreover, the 15 May meeting took place after the Claimant had been excluded for 5 days and had then spent 5 days in isolation, very unfairly as she saw it, and shortly before these proceedings were to be issued. I did not accept that one could draw reliable or relevant conclusions, from her manner at this point, about how she would have presented if, hypothetically, she had been given an opportunity to give her account before the decision was taken.

Derogations from open justice

17. Shortly before the hearing before me, there were cross applications in relation to an existing Order for the anonymisation of the parties. This Order also imposed reporting restrictions which prevented the publication of any information which might lead to the parties being identified. It had been made on the papers, effectively on an interim basis pending the trial, by Julian Knowles J on 26 May 2023, and amended by Eyre J on 5 June 2023, and again on 7 August 2023.

18. The Claimant's written application, dated 22 December 2023, was for it to be made clear that the existing Order did not prevent the advocates from referring, in the course of their arguments, to matters which might lead to the identification of the parties. But it would remain the position that the Press and members of the public would not be permitted to publish such information. In her oral submissions, Ms Sarah Hannett said that she sought an anonymity order and reporting restrictions in relation to the identity of the Claimant and her mother, but that this did not necessitate similar orders in relation to the identity of the School and the Interested Party. She was, however, neutral as to these matters and as to the School's application for the hearing to be in private.

19. On 10 January 2024, the School then made an application for the hearing to be held in private. Mr Jason Coppel KC argued that there was a real and immediate risk to life and limb in relation to staff if the identity of the School were to be known more widely than it already is as a result of the dispute which is the subject matter of the case. His position was essentially that the existing Order was not sufficient to protect the School, notwithstanding that it prohibited publication of information which could lead to it being identified, given the difficulties with policing it in the course of the hearing.

20. Bearing in mind what was said in *Imam v Croydon LBC* [2021] EWHC 736 (Admin) at [41] about the importance of the parties giving consideration to any proposed qualifications to the open justice principle at the earliest possible stage, the lateness of these applications was unfortunate. Given that the parties' proposal was, in effect, that the Press would be virtually unable to report the proceedings in court, I notified them on the day before the hearing that it would be necessary for this issue to be dealt with at the outset, and that the proposed restrictions on reporting the proceedings in court would need to be justified by them.

21. The Claimant had suggested that these issues be dealt with at a 2 hour hearing in the week before the hearing but the Defendant had maintained that this was unnecessary because they would take no more than 45 minutes to resolve. In the event, the first half day of the hearing was taken up with submissions from the parties and various members of the Press, and with my ruling. For reasons which I explain at Appendix 1 to this judgment, I refused the School's application for a private hearing. I also decided that the School and the Interested Party should no longer be anonymised and that they could be identified in any reporting of this case. The Claimant, her mother, staff and pupils at the School and members of their immediate family were entitled to anonymity and there would be no reporting of information which could lead to their being identified as a result of these proceedings. I gave Mr Coppel an opportunity to take instructions as to whether the School wished to appeal my decision and/or to make any further application. Having done so, he indicated that the School did not.

22. As a consequence of dealing with these applications, it was not possible to complete oral submissions in the claim for judicial review itself. Ms Hannett's submissions were cut short after she had had 4.5 hours and Mr Coppel then made his oral submissions in

the 3.75 hours which remained. I therefore gave Ms Hannett permission to make her reply in writing, and Mr Coppel permission to address any new points or suggest any corrections in response. Further written submissions were provided on behalf of the Claimant on 24 January 2024 and on behalf of the School on 31 January 2024. I am satisfied that, bearing in mind the detailed pleadings and written submissions which they made, the parties each had a fair opportunity to put their case.

APPROACH TO THE EVIDENCE

23. Whilst there are significant areas of common ground in relation to the facts, the evidence reflected contrasting views about the School and the merits of its overall approach to the provision of education. Unfortunately, neither side's statements were written dispassionately. The key witnesses argued their cases in the evidence and there was little acknowledgment of the perspective of those with whom they disagreed. The statements and exhibits included irrelevant and, in some instances, unjustified criticisms of the other side, and their tone reflected the fact that feelings were running high. In assessing the evidence I therefore factored these matters in. Happily, the same cannot be said of Ms Hannett and Mr Coppel whose submissions were characteristically measured, and who were evidently aware of the sensitivities of the case.

24. There were also evidential disputes about aspects of how the School operates in practice and some of the events which form the subject matter of the Claim, including the incidents which led to the FTEs. There was no application to cross examine. My approach to these disputes was therefore to apply the helpful summary of the law which was provided by Chamberlain J in *R (F) v Surrey County Council* [2023] EWHC 980 (Admin), [2023] 4 WLR 45 at [50].

APPROACH TO THE GROUNDS AND CONCLUSION

25. In the event, Ms Hannett argued Grounds 1-3 in reverse order. This was perfectly logical given her argument that the quality of the decision making process, which is challenged under Ground 3, impacted on the question of justification under Grounds 1 and 2. I have taken her criticisms of the process into account in deciding Grounds 1 and 2 but, in explaining my decision, I address the Grounds in the order in which they were pleaded as this is likely to make what is a lengthy judgment more readable.

26. My overall conclusion is that all of the Grounds save for Ground 4(b) fail for the reasons set out below.

THE FACTS IN MORE DETAIL

The Claimant and her beliefs

27. The Claimant was born in this country and brought up in the London Borough of Brent where she went to primary school. She describes herself as a practising Muslim.

28. The Claimant began at the School in Year 7 in September 2020. She says that she wanted to go there because the School gets good results and because a number of her friends' parents were sending them there. She says that her mother's primary reason for wanting her to go to the School was its strict approach to discipline, which meant that she would be safe, along with its academic success.

29. The Claimant was initially put on the waiting list for a place at the School and her place was only confirmed shortly before Year 7 started. Her mother did not attend the School's open days, or its welcome events for new pupils. This may be why she does not recall being told anything about prayers or the fact that the School did not have a prayer room when the Claimant joined the School. Her mother says that she just assumed that prayers were something which the Claimant would do when the time was right for her. She does not suggest that she herself sought information about the School's position on this issue.

30. The Claimant says that in Year 8 she started to take prayer seriously. The question of praying came up in conversation amongst her friends, and her mother and other parents also discussed it. She and her friends knew that they should be praying as they were getting older and reaching puberty, but they did not feel that they could ask for a prayer room because they believed that prayer was not permitted: *"In general if we were not explicitly allowed to do something we could not do it"*. They had also heard rumours of a request for a prayer room being made in the past which had been ignored. The Claimant says that her mother had telephoned the School to raise a concern that, when she was fasting during Ramadan, the Claimant was uncomfortable about sitting with children at *"family lunch"* who were eating and drinking, but the question of prayer had not been raised with the School. Although her mother says that she thinks she is likely to have raised prayers in the same call, she does not appear actually to recall doing so. The School's evidence is that prayer was not raised as an issue before the events of March 2023 which I describe below.

31. The Claimant gives evidence that one of the core "pillars" of her faith is undertaking five daily prayers. These are *Fajr*, which is a morning prayer; Duhr, which she initially said is *"a midday prayer which takes place between around 12.30pm and 2pm*"; Asr, which is a prayer in the afternoon before sunset; *Maghrib*, which is a prayer at sunset; and *Isha* which takes place approximately an hour and a quarter after sunset. She says each prayer takes her around 5 minutes. It is recited silently and it involves movement, including prostration. Prayer is required to be performed using a prayer mat or on a floor which is clean, but she can use a prayer mat which can be folded up and carried around in her pocket.

32. In her second witness statement the Claimant exhibits a list of daily prayer times from 2023 which was provided by the Central London Mosque. This shows that there are five prayer windows, the precise daily timing of which depends on the position of the sun relative to the earth on the day in question, and whether the day is during British Summer Time or Greenwich Mean Time. As each prayer window closes, the next opens. The Claimant says that it is seen as much better to conduct one's prayer earlier in the window rather than later, and that it is not right to wait until the last possible moment before doing so.

33. The lunch break or period at the School is between 12.10pm and 1pm. It can be seen from the list of daily prayer times that the window for Duhr overlaps with the lunch break from late September through to the end of March. In late September the window opens at just before 1pm and closes at 4.15pm. The times of the opening and closing of the window then get progressively earlier until the clocks go back in late October, when they are moved to an hour earlier (so that the window is between 11.49am and 2.11pm at that point). By the time the clocks go forward in March, the window is between 12.12pm and 3.31pm. The effect of the clocks going forward is therefore that the

window opens and closes an hour later and there is no longer any overlap with the lunch period. Similarly, the window for Asr opens during the School day from October to March, albeit it closes after the end of the school day. During the summer months it opens and closes after school.

34. The Claimant performs Fajr, Maghrib and Isha outside the school day and at home. Asr is normally performed by her at home except in the middle of winter when the window closes too soon after the end of school for her to get home. When the window for this prayer does fall during the school day it clashes with lessons. The Claimant says that she does not think it right to interrupt lessons for her and others to pray so she waits until she gets home before undertaking it, even if this means that she does so a little late. In her first witness statement, the Claimant says that on school days when she was in Year 8 she would pray at home at the end of the day *"making up for those prayers that I missed"*.

35. The Claimant explains that in most of the summer term and at the start of the autumn term she is able to get home to do the Duhr prayer within the allotted window. She has more time to do so in June - because the window opens after 1pm and closes at around 5.20pm - than she does in April, when it closes between 4.37pm and 5pm, getting later in this range as the month progresses. She says that although it would be preferable to pray earlier in the window, there is less of a problem because the window opens when pupils are back in their lessons after the lunchbreak and the prayer can be completed after school within the required window. So in these months it is not a case of her being prevented from praying in time which she regards as free time.

36. Twenty-five minutes of the lunch period are spent at *"family lunch"* which pupils are required to attend, and which I describe further below. The Claimant accepts that this is not *"free time"* and does not complain about the fact that she is not able to pray during this time. However, she says that she regards the rest of the lunch period as her own, or "free" time. She says that the School has *"tried to"* arrange clubs during lunch break but these are not compulsory and she does not go to any of them. She likes to have a break and she spends this time chatting with friends: speaking with who she wants about whatever she wants. The Claimant wishes to be able to perform Duhr during this period of time.

37. The Claimant says that prayer is important to her. Duhr is a requirement of her faith. She is *"deeply unhappy"* about being prevented from doing so and she feels *"really guilty*". She says that she needs the *"connection with God for those five minutes at the right time"* so as to enable her to continue peacefully with her day. Not being able to do so makes her *"really upset"*.

38. In relation to the School's reliance on Qada as a substitute for praying at the right time, at [90] of her first witness statement the Claimant says:

> *"90….Doing Qadaa is <u>less meaningful</u> than performing the prayer at the proper time. <u>Qadaa is when one makes up prayers when one has inadvertently missed them</u>. This could be for very straightforward reasons (being asleep at the time that the prayers are supposed to have been undertaken) or for more substantive ones – i.e. a surgeon performing a complex operation clearly could not break from that to perform prayers….. Being in the middle of, say a biology lesson on a winter's afternoon would in my view be a reason for Qadaa, given the inconvenience that*

> *seeking to pray at that time would cause to myself and to others. Qadaa seems to me to be a reasonable way of dealing with that, and accommodating my religion to the world within which I live. If I have time free to pray I think it is right to pray rather than not pray. At school, because of the lunchbreak, the opportunity is there at the relevant time and in my view I should use that opportunity. I really do not think it right to seek to apply Qadaa to a situation such as this. It upsets me that somebody suggests that I should. That is not what Qadaa is for."* (emphasis added)

39. [21] of the Amended Statement of Facts and Grounds says that this paragraph explains the Claimant's *"understanding"* of Qada, and summarises it as saying the following about the circumstances in which Qada is available:

> *"It is occasionally possible to miss a prayer and to do Qadaa…..Where an adherent misses a prayer inadvertently or for good reason, it can be offered as soon as possible after…."*

40. In her second witness statement, the Claimant says that Qada is not the equivalent of doing the prayer at a later time, and the prayer still being valid. If Duhr is not performed at the right time it has not been performed. *"[Qada] is to seek of forgiveness for missing the prayer. I can't just be seeking forgiveness every day, all of the year. That is not what God would want. That is not what I want."* (Although I note that this overstates the effect of the PRP, even on her own evidence, given that the problem arises in the winter months only and only when *"free time"* coincides with the allotted window for Duhr). She also says that it does not seem to her to be genuine to seek forgiveness and then go on to do exactly the same thing the next day.

> *"Being forced to seek to do Qada (whether or not it is possible for Qada to be an option/the prayer accepted) instead of being able to conduct the prayer at the proper time is (to me, and many other Muslims) a significant detriment".*

41. The events which gave rise to this Claim took place when the Claimant was in Year 9. She is now in Year 10, studying for her GCSEs. There were and are no concerns about her academic performance and, before the FTEs, nor were there any concerns about her behaviour. Although she has been severely criticised by Ms Birbalsingh for her involvement in the events which unfolded in March 2023, and although there was some disagreement between the parties as to the nature of Qada, the sincerity of the beliefs which the Claimant professes has not been questioned by the School.

Professor Siddiqui's evidence

42. Professor Siddiqui's evidence about the importance of prayer was broadly consistent with the Claimant's, although perhaps with some differences of emphasis. She confirms that prayer is one of the five pillars of Islam, and that it is regarded as an obligation. She confirms that children are normally expected to begin to pray on reaching puberty. She says that prayers last no more than 5-10 minutes at a time, and she confirms that prayers should take place early within the allotted time and not left until it is coming to an end.

43. In relation to Qada, Professor Siddiqui says that *"If one fails for any reason to perform a prayer within the specified time period, one can (and should) make it up later (qada)."* It appears from her report that Qada is the performance of the prayer – the fulfilling of

the obligation – at the first opportunity, in contrast to seeking divine forgiveness, which is an *"ever-present possibility"*.

44. As I understand her report, consistently with [21] of the Claimant's pleaded case, Professor Siddiqui draws a distinction between freely choosing not to pray at the allotted time – *"intentionally or deliberately"* choosing not to do so – and missing a prayer through forgetfulness or oversleeping or circumstances beyond the person's control. Professor Siddiqui says that:

> *"The dominant view is that qada prayers are prayers which compensate for prayers which have been missed owing to forgetfulness or oversleeping, not prayers which have been deliberately not observed. Therefore, qada should not be regarded as an alternative practice to missed prayers. For some scholars, if one missed a prayer deliberately, that prayer could never be made up by qada, rather, the person should seek God's forgiveness and repent".*

45. She goes on to give the example of a surgeon (also given by the Claimant in her evidence) who may forgo prayer during an operation and says:

> *"…a pupil at a school should not miss a lesson to perform their prayers because it may disrupt staff, the timetable and other pupils or scheduled activities. However, this is very different from situations where a person has free time at school or at work and observing prayers does not cause any disruption or inconvenience to the wider institution."*

46. It is fair to say that this should not be regarded as an opinion about the position on the facts of the present case. Professor Siddiqui did not have sight of any of the witness statements in the case or the School's pleaded case when she prepared her report, and she was asked to give her evidence on the premise that the time in question was entirely free time. Nor was she asked to deal with the specifics of the School's case that there are practical issues with facilitating prayer, and other implications, if it were permitted.

The School

Overview

47. The School is located in one of the less affluent parts of London. It was founded in 2014 by Ms Birbalsingh. It has around 120 pupils in each of Years 7 to 11, and around 70 in each year of the Sixth Form. 25% of the School's pupils are on pupil premium (i.e. they are or have been eligible for free school meals, or in local authority care) and Ms Birbalsingh estimates that 90% are from ethnic minority backgrounds. Although half of the pupils are Muslims, the School also has large numbers of Sikh, Hindu and Christian pupils, which is broadly in line with the demographic profile of the School's catchment area.

48. The Schools' academic results are exceptionally good. For example, in 2022 it achieved a Progress 8 score of +2.27 which means that, on average, each pupil at the School achieved more than two grades higher at GCSE than they would have at an 'average' secondary school. This was the best Progress 8 score in the country that year and the highest ever score achieved since this system of measurement was introduced in 2016. The actual GCSE results were also outstanding: nearly 40% of the grades were Grade

9 and almost 75% were Grade 7 or above. Also in 2022, almost three quarters of the A level exams taken at the School were graded A* or A, and 91% were graded A* to B. 82% of the School's A Level students went on to study at Russell Group universities.

49. The School is heavily over-subscribed. It and Ms Birbalsingh have also attracted media attention because of the School's distinctive methods, its academic success and her outspoken views. The School is well known for being extremely strict and, indeed, Ms Birbalsingh describes it as *"the strictest school in Britain"*.

The ethos of the School

50. Ms Birbalsingh says that the academic success of the School is what has made the headlines, but it is only half of the story. The focus of the School is on developing the whole child rather than merely being an exam factory:

> *"The School's focus is on enabling inner city children to be able to become responsible, upstanding members of society. The School succeeds when the children leave, whether to university, to another school, or elsewhere, confident in their own abilities, respectful of others, and able to integrate into society as kind and responsible young adults."*

51. She emphasises two main aspects of the School's ethos: its disciplinary ethos and its "Team" ethos.

The disciplinary ethos

52. As far as the former is concerned, Ms Birbalsingh says that in many *"inner city"* schools there is a lack of discipline and supervision. Children are bullied, harassed or subjected to peer pressure which affects their attitude to learning and how they behave and present themselves, and makes their experience of education an unhappy one. So she and her team:

> *"were determined to create a school where all bullying and harassment whatsoever was eradicated and where the children respected each other. The behaviour policy was designed with that goal in mind, and I am extremely proud to say that we have succeeded in that goal"*

53. The aim of the School's behavioural requirements and system of discipline is to make the pupils feel safe and secure. Ms Birbalsingh says that children like consistency. They want to know what is expected of them, that there are authority figures who are in control and who will look after them, and that they will be treated fairly by those authority figures. The School's strict rules and routines mean that the pupils can be themselves and concentrate on learning. However:

> *"An important corollary of this disciplinary ethos is that teachers at the School are in unquestioned positions of authority over the children. ....If a teacher has handed out a punishment or a reward to a child, that is the end of the matter. There is no opportunity for a child to answer back or respond, nor for anyone else to complain that the child is receiving unduly favourable or unfavourable treatment. That would undermine the teacher's authority in the eyes of the children. Teachers and children are not equals..."*

54. The School has a system of merits and demerits, which the teacher enters into an App on his or her phone at the time of the relevant event, so that it becomes part of the pupil's disciplinary record. Merits operate as a system of reward which may result in prizes or badges at the end of each half term. The badges can then be worn on the school blazer in the following half term. There is also a Reward Day at the end of each term during which pupils who qualify can watch films and eat sweets. Pupils who do not qualify for Reward Day spend the time working elsewhere.

55. Demerits cancel out merits. Two demerits in a lesson, or a single instance of unacceptable behaviour, will also result in a detention of 20-30 minutes at the end of the school day. Unacceptable behaviour *"could include answering back to a teacher, disobeying a teacher, talking in the corridor, not having a required piece of equipment, disrupting others in lessons or being late to school (even a minute late)"*.

56. *"Referral"* requires the pupil to work in silence in the bespoke referral centre between 8.20am and 5:30pm. Although there may be other pupils in the referral centre on any given day, it is also referred to as *"isolation"*. I deal further with FTEs and referral below, when I consider Grounds 4(a) and (b).

The Team ethos

57. As for the Team ethos, a sign painted on the School gates says: *"Do your duty"*. Ms Birbalsingh explains that this refers to each pupil's duty:

> *"to their community, to their school, and to their classmates. I often say that there are no individuals at the School, by which I mean to reflect that duty."*

58. She goes on to say:

> *"A great part of the School's success depends on minimising the distinctions and divisions between the children and promoting social and cultural integration between them. Children are keenly aware of differences between them. Without strict boundaries, they will leverage those differences to jockey for social standing by, for instance, looking down at and belittling other children who don't conform to what are considered to be the 'correct' norms or at other children whose families can't afford the same luxuries as their family can. These problems can be particularly acute in a school that is as diverse, multi-racial and multi-faith as this one. Without corrective action, children inevitably end up separating themselves into social groups along the same dividing lines that separate groups in wider society. For instance, children with a shared religion will form a particular social group…There is of course nothing wrong with children wishing to spend time with others who share the same background, but my experience of working in other schools, and that of my colleagues, is that – if left unchecked - this can develop into social stratifications which are damaging to standards of behaviour and to a collective ethos.*
>
> *The School's approach to tackling such worrying divisions is to aggressively promote integration between different faiths, cultures and ethnic backgrounds through the notion of the Team. This ethos infuses all of the School's practices and policies at all of the different levels of the school"* (emphasis added)

59. In her witness statements Ms Birbalsingh explains these practices and policies in detail. I will summarise some of them below, so as to give a flavour. But before I do so it is relevant to understand the nature of the school building given the issues as to the practicalities of facilitating prayer.

The school building

60. The School is housed in a seven storey office block rather than premises which were designed to be a school. The corridors are narrow and the former offices, which now serve as classrooms, are significantly more cramped than classrooms ought to be. The building has two staircases which are only wide enough for two to stand abreast: one is used to go up, and the other to go down. There is a strict prohibition on using a staircase to go the wrong way.

61. Because of the constraints on space, it is not possible for all of the pupils to move to their next lesson at once. The start and end times of each lesson are therefore staggered on a minute-by-minute basis. For example, certain classes will leave their classroom for Period 1 at 08:13; the next classes will leave at 08:14; and the next at 08:15 and so on. By the time one class has started moving out of a given classroom, the next class is already waiting outside in the corridor, ready to enter the room. Every classroom has a large digital clock on the wall, which is accurate to the second, so that the movement of the entire School can be coordinated.

62. The corridors have a line running down the middle to ensure that pupils walk down one side of the corridor. They are required to move around the building and enter and exit all rooms in single file and in silence. Any child walking past a teacher is required to make eye contact and say *"Good Morning/Afternoon Sir/Miss"*.

63. No room in the School is large enough to serve as the school hall. Instead, two rooms - one on the ground floor and one on the first floor - are used for assemblies in the morning and as the dining halls at lunchtime. Every day, the chairs and tables in both of these rooms have to be rearranged from the assembly set up to the dining hall set up and back again.

64. The car park of the former office block now serves as the playground or *"yard"* for the School. There are basketball hoops, table tennis tables and wooden picnic tables and benches, but the yard essentially remains an open stretch of tarmac which is clearly visible from the street and the buildings which surround the School. Part of the school building overhangs the middle part of the yard so that this part is under cover.

Tutor time

65. Twice a week, pupils will attend assembly where they sing the national anthem and receive a talk from Ms Birbalsingh or a Head of Year. Otherwise, the day begins with 20 minutes of *"Tutor time"*. There are also 25 minutes of Tutor time at the end of the school day.

66. The pupils are arranged into form groups in Year 7 according to their ability as broadly averaged across all subjects, rather than being put in sets according to their abilities in particular subjects as some schools do. They then attend all of their subject lessons together. The form generally then stays together until GCSEs, with the aim of also

keeping the same form tutor and Head of Year. Ms Birbalsingh explains that this approach is taken because the School considers it *"more important to create a cohesive and supportive environment within a form, with a distinctive form spirit and a sense of community, than to focus solely on developing a child's individual strengths and improving their individual weaknesses"*. Her view is that, not only does it lead to better exam results; the pupils within a form see themselves as part of a team, rather than a collection of individuals.

67. Ms Birbalsingh says that during Tutor time the form tutor can seek to encourage and develop team spirit. The pupils are taught poems or to sing the national anthem, or they play educational games together. At the start of the day, the tutor will talk to them about the importance of not letting the team down during the course of the day. At the end of the day, the tutor will pull up the Reward app and go through the tally of merits and demerits which have been awarded to form members during that day.

68. All of the pupils have identical navy blue school bags which they are required to bring into school every day. At the start of the school day, bags and coats are hung on hooks at the back of the form room, where they remain until the end of the day. Pupils are not permitted to carry these items around the School, even in the winter months. They are required to carry all of the books and equipment which they need in identical transparent work packs. Pens, pencils etc are kept in a smaller, transparent plastic pencil case.

69. The School operates a policy that items of property which are not expressly authorised are forbidden. Apart from the School's water bottle, these are the only items that they are allowed to carry into class, and around the School building. Any pupil who does not have a required item of equipment is liable to receive a detention. If a teacher suspects that a pupil has what Ms Birbalsingh refers to as *"a contraband item"*, the teacher will search them and it will be confiscated. If a teacher sees or hears a mobile phone it will be confiscated from the pupil until the end of that half-term; if it is confiscated in the last two weeks of that half-term, then it will not be returned until the last day of the following half-term.

<u>The approach in lessons</u>

70. The practices of the School in lessons aim to ensure that the pupils are fully engaged for the whole of the lesson and that there is *"no time whatsoever in lessons during which the children are free to socialise or have casual discussions or other interactions with other members of the group*". For example:

    i) Every pupil is required to pay constant attention to the teacher. This is called *'tracking'*. If the teacher senses that attention is beginning to waver, they will say *"Tracking"*, sometimes with a click of the fingers, whereupon every pupil is required to pay attention immediately and in silence.

    ii) When a teacher asks a question, every pupil is required to put their hand straight up to answer the question, and to do so rapidly and enthusiastically. When answering a question, a pupil is required to project their answer loudly so that the whole class can hear. If the pupil does not know the answer, *"that is fine". "But no one is allowed to hide"*. Sniggering or criticising another pupil's answer will warrant an immediate detention or demerit because it *"undermines the team spirit"*.

iii) When asked a question or given an individual instruction by a teacher, pupils are required to answer *"Yes Sir"* or *"Yes Miss"*. This is known as the *'Michaela full stop'*.

iv) After the teacher has picked a few pupils to answer a question, they will often say *"In your pairs, (e.g.) 10 seconds, go"*. The pupils are then all required to turn to the person sitting next to them and rapidly explain their answer to the question. Towards the end of the allotted time, the teacher will count down *"3, 2, 1, tracking"*, at which point the pupils must stop discussing in their pairs and turn to face the teacher.

v) All pupils must have an A4-size whiteboard and erasable pens with them. From time to time the teacher will ask them to write down an answer on their whiteboards, and then hold it up to show the class. The teacher will say *"Answers on whiteboards, 10 seconds"*, and then count down towards the end of those ten seconds *"3, 2, 1, show me"*, at which point all of the pupils are required to hold up their whiteboards.

vi) Pupils are otherwise required to sit up straight and in silence, with their arms folded on the desk in front of them, listening to the teacher. The School has an acronym for the behaviours required of all pupils - *"SLANT"- "Sit up straight, Listen hard, Ask questions, Never interrupt, Track the teacher"*. They are required always to look at the teacher when the teacher is talking to them.

Morning break

71. The morning break lasts for 15 minutes. Years 9-11 are required to spend the whole of it outside in the yard, even if it is cold and/or raining. This is because of the lack of time and the logistical problems with them returning to their form rooms. During break, they are required to assemble in their year groups and are not permitted to mix with other years. Toilet blocks have been built in the yard so that they do not need to go inside. If it is raining, they can shelter under the overhang in the yard to which I have referred.

72. Years 7 and 8 stay inside during morning break. Year 7 go to the upper hall and Year 8 go to the lower hall. They are not allowed to go to any other part of the School building during morning break save to go to the toilet, at which point they are supervised by teachers on duty in the corridors and on staircases. A teacher also stands by the door to the toilets.

73. One of the School's rules is the *"rule of four no more"*. This is most relevant when pupils are in the yard, but it also applies throughout the school day. Pupils are not permitted to talk or otherwise socialise in groups of more than four. The aim of this rule is to prevent pupils from being excluded from social circles and Ms Birbalsingh says that this is an integral part of the School's success in driving out bullying and harassment.

74. At the end of the morning break the pupils gather together and are given a short *"pep talk"* by their Head of Year *"to build a team spirit amongst their year group"*. The pupils then go to their lessons.

Lunchtime

75. Ms Birbalsingh says that in many schools pupils fear school lunchtimes because that is when the worst bullying and harassment happens. She says that this is because at other schools the pupils are essentially left to their own devices. The approach is very different at the School. Pupils are continuously and closely supervised by teachers at lunchtime. Teachers do not have their lunch separately or any other free time during the lunch period. They are either at family lunch, or supervising pupils who are in the yard or attending lunchtime clubs.

Family lunch

76. Lunch sittings last 25 minutes. At the start of every sitting the pupils stand beside their chairs and chant poetry which they have memorised during Tutor time or during English lessons. A teacher calls out the first word of the poem and all of the pupils call back together with the rest of the line. The poems include *"If"* by Rudyard Kipling and *"Invictus"* by William Ernest Henley, which are chosen for their emphasis on resilience and responsibility for one's own actions.

77. A teacher also sets a mandatory topic of conversation, such as books or current affairs or holiday plans, which all of the pupils are required to discuss during the meal. They are not permitted to discuss anything else. The aim is to teach all pupils to be comfortable engaging in conversation on a range of topics at a meal table.

78. The pupils sit at tables of six to which they have been assigned according to year and form. A teacher or a visitor is seated at the head of the table. The pupils have set roles: to set the table and pour water for the whole table; to collect the food from the caterers at the end of the dining room and serve it to the others at the table; and to collect the plates and utensils at the end of the lunch and take them back to the end of the dining hall, before wiping the table. Again, the aim of this is to promote the Team ethos.

79. Ms Birbalsingh explains that, when it was founded, the School served meat at lunch. However, she quickly realised that this divided the pupils along racial and religious lines given that different religious and ethnic groups have different rules and practices in relation to food, and particularly in relation to meat. The School therefore stopped serving meat after the first week of its existence and only served vegetarian food from then on. Ms Birbalsingh characterises this as all of the pupils who would like to eat meat being required to make a concession so that everyone can eat the same food together. Muslim pupils who are fasting during Ramadan are not permitted to miss family lunch or to sit separately from pupils who are eating and drinking.

80. After the food has been cleared away, there are a few minutes of *"appreciations"*. A teacher at the front of the dining room randomly selects a pupil who then has to stand up behind their chair and express gratitude to a person of their choice: it may be a teacher, a classmate, a parent, or a friend. The appreciation must be loudly projected to the whole room. At the end of an appreciation the whole room claps twice, and then the teacher chooses another pupil. A good appreciation, which is one which is sincere and delivered loudly and confidently, may be awarded merits by the teacher in charge. When the appreciations are over, the pupils file out.

The other part of the lunch period

81. Ms Birbalsingh contests the Claimant's characterisation of the 25 minutes of the lunch period which are not spent in family lunch as *"free time"*. Pupils are not permitted to roam around the school building. They are only permitted to go into the yard, to the library, to work in the computer room, or to a small number of lunchtime clubs such as chess, maths, classics or debating which take place once a week. These clubs, which they sign up to at the beginning of each term, take place in a small selection of classrooms. She says that the pupils move to the club at the start of the 25 minutes, accompanied by a teacher, and cannot leave that club until they are required to go to family lunch/Period 5. Although the Claimant contests this evidence and gives the impression that pupils are free to move around the school corridors during the lunch period, I accept Ms Birbalsingh's evidence, not least because the Claimant does not attend school clubs and I can see no reason at all to disbelieve the Headteacher on this point.

82. There are usually around 10 teachers on duty in the yard. Ms Birbalsingh says that they will actively intervene in the pupils' conversations and games, and ensure that no child is feeling left out. They will also rigorously police the *"rule of four no more",* and they will direct pupils to specific parts of the yard to ensure that they are socialising with members of their own year group. Teachers are also mindful of the need to promote harmony and integration between pupils of all backgrounds and will take active steps to encourage interaction between pupils of different ethnic or religious groups if they sense that segregation is developing. She says that the School's community spirit is strengthened by the *"guided socialising"* and engagement between the pupils during this part of the lunch period.

83. Even the way that the children play basketball or table tennis in the yard is subject to requirements. The School encourages *"professional play"* i.e. the pupils are not permitted to play casually: for example, to dribble the basketball around the yard or to hit the table tennis ball other than in earnest. They are expected to play according to the norms and rules of the game, and competitively.

84. Ms Birbalsingh says that *"this part of the school day is just as important as time spent in lessons or in family lunch"*. It is the only part of the school day, other than a few minutes during morning break, when pupils are permitted to discuss what they want with other members of their year group and it provides an opportunity for *"guided socialisation"* which is not available during the rest of the school day. She says that for this reason teachers will identify those children who are quieter than others, and who may be more inclined to go to the library than out into the yard, and make sure that they go into the yard and socialise with the other members of their year.

85. Again, the Claimant advances various arguments in her witness statements that the 25 minutes are a *"break"*. I accept that she spends this time chatting with friends and that she personally may not have been told by a teacher to socialise with a particular pupil. But this is not inconsistent with Ms Birbalsingh's evidence on this topic, which I accept. The Claimant does not directly contest that evidence and may not be in a position to do so. She also accepts that her choice of social circle is limited by *"the rule of four no more"* and that teachers do sometimes come up to a group and *"try to"* strike up a conversation with them and to be friendly and approachable. Consistently with the somewhat negative tone of her evidence, she says that this can come across as *"a bit fake"* depending on the teacher*: "Everyone hopes that they won't get picked on, and if they do it is for as short a time as possible"*.

86. A few minutes before the end of their time in the yard, a whistle blows. The pupils must immediately line up in their forms, in silence. Their Head of Year will then call out *"Hands up"*. Every pupil must then raise their arms immediately. They are then told to lower their hands and are addressed by their Head of Year before they file out of the yard, in their lines, for the next part of the school day.

87. Ms Birbalsingh also gives evidence of significant logistical complexity in organising the lunch period. There are two lunch sittings and both of the "halls" are used. Arrival and departure times therefore have to be strictly enforced so that large numbers of pupils can move into and out of the halls on different floors and into and out of the yard and/or their lunchtime club or other activity. The children are constantly supervised by teachers during these movements.

The Sixth Form

88. Sixth formers enjoy more freedom than the pupils in Years 7-11. They have access to the Sixth Form Common Room during free periods. Sixth form students are permitted to leave the school grounds during the lunch period and they are not required to walk through the corridors in their tutor groups in single file. Rather than the school uniform worn by the pupils in the rest of the School, Sixth form boys wear suits and the girls may wear smart business wear.

Religion at the School

89. The School has a strict and highly prescriptive uniform policy from which any departure will result in confiscation of the offending item and/or the pupil being placed in isolation until a parent or guardian brings the correct item to school. The uniform policy permits girls (regardless of religion) to wear headscarves, albeit subject to detailed requirements. They must be black or dark blue, any pins or clips must be small, dark in colour and understated, the headscarf must not have any decorations and the material must not be too long at the front or the back as it must not obscure the uniform or look untidy. The headscarf must also completely cover the hair. Ms Birbalsingh says that compliance with these requirements means that the girls look smart and professional and that there have never been any issues with girls wearing appropriate headscarves.

90. The uniform policy provides that the Headteacher may grant exceptions in relation to items of religious significance but only where this is required as a matter of sincere religious observance and this is substantiated by a letter from the leader of the relevant religious community. Ms Birbalsingh says that pursuant to this provision she decided that Hindu girls should be allowed to wear a kautaka (a red thread) on their wrist, and this has never caused a problem within the School.

91. Boys in the sixth form are permitted to grow facial hair. Boys in Years 7-11 are not. However, the uniform policy recognises that some male pupils may wish to grow their facial hair on religious grounds and sets out a process for applying for permission to do so, including a face to face meeting between the parents and the Headteacher who may request a letter from a relevant religious authority, such as an Imam, after which the matter will be considered by the governors and the Senior Team. The Claimant says that some Muslim boys do seek to grow their facial hair although the School sometimes tells them to shave.

92. Ms Birbalsingh's evidence is that prayer has always been permitted at the School. Until the events of March 2023 prayer *rituals* had never been prohibited either, but nor had they been actively encouraged or facilitated. The School has never had a designated prayer room and this is made clear to the parents of prospective applicants to the School and pupils, at open days and welcome events.

93. In her second witness statement Ms Birbalsingh says *"It is important to appreciate that, prior to the events of Spring 2023, none of the children at the School had ever sought to conduct prayer rituals during the school day."*. This was then contradicted by Ms Hassan's evidence, which I accept. She left at the end of the Sixth Form in July 2021. When she was in the second year of the Sixth Form, Ms Hassan was permitted by her then Head of Year to perform the Asr prayer before *"maths clinic"*, which took place after school. The Head of Year *"could not have been more helpful"*. She made a classroom available for Ms Hassan who then used it to pray at lunchtime as well. Ms Hassan says that the practice which developed was that many other sixth formers, although she does not know how many, would also use this room to pray at lunchtime: *"It was hardly a secret"*. They would walk across from the Sixth Form common room, generally holding their pocket prayer mats, pray and then go back to the common room. Staff would see them doing so: *"it was just an accepted part of sixth form life"* and it was not controversial or a major issue.

94. Ms Birbalsingh's statement in reply says that Ms Hassan *"has described some events from a previous period in the School's history"*. Regrettably, she does not acknowledge that her second witness statement, or other statements which she has made to the effect that hitherto no pupil had shown any wish to pray in school, were inaccurate in this respect. Nor does she explain how the inaccuracy came about. But nor does she contradict Ms Hassan's account. Instead, she argues that *"there is one respect in which Ms Hassan's evidence is relevant"* namely that it shows that if prayer rituals were permitted for some pupils, others would wish to follow suit. This is not in fact the only respect in which Ms Hassan's evidence is relevant for reasons which I will come to.

95. Ms Birbalsingh also says that members of the Sixth Form who wish to pray during the lunch period are able to do so at the Brent Civic Centre. This is a reflection of the fact that they are subject to a different, and more permissive, regime to the rest of the School. The Civic Centre is approximately a five minute walk away from the School and it has at least one prayer room. Many of the Muslim pupils in Years 7-11 who wish to pray at the end of the school day do so there.

The events which led to the introduction of the PRP

96. The Claimant says that by Year 9 she and her friends felt that there was a real problem. They knew that they should be praying at lunchtime but they were not clear how they were going to go about this. Throughout the autumn term of 2022 and at the start of term in 2023 *"lots of children were talking amongst themselves about the possibility of praying at school but, with one possible exception, none of them raised it or acted on this"*.

97. However, around the start of March 2023 she and her friends spoke with a visitor to the School who was the Headteacher of an Islamic school. He was wearing a thobe (a long white traditional robe worn by male Muslims) and was with a group of women, some of whom were wearing hijabs and others burqas. He spoke to the Claimant and her

friends and said that he had heard that they were not encouraged to ask questions. He wanted to know whether this was true, and whether they were able to question the rules. He said that at his school pupils would tell him if they felt that something was wrong.

98. The Claimant says that she understands that the visitor also had a conversation with another group of girls who told him that there was no prayer room, and he suggested that they could just pray in the school yard. After that, she and her friends discussed whether this was a good idea. The problem was that the ground in the yard was dirty and sometimes wet. Whilst she was considering what to do certain other pupils went ahead and began praying in the school yard, using prayer mats.

99. The School's evidence is that, on Friday 17 March 2023, one of the teachers saw a Year 9 pupil (not the Claimant) praying in the yard during the lunch break, using their blazer as a prayer mat. Ms Birbalsingh says she was informed but did not intervene because this was within the School rules at the time.

100. On Monday 20 March, three Year 9 children prayed in the yard using their blazers. On the Tuesday there were six, all from Year 9. It was on one of these days that some of the pupils used prayer mats which they had brought in. These items are not permitted under the School's policies and they were therefore told that they should not be brought into school.

101. On Wednesday 22 March, around 20 children prayed in the yard. They were grouped together, highly visible from the street, and would have been seen by numerous passers-by. Ms Birbalsingh says that there was a high degree of concern and unease amongst teachers and pupils as no one had ever sought to conduct prayer rituals at the School before. A large number of the year 9 girls had coordinated with each other to bring in prayer mats without permission, knowing that this was against the rules. They were using identical travel prayer mats which can be rolled up and put into a pocket. Never before had there been a coordinated attempt to undermine the School's rules. The pupils were told that prayer mats should not be brought into school. The Claimant denies that the pupils had gone out and bought prayer mats but she accepts that they had discussed that it was not right to use their blazers as prayer mats. She says that they had made their own decisions.

102. On Thursday 23 March, about 25 Year 9 pupils prayed in the yard, again using prayer mats. They included the Claimant. A senior teacher ("Ms A") who, it is relevant to note, is black, told them to put the prayer mats away as they were against school policy. They were, however, allowed to continue praying using their blazers as prayer mats.

103. On the same day, Ms A made a record of what happened. She also says that the bringing in of the prayer mats had clearly been coordinated. When the pupils were told to put them away the majority did this but two, including the Claimant, answered back. The Claimant became very angry and repeatedly interrupted her. Ms A's account relates her surprise at how rude and aggressive the Claimant's tone and facial expression were, and she says that there was a level of contempt towards her which she found shocking despite her extensive experience as a teacher. The Claimant was sent to wait inside and the matter was escalated to Ms Birbalsingh who, having spoken to Ms A, decided that both pupils should be given FTEs for *"extreme rudeness towards a teacher"*. Her decision to impose a 2 day FTE, which would be followed by 4 days of referral

(subsequently reduced to 2 days) was communicated to the Claimant's mother by email after school that day. I return to this incident when I consider Ground 4(a) below.

104. Ms Birbalsingh also says that at family lunch on the Thursday, and at the 'break food' stations during morning break, some of the pupils who were conducting prayer rituals in the yard were intimidating other Muslim students who had chosen to eat rather than fast. They would stare at them as they were served food, and pointedly decline to talk to them during the meal or for the rest of the morning break. In addition to this, more children than was usual were given detention for breaching the *'rule of four no more'* by congregating in groups in the yard.

105. On Friday 24 March there were around 30 pupils praying in the yard. The group included pupils from Years 7 and 11 rather than being confined to Year 9s. Ms Birbalsingh says that she was told by a teacher that one of the Muslim pupils who had not previously worn a headscarf had been intimidated into doing so. Around this time she also learned that a Muslim girl had dropped out of the School choir as she had been told by one or more of the other Muslim pupils that this was 'haram', i.e. forbidden, during Ramadan. She says that the intimidation of Muslim pupils who were not fasting at family lunch and during morning break also increased. Some of the Muslim children who were praying had been intimidated into doing so by being told by others that they were bad Muslims if they did not do so. Four of the pupils, two from Year 9 and two from Year 7, were given FTEs for refusing to respond to a teacher when spoken to, on the basis that they should not be interrupted when they were praying.

106. Ms Birbalsingh says that it was also clear that there was a division developing between the Muslim pupils and the non-Muslim pupils. One area in the yard was being exclusively occupied by Muslim children during the lunch period, whether or not they were conducting prayer rituals, while another was occupied by non-Muslim pupils. She says that it was clear that this was undermining of the School's culture of all races and religions mixing and being friends with each other.

107. Also on 24 March 2023, an online petition was started which gave an inaccurate account of the incident between Ms A and the two pupils on the previous day which had led to their FTEs. Ms A was accused of *"disgusting, Islamophobic behaviour*". The petition was signed by at least 4000 people. Several messages of support for the petition were also posted. Some of these made criticisms of the School in language which was unexceptionable, albeit without knowing the full facts. Others displayed a range of prejudice, including by contrasting the School's supposed favouring of gay people and Jews with its treatment of Muslims. A good deal of abuse was directed at Ms A and Ms Birbalsingh, and the abuse towards the former was particularly shocking. I will not dignify what was said by repeating it, but the comments included references to the Klu Klux Klan, use of the full range of terms which members of the Klu Klux Klan might use to refer to black people, and references to slavery and lynching. There were comparisons with monkeys, there was misogyny and there were threats of violence and death directed at her. There were calls for her and Ms Birbalsingh to be dismissed and for protests outside the School.

108. Two videos which were posted on YouTube and TikTok and a number of blogs also named Ms A and accused the School of Islamophobia. Threatening and abusive emails were sent to the School's general email address which were similar to the comments posted in support of the petition, and the School office received phone calls in which

people shouted abuse at staff. The callers accused the School of disrespecting Islam by requiring children to pray outside in dirty and wet conditions rather than allowing them to pray inside in a prayer room. Ms Birbalsingh says in her evidence that the abuse appeared to stem directly from the fact that the school yard is easily visible to members of the public so that they were reacting to the sight of the children praying outside on their prayer mats or using their blazers as prayer mats.

109. On Saturday 25 March 2023, an email was sent to the School which said that several bombs had been planted in the School building. The abusive and threatening emails and comments continued to arrive on Sunday 26 March. Over the course of the weekend, Ms Birbalsingh spoke repeatedly with the School's senior leadership team to decide what to do. She also discussed various plans of action with the Chair and the Vice Chair of Governors. Their overriding concern was how to keep the School, the teachers and the children safe. They agreed that Ms Birbalsingh should ban the conduct of prayer rituals at the School, with that ban to be reviewed by the Governing Body at its next meeting.

110. The police attended early on Monday 27 March and swept the premises for explosives. Nothing was found. Ms Birbalsingh informed teachers that she had decided to ban prayer rituals and instructed them to inform pupils during Tutor time. Prayers in the yard ceased that day. She met with the Chair and Vice Chair of the Governors in the evening to confirm her decision subject to a full decision being made by the Governing Body in due course.

111. The School felt obliged to engage two security guards, one for Ms A personally, who were present from 27-29 March. Ms Birbalsingh says, and I accept, that there was a very real sense of fear amongst staff and children. She and Ms A no longer felt that they could safely travel to work on public transport.

112. On 29 March, end of term school trips which were due to take place on 30 March were cancelled and the School closed two days early for the Easter holiday. The School term was meant to finish on Friday 31 March with a Reward Day. On 29 March a brick was thrown through the window at the home of one of the teachers. On 30 March 2023, the day after the School had closed, it was found that glass bottles had been thrown into the School yard and smashed. On Tuesday 4 April there was an attempted break in at a teacher's home. Two new videos criticising the School were put up on TikTok.

113. On Friday 14 April, the online petition and the videos on Youtube.com were taken off the internet after lawyers had been instructed. The abusive emails also slowed by around this time.

The new term

114. The new school term began on Monday 17 April 2023. Ms Birbalsingh says that the senior leadership team and staff were anxious as to whether the pupils would abide by the prohibition on prayer rituals, whether the School's ethos had suffered irreparable damage, or whether the campaign of abuse would start up again. However, none of this came to pass:

> "*The School returned to the peaceful and successfully integrated community that it had been prior to the events of the previous term. None of the children sought to*

> *conduct prayer rituals on the School's premises. The children returned to their normal level of compliance with the School's behaviour policies and practices, and the mutual trust between teachers and pupils returned. The resentment and anger we had discerned before the Easter holidays had disappeared."*

115. On 24 April 2023, Ms Birbalsingh met with the Claimant's mother to explain the reasons for the PRP and the reasons for her exclusion before the Easter holiday.

116. The Claimant was then in referral for 25 and 26 April 2023. On 28 April 2023 she received a five day FTE followed by 5 days in referral based on a conversation which she had had with a fellow pupil the day before. Ms Birbalsingh's letter of that date gave the reason for the exclusion as *"openly talking about wanting to do harm to the school"*. I will return to the detail of what happened below, when I deal with Ground 4(b).

The Governing Body's decision to introduce the ritual prayer policy

Overview

117. The Governing Body then met on 23 May 2023. Prior to this meeting a 3 page Briefing Note was circulated to Governors in which Ms Birbalsingh explained her decision of 27 March 2023 ("the Briefing Note") and her view that the PRP should continue *"for the time being"* although it could be reviewed at a future Governing Body meeting if appropriate. She then attended the meeting itself to explain her views further and to answer questions. Although there is no witness evidence about the specifics of what was said, the minutes of that meeting form part of the evidence. Eleven members of the Governing Body voted to accept Ms Birbalsingh's recommendation and one against.

The Briefing Note

118. The Briefing Note referred to the decision of 27 March 2023 and said that:

> *"The Governing Body now has the opportunity to review the decision that I made and to decide whether the prohibition of prayer rituals should be continued, and if so for how long, or withdrawn, or whether some lesser or different measure ought to be taken instead."*

119. Ms Birbalsingh set out the position hitherto as follows:

> *"As the Governing Body is aware, the School does not provide a prayer room for use by pupils, for various reasons. These reasons include that a prayer room would foster division amongst pupils, contrary to the School's ethos, lack of available space and available staff to supervise pupils, and that pupils would miss important School activities including during the lunch break, if they were to spend time in a prayer room. The School did not prohibit the conduct of prayer rituals, but until very recently there had been no interest amongst pupils in engaging in prayer rituals."*

120. There was then an account of the events of March/April 2023 which I have summarised above. The reasons for the decision on 27 March 2023 were explained at [7] including that there had been breaches of disciplinary policies and:

> *",,, engagement in prayer had further impacts upon the secular, inclusive environment, free of intimidation, which the School seeks to promote. Since the start, last term, of a concerted campaign to conduct prayer rituals during the School day, certain pupils had been intimidated by others into engaging in prayer rituals, and engaging in other conduct associated with religious observance, when they would not otherwise have wished to do so. This represented a serious threat to the School environment."*

121. At [8]-[9] Ms Birbalsingh said, so far as material:

> *"8. The decision to ban prayer rituals.. was not taken lightly. I recognised that, ...this was a particularly important religious season for Muslims (Ramadan) and that some pupils considered it important that they pray during the lunchtime break at various times of the year. Many Muslim pupils feel able to 'save up' their prayer until the end of the day (Qadaa), but it was clear that some felt that that this is not permissible.*
>
> *9. The ban would primarily affect observant Muslim pupils but could also have adverse impacts on pupils of other religions, at least where they regarded it as a requirement of their religion to pray during the school day. It was also the case that....pupils wishing to pray might be disproportionately represented within certain other groups, such as racial groups."* (emphasis added)

122. Ms Birbalsingh said that she had considered whether the School could take a lesser measure but the nature of the concerns at that stage was such that she could not see a way round this:

> *"Unacceptable segregation or division, contrary to the whole ethos of the school, was taking place as a result of permitting prayer. An intimidatory atmosphere was developing. Our strict disciplinary policies, on which the ethos and great success of School is based, were at risk of being undermined."*

123. She noted that the School had returned to *"a peaceful integrated community this summer term"* before saying the following:

> *"My view, as Headmistress with full oversight of how matters have developed, is that the policy to prohibit prayer rituals should be maintained for the time being. If events develop such that it is appropriate to review the policy, then a review can take place at a future Governing Body meeting. In my view the justifications for the policy remain as matters stand. I consider that the policy should be maintained notwithstanding the adverse impacts which I fully appreciate it may have on certain pupils who are religious or who may be disproportionately represented within groups protected under the Equality Act 2010. I believe that the policy is in the interests of at least the great majority of pupils at the School."*

The minutes of the Governing Body meeting on 23 May 2023

124. The minutes of the Governing Body meeting state that, in addition to the Briefing Note having been circulated, Ms Birbalsingh gave an oral report to the Governors, which is summarised. She gave a chronological account of the events in March/April 2023 which

it is not necessary to repeat save to note, for the purposes of one of Ms Hannett's arguments, that she is recorded as having said:

> *"There is no physical space for a Prayer Room, classrooms would have to be used which would mean that staff would need to be allocated to supervise and pupils would not be able to leave their bags in their classroom but would have to carry them around all day. ...."*

125. The minutes record the following summary of the reasons that Ms Birbalsingh gave in favour of continuing the PRP:

- *"The practicalities of inside prayer, which would require a complete change in the way the school works with regard to staff deployment, pupil bags, coats, etc. and arrangements for Family Lunch. The impact of pupils carrying bags around in the narrow corridors and stairwells and in moving around the school during the lunch break would mean Michaela could not be the very strict school that it is. Instead, it would have corridors and lunchtimes that would be like a normal school.*

- *The impact of allowing prayer outside would endanger the staff because of the visibility from the street and it would change the attitude of the children and risk another online campaign against the school.*

- *The ethos of the school, which is that the school community takes precedence over the individual. Other faiths have also had to make concessions, for example there are no special plates provided for Hindus, Year 11 revision sessions take place on a Sunday despite Christians asking for this to change, Macbeth is still taught as a set text despite the beliefs of Jehovah's Witnesses. Muslim families have made the concession for their children to pray at the end of the day when they return home during Ramadan. The school is proud to be multi-cultural. The ethos is to build friendships across the faiths and not to allow segregation. Where it is possible to accommodate religious practice without undermining this ethos, this is allowed, for example the wearing of the hijab.*

- *The pupils undertaking formal prayer rituals was undermining the discipline upon which the school is built. If the school made the changes demanded by the court case, there would be a serious risk that it would lose its distinctiveness and become like every other school."*

126. There were then questions to Ms Birbalsingh before the vote was taken.

Ms Birbalsingh's evidence about her reasons for advocating the continuation of the PRP

127. Ms Birbalsingh says that large numbers of parents were in touch with her about this issue (around 30), as well as with tutors and Heads of Year, between the week of 20 March 2023 and the decision of the Governing Body. Muslim parents, in particular, explained the importance of prayer to them and their children. They generally, although not exclusively, wanted the School to provide a prayer room during the lunch period. Notwithstanding this, her view was and is that the only appropriate response was to prohibit prayer rituals. She gives detailed evidence about her reasons for advocating a continuation of the PRP. In summary, these are:

i) First, permitting prayer rituals had fostered division amongst the pupils and had led to intimidation and an aggressive atmosphere at the School. This was contrary to the School's ethos and undermined the work which had been done over the years to develop this ethos.

> *"At the School the needs of the community, the team, take precedence over the needs of the individual. The ethos of the School is to build bridges and relationships across the faiths, not to allow them to be divided."*

ii) Second, permitting prayer rituals had a significant adverse impact on compliance with the School's behaviour policy. The behaviour of pupils in March 2023, which I have described above, was shocking by the standards of the School and represented a departure from, and an undermining of, the disciplinary ethos. Not only were prayer rituals damaging cohesion; they were *"associated with a sense of entitlement which crossed the bounds of acceptable behaviour"*.

iii) Third, permitting prayer rituals in the yard had resulted in a campaign of abuse, harassment and threats against the School.

iv) Fourth, permitting prayer rituals inside during the lunch period would not be logistically possible without fundamentally changing the operation of the School. Ms Birbalsingh sets out the basis for this view in detail but, in very brief summary, she anticipated that all or nearly all of the 350 pupils would wish to pray during the lunch period. Prayer rituals would have to be conducted in classrooms given that the two larger rooms are in constant use at lunchtime. Several rooms would be needed: she estimates 12. The classrooms are small and it would be necessary for furniture to be moved so that praying could take place, and then put back in time for lessons. There would need to be supervision as there is more generally, but also because of security given that pupils' coats, bags and other valuables are left in their form rooms. There would either need to be a member of staff constantly in each classroom or coats and bags would have to be carried around school during the day, causing very real difficulties and disruption. Staff are already fully deployed in lunchtime supervision and there is no additional capacity so that there would be a need to carry coats and bags around. The fact that the time for Duhr is not fixed throughout the year and the preference for prayer early in the window would add a further layer of complication: for example, would it be necessary to arrange pupils' sittings for family lunch so that they were able to pray during the allotted window? She says that these issues would cause very significant problems even if she is wrong in thinking that there would be substantial take up of the opportunity to pray during the lunch period.

v) Fifth, children would miss important School activities during the lunch period including the *"guided socialisation"* to which I have referred.

vi) Sixth, once the PRP had been introduced, the operation of the School returned to normal i.e. it had the effect of protecting or promoting the School's ethos etc.

128. Ms Birbalsingh argues that these detrimental consequences have to be considered alongside the point that observant Muslim pupils who miss the Duhr prayer can make

up for it later in the day, including by praying at the Brent Civic Centre if they wish. She says that in the aftermath of the events of March and April 2023 she also spoke with the Imam at the London Central Mosque and Islamic Cultural Centre who agreed with this view and offered to speak to any Muslim parents who had doubts on this point.

GROUND 1: BREACH OF ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

The legal framework

129. Article 9 ECHR provides that:

> *"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
>
> *2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."* (emphasis added)

130. There was no dispute that this provision is directly enforceable against the School as a public authority pursuant to section 6(1) of the Human Rights Act 1998.

Overview of Article 9 EHCR

131. The freedom, under Article 9 EHRC, to hold and manifest beliefs is not limited to religious beliefs. Article 9 is *"also a precious asset for atheists, agnostics, sceptics and the unconcerned"* (*Kokkinakis v Greece* (1993) 17 EHRR 397, 481 at [31]). It protects freedom of thought, including a range of religious and philosophical beliefs, and freedom of conscience.

132. In *R (Williamson) v Secretary of State* [2005] UKHL15, [2005] 2 AC 246 at [15] and [16] Lord Nicholls explained Article 9 in the following way:

> *"15…Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilised society. Unhappily, all too often this hallmark has been noticeable by its absence. Mutual tolerance has had a chequered history even in recent times. The history of most countries, if not all, has been marred by the evil consequences of religious and other intolerance.*
>
> *16. It is against this background that article 9 of the European Convention on Human Rights safeguards freedom of religion. This freedom is not confined to freedom to hold a religious belief. It includes the right to express and practise one's beliefs. Without this, freedom of religion would be emasculated. Invariably religious faiths call for more than belief. To a greater or lesser extent adherents are required or encouraged to act in certain ways, most obviously and directly in forms of communal or personal worship, supplication and meditation. But under*

> *article 9 there is a difference between freedom to hold a belief and freedom to express or "manifest" a belief. The former right, freedom of belief, is absolute. The latter right, freedom to manifest belief, is qualified."*

133. In the other leading Article 9 case in this jurisdiction, *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at [20] ("*Begum*"), Lord Bingham referred to what Lord Nicholls had said at [15] and [16] of *Williamson* as an explanation of:

> *"The fundamental importance of this right in a pluralistic, multicultural society"*.

The extent of the court's inquiry into whether a person holds a professed belief

134. There was no dispute that the Claimant in the present case holds beliefs which are protected by Article 9. However, in view of her reliance on the evidence of Professor Siddiqui, and a measure of disagreement between the parties as to the content and effect of the relevant religious beliefs, I note that in considering whether a given belief falls within Article 9, the court is concerned with the Claimant's subjective beliefs: what she actually believes. In *Williamson*, at [22], Lord Nicholls made two points:

i) First, there may be an inquiry by a court as to whether a claimant holds the alleged belief at all i.e. whether the assertion of religious belief is made in good faith; but,

ii) Second, if the belief is genuine:

> *"...emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual."*

135. Evidence about the doctrines and teachings of Islam, such as that of Professor Siddiqui, is relevant insofar as it throws light on whether a claimant's professed belief is genuinely held. But the court is not required to assess whether the Claimant's understanding of Islam is correct or well founded.

136. This does not mean that all of a person's subjective beliefs are protected by Article 9. The belief must be philosophical in nature and consistent with human dignity and respect. It must relate to matters which are more than merely trivial, possess a sufficient degree of seriousness and importance, and be intelligible and capable of being understood: e.g. per Lord Nicholls in *Williamson* at [23]; *Eweida v United Kingdom* (2013) 57 EHRR 8 at [81].

137. There was a slight issue between the parties as to whether the Claimant's assertion that the part of the lunch break which is not spent in family lunch is "free time" is a protected belief, which the court was bound to accept. If this was Ms Hannett's argument, I do not accept it. A belief about the characterisation of a period of time in a school timetable is not a religious, philosophical or other protected belief: it is a matter for the court to

assess on the evidence. I do, however, accept that the Claimant's belief that she should pray during this period of time was protected by Article 9.

Is a given act a manifestation of the relevant belief?

138. It is not the case that every act which is motivated by a protected belief is necessarily a manifestation of that belief. However, in *Williamson* Lord Nicholls explained, at [32]-[33], that although it is not necessary to establish that the adherent believes that they have an *obligation* carry out the particular act of religious observance:

> *"32……If... the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice. In such cases the act is "intimately linked" to the belief, in the Strasbourg phraseology…."*

139. The School therefore correctly accepts that performing Duhr during the allotted window of time would be a manifestation of the Claimant's religious beliefs.

"Limitation" of/interference with freedom to manifest one's religion or beliefs

140. The School contends, however, that the PRP does not materially *"limit"* (see Article 9(2)), or interfere with, the Claimant's freedom to manifest those beliefs. As to this question, in *Williamson* Lord Nicholls explained, at [38]:

> *"What constitutes interference depends on all the circumstances of the case, including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his beliefs in practice."*

141. Until more recently the caselaw of the European Court of Human Rights has adopted a restrictive approach to the question whether there has been a limitation of a person's *freedom* to manifest their beliefs. In *Begum*, the House of Lords reviewed this caselaw. At [86], Lord Scott observed that:

> *""Freedom to manifest one's religion" does not mean that one has the right to manifest one's religion at any time and in any place and in any manner that accords with one's beliefs"*

142. Lord Bingham said, at [23]:

> *"The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience."* (emphasis added)

143. At [24] he noted that this line of authority had been criticised by the Court of Appeal in both *Copsey v Devon Clays Ltd* [2005] EWCA Civ 932, [2005] ICR 1789 (where it was argued that the Christian employee could find different employment if he did not wish to work on Sundays) and the *Williamson* case. But, he said:

> *".. the authorities do in my opinion support the proposition with which I prefaced para 23 of this opinion. Even if it be accepted that the Strasbourg institutions have erred on the side of strictness in rejecting complaints of interference, there remains a coherent and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established."*

144. At [87] of *Begum*, Lord Scott said that:

> *"87 ... The cases demonstrate the principle that a rule of a particular public institution that requires, or prohibits, certain behaviour on the part of those who avail themselves of its services does not constitute an infringement of the right of an individual to manifest his or her religion merely because the rule in question does not conform to the religious beliefs of that individual. And in particular this is so where the individual has a choice whether or not to avail himself or herself of the services of that institution, and where other public institutions offering similar services, and whose rules do not include the objectionable rule in question, are available."* (emphasis added)

145. Applying this approach, in *Begum* the House of Lords held that there had been no limitation placed by a school on the freedom of a female Muslim pupil to manifest her religious beliefs by wearing the jilbab in circumstances where the uniform policy of the school did not permit this. The claimant's family had made a free and informed choice to send her to this particular school, knowing of its uniform policy, and she was able to move to another school where the wearing of the jilbab was permitted if she wished to manifest her religious beliefs in this way.

146. I note that in *Eweida* (supra), which was an employment case, at [83] the European Court of Human Rights said that it agreed with Lord Bingham in *Begum* that:

> *"there is case law of the Court and Commission which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under art.9(1) and the limitation does not therefore require to be justified under art.9(2)."* (emphasis added)

147. In an apparent change of approach, however, the Strasbourg Court went on to say that the better approach would be to hold that the possibility of an employee changing job or employer should be weighed in the overall balance when considering whether or not the restriction was proportionate [83]. On the basis of *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465 at [43], however, Ms Hannett conceded that the approach to the question of interference in *Begum* is binding on me.

148. Ms Hannett's skeleton argument contended that, for the proposition stated at [23] of Lord Bingham's Opinion in *Begum* to apply, there must be both voluntary acceptance and other means open to manifest the religious belief without undue hardship or inconvenience. In her oral submissions, however, she accepted that this was not the position. This concession was consistent with the decision of Silber J in *R (X) v Head Teacher and Governors of Y School* [2007] EWHC 298, [2008] 1 All ER 249 at [29] ("the *X v Y School* case"). She also accepted that these considerations were not mere factors to be taken into account as part of an overall assessment of whether, on the evidence, the court considers that there has been a relevant interference.

149. In relation to the question of voluntary acceptance, Ms Hannett relied on the Claimant's mother's evidence that she had not been aware that there was no prayer room at the School when the Claimant enrolled and, perhaps more significantly, on the fact that ritual prayer was not banned at this point (although the Claimant believed, and argued in her evidence, that it was). The PRP was introduced during the Claimant's third year at the School. In the *X v Y School* case, the claimant's sister had worn the niqab, and the decision that the claimant would not be permitted to do so was made by a new Headteacher, who had joined after she had enrolled. At [28] Silber J accepted that this was a material difference between the case which he was considering and the facts of *Begum*, where the uniform policy was known in advance, albeit ultimately he held that there had been no interference with the claimant's Article 9 rights. Thus, submitted Ms Hannett, this is not a voluntary acceptance case.

150. I am not persuaded that the principle is as narrow as this. For example, in *Begum* Lord Bingham noted the following cases:

i) *Karaduman v Turkey* (1993) 74 DR 93 where the Muslim applicant was denied a graduation certificate unless she was prepared to submit a photograph of herself without a headscarf. Her application was dismissed by the European Commission on Human Rights as manifestly unfounded in that, on the facts, there was no arguable interference with her Article 9 rights. It said that: *"by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs."* The decision of the Commission did not turn on whether the applicant was specifically aware of the requirement in respect of photographs for graduation certificates. Indeed, this question did not feature in the Commission's reasoning.

ii) *Kalaç v Turkey* (1999) 27 EHRR 552, which concerned a Muslim who worked as a judge advocate in the Turkish air force. His Muslim faith and practice were accommodated by the air force but, in 1990, he was compulsorily retired pursuant to general rules against *"breaches of discipline and immoral behaviour"*. It was said that he had adopted fundamentalist opinions in that he was a member of the Suleyman sect. This was not a case in which there was a specific rule against being a member of this sect, still less one of which he was aware when he joined the air force. It was held that there had not been an interference with his rights under Article 9. In choosing to pursue a military career Kalaç was accepting, of his own accord, a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations which were not capable of being imposed on civilians: [28].

iii) *Konttinen v Finland* (1996) 87-A DR 68, where the Commission rejected a claim brought by a Seventh-Day Adventist whose working hours conflicted with his religious convictions. As Silber J noted at [35] in the *X v Y School* case, the Commission's reasoning was that the applicant was free to relinquish his post and *"they did not apparently attach any importance to the fact…that the claimant only becomes a Seventh day Adventist after he had started his work with his employers"*.

151. In my view, the essence of this aspect of the principle identified at [23] of Lord Bingham's Opinion is that voluntary acceptance of the rules or the regime of an institution may mean that the individual has expressly or impliedly agreed to limitations being placed on their freedom to manifest their religious beliefs and therefore cannot subsequently complain when such limitations become an issue. This may be so whether or not the precise limitations are known to the claimant at the moment of joining, and whether or not limitations which are known at the time of joining only become an issue later on as a result of decisions which the claimant takes after joining.

152. In any event, the Strasbourg caselaw, pre *Eweida*, also demonstrates that the fact that there are other means open to a person to practise their religion – ways to circumvent the limitation placed on their freedom to manifest their religion, as it was put in *Eweida* - will mean that there has been no interference with that freedom for the purposes of Article 9. This may be the case where they can manifest their beliefs in a modified way whilst remaining at the relevant institution (see *R (Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 (Admin), [2007] HRLR 34 at [30]). It may also be the case where they can choose to leave the particular employer, or can choose to avail themselves of the services of an alternative provider.

153. Ms Hannett placed particular emphasis on the last five words of Lord Bingham's formulation at [23]: *"there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience..."*. She also pointed out the different ways in which members of the Judicial Committee expressed their conclusions in *Begum* as part of a submission that it is not difficult for a claimant to establish that they would experience undue hardship or inconvenience if they were obliged to move to a different provider. For example, Lord Bingham said that there was no evidence of *"any real difficulty"* in the claimant attending a school which permitted her to wear the jilbab [25] and Lord Hoffmann said that there was *"nothing"* to stop her from doing so [50]. Thus, Ms Hannett's argument was in effect that, if there had been any real difficulty or *something* to stop Ms Begum from doing so, she would have succeeded in establishing an interference with her Article 9 right.

154. Mr Coppel relied on Silber J's formulation in the *X v Y School* case at [30]:

> *"This issue can be refined to being a question of whether a person's article 9 rights are infringed if a person is prohibited from wearing the article of clothing connected with his or her religion at their present school but that person is permitted to wear the article in another available suitable alternative school."* (emphasis added)

155. I respectfully agree with this formulation. The essence of this aspect of the principle identified in *Begum* is that if the individual has a genuine choice (see Lord Scott at [87] of *Begum*, above) to manifest their beliefs elsewhere there will be no interference with their Article 9 rights.

Article 9(2)

The test for proportionality

156. The issue under this heading was limited to whether the PRP was proportionate. It was common ground that I should apply the well-known test in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38; [2014] AC 700 at [74] per Lord Reed i.e:

> *"(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."*

157. Ms Hannett also relied on Lord Sumption's statement in *Bank Mellat*, at [20], that the test *"depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine"* these questions. And she submitted that the court should adopt the *"flexible"* approach to proportionality explained in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 at [97]-[162], whereby the intensity of review is informed by various factors including the ground of the alleged discrimination, the democratic credentials of the decision-maker and whether the justification advanced was considered at the time of the impugned decision.

The relevance of the procedure adopted by the decision maker

158. In the light of Ms Hannett's arguments, two further points are also important. The first is that the focus under Article 9 is not on the question whether a challenged step or measure is the result of a defective decision-making process; it is on whether the Convention rights of the claimant have been violated: see Lord Bingham in *Begum* at [29]. This was a fundamental point on which the House of Lords disagreed with the *"procedural approach"* of the Court of Appeal on the question of proportionality. As Lord Hoffmann put it at [68]:

> *"… article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9(2) ? ….Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows. The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law."*

The weight to be given judgments made by the decision maker

159. The second point is that, as Lord Hoffmann said in the passage above, the court will accord an area of judgment to the decision-maker in this context based on (a) recognition of the role and powers of the school within the relevant statutory framework, and (b) the relative expertise of the managers of the school, on the one hand, and the court on the other. Lord Hoffmann identified the former rationale when he said at [64]:

> *"In my opinion a domestic court should accept the decision of Parliament to allow individual schools to make their own decisions…In applying the principles… the justification must be sought at the local level and it is there that an area of*

> *judgment, comparable to the margin of appreciation, must be allowed to the school. That is the way the judge approached the matter and I think that he was right."* (emphasis added)

160. He recognised the latter when he said in relation to the issues concerning the school's uniform policy, at [65]:

> *"These are matters which the school itself was in the best position to weigh and consider".*

161. Albeit in the context of passages which accepted the cogency of the school's reasons for its policy in the *Begum* case, at [34] Lord Bingham also said this about what Mr Coppel referred to as the *"predictive judgment"* of the school in that case:

> *"It was feared that acceding to the respondent's request would or might have significant adverse repercussions. It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it . . ."* (emphasis added)

162. Lord Scott also referred to *"the margin of discretion that must be allowed to the school's managers"* [84].

163. These passages were applied by Silber J in the *X v Y School* case: see [48]-[51] and [55]. At [91] he referred to the prediction of the headteacher that if the position went from there being no mention in the school rules of whether niqabs could be worn, to express permission for them to be worn, Muslim girls might become subject to pressure to wear the niqab. His view was that:

> *"the head teacher will know how her pupils might react and it would be wrong for me to overrule her."*

164. Ms Hannett submitted, relying on *In re Brewster* [2017] UKSC 8, [2017] 1 WLR 519 at [50] and [64], that *"a defendant earns the Court's deference through its decision making"*. Her argument was that the reason for the statements in *Begum* which I have cited above at [159]-[162], and the outcome of that case on the issue of justification, was that the school had conducted an impeccable process. It had a governing body which was representative of the community which it served, the Headteacher was involved in the local Bengali Muslim community, the school had sought advice from two mosques and other Muslim organisations, and so on. The quality of the decision making in the *X v Y School* case had also been high, whereas the schools in *R (Watkins-Singh) v GB Aberdare GHS* [2008] EWHC 1865 (Admin), [2008] ELR 561, and *G v St Gregory's Catholic Science College* [2011] EWHC 1452 (Admin), (where the issue was justification of indirect discrimination under the equality legislation which subsequently became part of the 2010 Act) had not turned their minds to the relevant matters and this had led to them losing on the issue of justification.

165. With respect, these arguments did not carry Ms Hannett's case very far in law or on the evidence in the present case. It is true that, in *In re Brewster*, Lord Kerr observed that when the measure in question is sought to be defended on bases which were not in the

mind of the decision maker at the relevant time, the role of the court in conducting a scrupulous examination of the justification put forward *"becomes more pronounced"* [50]. However, in the first place this was a point about appropriate deference to the judgment of the decision maker. Lord Kerr's observation was not directed at, and did not contradict, the view of the House of Lords in *Begum* that the issue under Article 9 ECHR is one of substance rather than procedure.

166. Secondly, Lord Kerr cited, as an example of this principle, the following passage from the Opinion of Lord Mance in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 at [46]-[47]:

> *"46…But, what is the position if a decision-maker is not conscious of or does not address his or its mind at all to the existence of values or interests which are relevant under the Convention?*
>
> *47. The court is then deprived of the assistance and reassurance provided by the primary decision-maker's "considered opinion" on Convention issues. The court's scrutiny is bound to be closer, and the court may…. have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider."* (emphasis added)

167. Indeed, at [52] Lord Kerr went on, in effect, to reject a submission that no deference can be given to ex post facto justifications for decisions which have been made:

> *"Obviously, if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made, this will call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised. Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide."* (emphasis added)

168. Ultimately, the question is whether the measure in question is proportionate. That is for the court to decide. In arriving at an answer to that question, however, the court will make allowance for the breadth of the decision making power conferred on the decision maker by Parliament and it will give appropriate weight to the relative expertise of the decision maker where they have made a judgment on an issue which is within their sphere of expertise, even if that judgment is made after the event. However, I agree with Ms Hannett to this extent: all other things being equal the better the quality of the decision making process, and the greater the relative level of expertise of the decision maker, the greater the weight which their judgment is likely to be given by the court, and vice versa.

The importance of the aims of Article 9/pluralism

169. Ms Hannett also submitted that in considering proportionality under Article 9 the Court will give significant weight to the aims of this provision and the importance of pluralism – in her words "*that differences between religious groups are to be protected and respected, not erased"*. She relied on [84] of the judgment of Silber J in *Watkins-Singh* (supra) where he said the following:

> "*…there is a very important obligation imposed on the school to ensure that its pupils are first tolerant as to the religious rites and beliefs of other races and other religions and second to respect other people's religious wishes. Without those principles being adopted in a school, it is difficult to see how a cohesive and tolerant multicultural society can be built in this country."*

170. One of the sources for this principle was the decision of the Strasbourg Court in *Serif v Greece* (2001) 31 EHRR 561, at [53] where it said, in the context of Article 9, that the role of the state authorities where there were religious tensions *"is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other."*. However, it is important to keep in mind that Silber J was addressing an argument that it was proportionate to prohibit a Sikh pupil from wearing a Kara (a narrow bangle worn for religious reasons) because of the risk that other pupils would bully her. In *Serif*, the applicant was being punished, by criminal conviction, for the mere fact that he acted as the religious leader of a group that willingly followed him. The School in the present case does not argue that the aim of the PRP is to prevent the risk of observant Muslim pupils being bullied by others; on the contrary, the risk is said to be that more observant Muslim pupils may intimidate less observant ones. Nor does the School seek to prevent pupils from manifesting their religious beliefs outside the school day or punish them for doing so.

171. As Lord Bingham said at [32] of *Begum*, referring to the decision of the Grand Chamber of the Strasbourg Court in *Sahin v Turkey* (2007) 44 EHRR 5 at [104]-[111]:

> *"The court there recognises the high importance of the rights protected by article 9; the need in some situations to restrict freedom to manifest religious belief; the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness; the need for compromise and balance; the role of the state in deciding what is necessary to protect the rights and freedoms of others; the variation of practice and tradition among member states;…"*

Was there an interference with the Claimant's Article 9 rights in this case?

The Claimant's submissions on the evidence

172. Ms Hannett argued that there was clearly an interference with the Claimant's Article 9 rights in this case. There had been no ban on prayer rituals when she joined the School; indeed, the School's position is that they were permitted. The Claimant gave clear and uncontradicted evidence of the importance to her of being able to pray during what she characterised as free time during the lunch period. Being required to move to a different school would cause her undue hardship or inconvenience given that she was only seeking to be permitted to pray for approximately 5 minutes.

173. In relation to hardship and inconvenience, in her first witness statement the Claimant says that despite, indeed because of, the victimisation she says she has suffered from the School, she is *"determined to stay"*. When proceedings were issued she had been at the School for nearly three academic years. All of her friends are there. She does not want to go to a new school and start again. She does not want to go to an Islamic school or a different secular school. She values the teaching at the School which she describes as "*excellent"* and she thinks she is likely to do well if she stays. She does not think

that she would be able to access such a high standard of education elsewhere in her area and a move would be very disruptive to her education.

174. By the time of her second witness statement the Claimant was in Year 10 and therefore doing her GCSE courses. She says that in most of her subjects she had started GCSE content in Year 9. She wishes to do well enough in her GCSEs to go to the School's Sixth Form. Moving would be very difficult for her as other schools are likely to have different exam boards and/or set texts and/or to have dealt with topics in a different order. She missed a certain amount of school in Year 9 owing in part to the FTEs. Having to move would *"really set me back"*.

Conclusion on interference

175. I do not accept that there has been an interference with the Claimant's Article 9 rights in this case, essentially for the reasons advanced by Mr Coppel. I recognise that this may appear to some to be a surprising conclusion but in my view it is consistent with the pre *Eweida* caselaw of the Strasbourg Court, which reflects the fact that Article 9 protects *"freedom"* to manifest religious beliefs rather than conferring an absolute right to do so.

176. It seems to me that this is a case, like *Karaduman* or *Kalaç* (referred to at [150] above), where the Claimant at the very least impliedly accepted, when she enrolled at the School, that she would be subject to restrictions on her ability to manifest her religion. She knew that the School is secular and her own evidence is that her mother wished her to go there because it was known to be strict. She herself says that, long before the PRP was introduced, she and her friends believed that prayer was not permitted at school and she therefore made up for missed prayers when she got home. Throughout her time at the School the Claimant has accepted restrictions on her ability to pray and she still does, other than during the 25 minutes of the lunch break in the winter months which are in issue in this case. In effect, her case is that the restrictions go too far in one particular respect but, even then, it was not until she was the best part of the way through Year 9 that she indicated any objection.

177. Secondly, the Claimant, who has the burden of proof, has not shown that there would be undue hardship or inconvenience, as that phrase is understood in the relevant Article 9 caselaw, if she were to move to a different school which permitted her to pray during the school day. She has not adduced any specific evidence about other schools in the area to show, for example, that in fact there is no school within travelling distance which would permit her to do so, or there is no such suitable school, or that it would be impossible for her to secure a place at such a school. Her evidence has focussed on her preferences and what she supposes the position would be elsewhere.

178. I do not suggest that there would be no adverse consequences for the Claimant is she were to choose to move, but it is reasonable to assume that in all of the Article 9 schools cases discussed above the parents and the pupil had a preference for the school about which they were complaining, and the pupil had no wish to move. They were no doubt keen to be offered a place at the school in question and wished to be able to complete their education there. They would have been able to say very similar things to what is said by the Claimant about why she wishes to stay at the School. In all of those cases there was necessarily a degree of hardship and inconvenience in going to a different

school, but that was held not to be sufficient for there to be an interference with their Article 9 rights.

179. I appreciate that the Claimant is now in her first year of GCSEs and it is natural that she would have concerns about moving at this stage. But there is no question of her being required to move: the question is whether, if she were to choose to move in order to be able to pray at school, there would be undue hardship and inconvenience to her. Moreover, the PRP was introduced at the end of the second term of Year 9. This was at a point which would have left her ample time to start Year 10 at a different school and begin her GCSE courses there. She would also have been in good time for the winter months when the issue arises in relation to her ability to pray at lunchtime.

180. Either of these two points is in my view sufficient to lead to the conclusion that the Claimant's case under Article 9 fails. But, in addition to this, whilst accepting that her belief is that she should perform Duhr during the relevant 25 minutes of the lunch break in the winter months, and that this belief falls within Article 9, the evidence indicates that the effect of the PRP is that Qada is available to mitigate the failure to pray within the allotted window. The, at the very least, clear implication of the Claimant's evidence and that of Professor Siddiqui is that Qada is not available where the adherent wilfully or voluntarily chooses not to pray during the allotted time. In any other case, such as where there would be a clash with lessons or family lunch, it is available. As noted above, Ms Hannett's pleaded case at [21] of the Amended Statement of Facts and Grounds, and her position at the hearing, was that the Claimant's *"understanding"* of Qada is that it is available if there is *"good reason"* to miss the allotted window. If that is right, it is difficult to see why Qada would not be available in a case where the adherent is in a location, or subject to a regime, where prayer is prohibited. This is not to reject or question the Claimant's belief that Qada is second best to praying at the required time; but it is to point out that the implication of what she says about her beliefs is that she is able to manifest them in accordance with the teachings of Islam notwithstanding the PRP, albeit in a modified and less satisfactory way.

181. Although Ms Hannett suggested that this was circular reasoning when I put this point to her, it is not. She also argued that it amounted to an illegitimate inquiry into the validity of the Claimant's beliefs about Qada but I do not agree that it is. As noted above, the Claimant's belief that Qada is less/unsatisfactory is not in question. The point is that the PRP is a *"good reason"* for missing Duhr and it is consistent with her beliefs that Qada is therefore available. The Claimant's evidence does not grapple with this point or state that it is her belief that, even with the PRP in place, Qada would not be available. She argues that the PRP ought not to have been introduced because the time in question is *"free time"* but she does not address her beliefs about the availability of Qada where, notwithstanding this, she is not free to pray during this time because of the PRP. On the contrary, in the passages from her second witness statement which I have summarised at [38]-[40] above, she makes the point that even if Qada is available, being forced to rely on it rather than pray at the allotted time is a significant detriment. In addition to this, the Claimant's own position is that Qada is available where it would cause disruption and inconvenience to others to pray at the allotted time. For reasons which I explain below, I accept Ms Birbalsingh's evidence that this is the case here.

182. In case I am wrong on the issue of interference, and because the issue is also relevant to the question of indirect religious discrimination, I turn to the question of justification under Article 9(2).

Article 9(2): the issue of proportionality

The School's arguments

183. Mr Coppel submitted that the continuation of the PRP had the following aims:

i) Preserving the ethos, policies and practices of the School. Under this heading he said that the School's considered judgment was that permitting prayer rituals would unacceptably risk undermining inclusion and social cohesion within the School community, which were at the heart of its Team ethos. It would risk the formation of groups of pupils who defined themselves along religious lines, and peer pressure on others to conform to those beliefs and practices. And he pointed to the recognition of this risk, and of the importance of inclusion and social cohesion, in *Begum* at [18], [59] and [97]-[98]. The basis for the School's judgment was its direct experience of the events of March/April 2023 and of the beneficial effects when the PRP was introduced as an interim measure on 27 March. It was no answer for the Claimant to point to the experience when Sixth formers were permitted to use a classroom at lunchtime in or around 2021. That was in a very different context and matters had moved on since then.

ii) Promoting pupils' compliance with the School's behaviour policy. In this connection Mr Coppel pointed to Ms Birbalsingh's evidence of a shift in culture when pupils started to pray in the yard, whereby pupils felt more *"entitled"* and therefore more able to engage in unacceptable behaviour.

iii) Protecting the School from threats and abuse. This referred to the response of members of the public in late March 2023 to the sight of pupils praying outside in the School yard.

iv) Avoiding the logistical disruption and detriments to other School activities which would be caused by accommodating prayer rituals within the School building. This referred to Ms Birbalsingh's predictive assessment (summarised at [127(iv)] above) of how many Muslim pupils would be likely to wish to pray if this were permitted and facilitated, and her assessment of the implications in terms of the use of the School building, supervision by teachers and the need to make arrangements and change existing arrangements if pupils were to be going in and out of the building to pray. Mr Coppel denied Ms Hannett's charge that Ms Birbalsingh's estimate of likely numbers was *"speculative"*. He pointed out that it was based on Ms Birbalsingh's detailed knowledge of the School, its parents and its pupils; on the experience of how rapidly the numbers grew in March 2023; on the views of parents who contacted the School between week commencing 20 March 2023 and the decision of the Governing Body; and on her view that there would be pressure on Muslim pupils to pray if this was expressly permitted and facilitated. He also argued that Ms Birbalsingh was best placed to assess the logistical implications, based on her estimates of how many pupils would wish to pray at lunchtime.

v) Avoiding detriment to pupils' education and to social cohesion within the School which would occur if they were permitted to opt out of the important period of socialising during the lunch break. The guided socialisation which took place during the relevant 25 minutes was, Mr Coppel argued, also an

educational activity and the effect of allowing prayer rituals during this time would be to take Muslim pupils away from this activity.

184. Mr Coppel submitted that, on the other hand, the interference with the Claimant's Article 9 right was *"slight at most"*. In this connection he argued that: she chose the School knowing that it is secular and of its strict regime; that the issue only arises during the winter months; that Qada is available when the Claimant misses Duhr and, indeed, she has performed Qada in relation to Duhr and the Asr prayer throughout her time at the School; and that she could move to another school if the ability to pray at lunchtime is sufficiently important to her.

185. Mr Coppel pointed to Ms Birbalsingh's evidence that the question whether some lesser or different measure could be taken was considered but it was concluded that this was not possible. He also pointed out that the decision was not *"for all time"*: the recommendation of the Headteacher, and the decision of the Governing Body were that the PRP could be reviewed at a future date as appropriate.

The Claimant's arguments

186. In summary, Ms Hannett emphasised that the burden of proof was on the School to establish its case under Article 9(2) on the evidence. She accepted that avoiding detriment to education and social cohesion through opting out of socialising during the lunchbreak, and avoiding logistical disruption, were both legitimate aims which were rationally connected to the PRP. But she submitted that:

i) Insofar as reliance on the ethos of the School meant removal of any distinction between pupils based on religion, rather than teaching other pupils to respect and tolerate each other's differences, this was not a legitimate aim: see *Watkins-Singh* (supra) at [84], discussed at [169]-[171] above. Nor was preservation of the inclusive ethos of the School rationally connected with the total banning of prayer given that the School permits certain signs of religious difference, including the wearing of headscarves and allowing pupils to observe Ramadan. The School's own evidence is that this has not threatened its inclusive ethos and there is no evidence that prayer within a clear and predictable system of rules would do so. Indeed, the experience of permitting Sixth formers to pray was that it did not have this effect. The School's evidence of segregation beginning to develop in March 2023 was in relation to 30 pupils at most and, in any event, was not logically probative of what would happen if ritual prayer were permitted and facilitated. The School's own equality objectives were *"to promote cultural understanding and awareness of different religious beliefs"*. This could and would be achieved by less intrusive means than the PRP, namely educating pupils to respect pupils of different faiths (again, see *Watkins-Singh* at [80]-[85]).

ii) The PRP is not rationally connected to the aim of promoting compliance with the School's behaviour policy. It is not rational to rely on experience from when there were no rules regulating permitted prayer to predict that there would be similar difficulties even if there were such rules. In relation to the risk of intimidation of Muslim pupils by other Muslim pupils, Ms Hannett argued that this could and should be addressed by a clear system of rules. There was no evidence of intimidation or peer pressure as a result of the wearing of

headscarves or pupils observing Ramadan etc, nor as a result of Sixth formers being permitted to pray. Such evidence of intimidation and peer pressure as there is took place in the context of prayer which was not controlled by the School and is any event not worthy of being given any weight as it is based on reports and observations but was not formally investigated and no pupil was sanctioned. The School's evidence of intimidation and peer pressure did not stand up to the sort of *"exacting analysis"* which is required by the caselaw.

iii) The concerns about a repetition of the abuse and threats directed at the School in March 2023 were only rationally connected to prayer outside in the school yard.

187. In relation to the third question in the *Bank Mellat* test, Ms Hannett disputed the School's evidence that less intrusive means were specifically considered. She argued that the School should also have considered only permitting children who attend lunch clubs or the library or computer room to pray – whether in their classroom or in a nearby classroom and permitting children to use the classroom accessible from the playground for prayer so that additional teaching staff were not needed inside. She also argued that the School should address any issues which arose in relation to ritual prayer by educations and/or requiring pupils to be tolerant and understanding of the beliefs and religious practices of others.

188. In relation to the, fourth *Bank Mellat* question - whether a fair balance was struck between the severity of the effects of the PRP on the rights of Muslim pupils and the importance of the aims which it was said to promote - Ms Hannett argued that the standard of scrutiny to be applied was a strict one given that the ground of discrimination was religion, the PRP does not have any democratic credentials and the process of decision making was *"remarkably poor, littered with factual errors and paid no weight to the serious risk of alienating Muslims"*. Ms Hannett emphasised the Claimants' evidence as to the importance of prayer to her and other Muslims, and passages in her witness statements which argued that the PRP had been counterproductive in that it had created a strong Muslim identity at the School which was defined by opposition to the School.

189. In relation to socialisation at lunchtime, Ms Hannett emphasised that what was at issue was a pupil withdrawing for approximately five minutes, about as much time, she said, as it would take them go and use the toilet; and in any event pupils were allowed to withdraw for permitted lunchtime activities such as basketball, table tennis or clubs etc. Pupils were also able to socialise during morning break.

190. Ms Hannett also attacked Ms Birbalsingh's evidence of logistical difficulties on the basis that these were ex post facto rationalisations which were both speculative and inconsistent. They were, in any event, not considered by the Governing Body. On the one hand, Ms Birbalsingh had told the Claimant's mother at the meeting on 27 March 2023 that many Muslim families had chosen the School because they did not want their child to pray; on the other, she was now maintaining that there would be virtually 100% take-up of the opportunity if it were provided. This did not happen when some Sixth formers began to pray at lunchtimes in 2021 and, in any event, the numbers would not conceivably approach 350 given, also, that prayer only becomes important at the onset of puberty (generally in or around Year 8). Nor would there need to be a moving of desks given that it would not be necessary for all pupils to pray at the same time. Nor

did the view that there would be insufficient teachers to supervise make sense, given that pupils who were on their way to and from prayer would not need to be supervised in the yard: the pupil teacher ratio in the yard would be unaffected. In any event, the School's own evidence showed that it was well accustomed to adapting its timetable and its use of its building.

191. Ms Hannett argued that the effect on the Claimant of the PRP was significant and that it was no answer for the School to say that the policy could be reviewed as appropriate. The effect of the PRP was immediate and continuing and there were no specific proposals to review it, still less to modify it or to bring to an end. In this case there was a way to permit prayer compatibly with the School's ethos; the problem was that there was no will to do so.

Discussion and conclusions

192. In my judgment the starting point is that the School was right to take the view that the issue was whether to permit and facilitate ritual prayer indoors: in effect, to reverse its longstanding policy of not providing a prayer room. Although Ms Hannett kept her options open, in my view it could not seriously be argued that it would be appropriate for Muslim pupils to pray outside in the yard in the winter months and nor, as I understood her, did Ms Hannett positively argue that it would be. The experience of the public reaction to seeing this in March 2023, is a further reason for taking this view. Even if a screen was put up to shield the yard from public view, as Ms Hannett suggested might be done, it would remain the case that pupils were being required to pray in wet and dirty conditions, that the public would become aware of this, and that there would be a risk of a similar reaction.

193. With this starting point, second, I agree with Ms Hannett that one can and should put aside fears of a repeat of the abuse and threats which occurred in March/April 2023. If prayer indoors were permitted and facilitated, a situation in which a teacher became involved in a dispute with a pupil connected with praying, and this was then brought to the attention of parents or members of the public, would be less likely to arise. Nor would parents or members of the public have any reason to feel that Islam was being disrespected if pupils were not being required to pray outside, in wet and dirty conditions, using their blazers instead of prayer mats.

194. Third, I also agree with Ms Hannett that an assessment of the implications of pupils being permitted to pray indoors has to be carried out on the assumption that this activity is in accordance with the School rules and regulated by them, and is understood to be by pupils. Part of the reason for aspects of the relevant pupils' apparently defiant behaviour towards the School in March 2023 is likely to have been that they understood that the act of praying at School was prohibited, they were unhappy about this and they had therefore made up their minds to challenge the regime. There would be no need for such an attitude if prayer was permitted indoors.

195. Fourth, however, I do not agree with Ms Hannett that one can therefore discount any possibility that permitting and facilitating prayer at lunchtime would lead to issues in relation to behaviour. It would remain the case that prayer was subject to close supervision by teachers and there would therefore still be scope for differences of view as to whether the presence or behaviour of a given pupil within the School building was or was not appropriate. There would still be the risk of peer pressure or intimidation of

Muslim pupils who would not otherwise wish to pray, or who might be regarded as less observant more generally. That was the experience in March 2023. Although Ms Hannett criticises the lack of investigation of these matters, Ms Birbalsingh's evidence about what occurred is based on her own observations and on what teachers saw and heard, no doubt as well as what the teachers were told by pupils. There is no reason for me to do other than accept this evidence and, in any event, this is classically the sort of point on which the court should give weight to the assessment of experienced teachers "on the ground".

196. Again, I accept that part of the reason for what occurred in March 2023 may be that those who had decided to pray in the yard felt that others should show solidarity with what they saw as their defiance of the School and, if so, the risk of peer pressure may be lower if prayer were permitted. But I also consider that, as in *Begum* and the *X v Y School* case, the predictive judgment of Ms Birbalsingh as to the consequences is one which I should accept. It should be remembered that the pressure and intimidation in March 2023 took place despite the strict behavioural regime at the School. It is also entirely plausible that, at the very least, there would be moral pressure placed on Muslim pupils to take part in lunchtime prayer now that it was permitted. The evidence of what happened in the Sixth Form in or around 2021 is not sufficiently cogent to demonstrate that Ms Birbalsingh is wrong on this point and, in any event, the Sixth formers are not a truly comparable case for the reasons which she explains in her evidence. In my view, contrary to Ms Hannett's argument, there therefore is a rational connection between the aim of furthering the behavioural policy of the School and the PRP.

197. Fifth, I also accept Ms Birbalsingh's judgment/prediction that there would be substantial take-up of the opportunity to pray at lunchtime. For nearly 10 years she has been the Headteacher of the School which she founded, working closely with parents and pupils from the local community, half of whom are Muslims. There is also the evidence of the speed of the increase in numbers of pupils joining in prayer in the third week of March 2023 despite their belief that it was forbidden, despite the fact that prayer mats were not permitted and despite the adverse conditions in the yard. And there is the evidence of parents' views expressed to Ms Birbalsingh and staff thereafter. Similarly to Silber J in *X v Y School* I do not find any contradiction in Ms Birbalsingh saying that, although parents and pupils are willing to accept that there is no prayer room and/or that prayer is not feasible at the School – some may even welcome this – their position would be different if it were permitted and facilitated. Then, even assuming that no one was actually pressuring any pupil to pray during the school day, they would be likely to feel a moral obligation to do so. Indeed, as I have found, the principles governing Qada would be entirely consistent with this prediction: if prayer were permitted in school, there would be no good reason not to pray and Muslim pupils would be likely feel obligated to do so. Again, Ms Birbalsingh is in a good position to form a judgment on this point.

198. Sixth, this being so, there is in my view a rational connection between the aim of promoting the Team ethos of the School, inclusivity, social cohesion etc and the PRP. What is in effect being proposed by the Claimant is that the School should have introduced a set of special arrangements which facilitated the withdrawal from the secular life of the School by significant numbers of Muslim pupils *as such*, albeit each individual pupil would do so for a short period of time whilst they went to the relevant

classroom, prayed and then returned to the yard. These arrangements would be particular to Muslim pupils and they would serve to emphasise their religious difference, in their minds and in the minds of the rest of the School community. I do not suggest that this would inevitably be a good or a bad thing, as it is not my function to take a view about this. The point is merely that it is clearly rational for the School to take the view that the permitting and facilitating ritual prayer in school would have these effects, and that the PRP is therefore a way of protecting and promoting the ethos of the School.

199. I take Ms Hannett's point that the School has permitted certain observable signs of religious observance, and that this and permitting prayer in the Sixth Form for a time do not appear to have threatened the ethos of the School. But the question is one of degree. One can see why arrangements for classrooms to be provided and re configured, for Muslim pupils (specifically) to be permitted to go in and out of the School building other than for family lunch or one of the clubs or approved activities, for there to be supervision of pupils who wished to pray etc, take the identification of Muslim pupils as such significantly further. This is before one gets to the question whether, on the Claimant's case, family lunch for Muslim pupils should be scheduled taking into account the timing of the allotted window for Duhr on that day and/or the pupil's wishes in relation to prayer.

200. Seventh, I accept the thrust of Ms Birbalsingh's evidence about the complexity of the arrangements which would need to be made to facilitate prayer by Muslim pupils: the logistical difficulties. Although the Claimant gave evidence which suggested that the level of difficulty was exaggerated by Ms Birbalsingh, even on her own assumptions as to take-up, I approached this part of the evidence on the basis that the Headteacher of the School was clearly in a better position than she was to make an assessment. It seems to me that it does not matter precisely how many pupils would wish to pray or precisely how many classrooms would be needed. Ms Birbalsingh predicts, for the purpose of her assessment, that the numbers would be substantial, and that was a judgment which she was best qualified to make, as I have said. Nor does the School have to establish that it would be *impossible* to facilitate prayer indoors. It might well be *possible*. But the School is entitled to say that, taken with the other considerations as to the effect on its ethos etc, the level of effort and the cost in terms of use of the School's resources would be such that it would not be proportionate to make the arrangements which would be necessary. Moreover, even if Ms Birbalsingh has overestimated the numbers, there would still be a significant degree of complexity in making special arrangements for a smaller cohort.

201. Eighth, I therefore accept that the aims of the PRP relied on by the School to justify not permitting and facilitating prayer rituals indoors are legitimate aims to which the PRP is rationally connected (*Bank Mellatt* questions 1 and 2). These were essentially the reasons why there had been no prayer room hitherto.

202. Ninth, as to the question whether a less intrusive measure could have been introduced without unacceptably compromising these aims, I do not consider that one could. On the basis of Ms Birbalsingh's assessment of the logistical difficulties alone it would not have been feasible to do other than introduce the PRP. The suggestion that permission could be given to some Muslim pupils in Years 7-11, or even 8/9-11, would not be workable. How would the School decide, without entering very difficult territory, who

should and should not be permitted to pray? Moreover, the issues in relation to the Team ethos, the behavioural policy and socialisation at lunchtime would still arise.

203. Ms Hannett's argument that the way forward would be to educate pupils to be tolerant of the perspective of others and/or to have strict rules to prevent intimidation and peer pressure does not fully meet the points made above, and particularly the point about separateness versus the Team ethos of the School. Moreover, contrary to her argument, this ethos is not tantamount to preventing pluralism and eradicating difference. Certain outward signs of religious belief are permitted at the School and the PRP does not prevent Muslim pupils from manifesting their religion through prayer altogether, as they are free to do so outside the school day. The Team ethos is also intended to be a means of promoting pluralism, albeit the Claimant argues that it has not had this effect.

204. Tenth, as to the balancing exercise at the fourth stage of the *Bank Mellat* test, I accept Mr Coppel's submission that in measuring the severity of the effects of the PRP one is entitled to take into account that prayer had not been raised as an issue in relation to Years 7-11 before March 2023. This is not to say that it was of no importance to Muslim pupils or that none wished to pray during the school day – the example of the Sixth formers confirms that that is not the case, as does the Claimant's evidence about how she and her friends came to start praying in the yard – but it does appear that the vast majority of Muslim parents and pupils did not regard the issue as of sufficient concern to wish to raise it. This may well be because they felt that performing Qada was an acceptable compromise, as Ms Birbalsingh suggests.

205. One is also entitled to take account of the fact that the PRP only impacts Muslim pupils in the winter months and that Qada is, on the evidence, available to Muslim pupils at the School when it does. I also agree that it is relevant that the essential nature of the School regime is one which the Claimant and her fellow pupils, or at least their parents, have chosen and, indeed, that they have chosen to remain at the School notwithstanding the PRP. Although the Claimant says that she is aware of resentment of the PRP amongst some Muslim pupils, there is no evidence that this has affected enrolment or led any of them to choose to leave. Nor, indeed, is there evidence of the issue being raised with the School since the PRP was introduced, other than in the context of this Claim. On the contrary, the evidence is that since the PRP was introduced good relations within the School community have been restored.

206. Eleventh, balancing the adverse effects of the PRP on the rights of Muslim pupils at the School with the aims of the PRP and the extent to which it is likely to achieve those aims, I have concluded that the latter outweighs the former and that the PRP is proportionate.

207. In coming to this conclusion I have had in mind Ms Hannett's criticisms of the decision making process, her argument that whatever Ms Birbalsingh may have thought there is no evidence that the Governing Body took these considerations into account, her argument that the School's case is based on ex post facto rationalisation and her allegations that the Governing Body acted on inaccurate or incomplete information. I deal with these criticisms in greater detail below, in relation to Gound 3 but, in short, in the context of the arguments about proportionality I did not find them persuasive. It is true that further inquiries might have been made but I am confident that the Governing Body considered the matter carefully. Although Ms Birbalsingh may have explained her thinking in greater detail in her evidence than she did at the meeting of

the Governing Body on 23 May 2023, her reasoning has been consistent and was explained to Governors. This is not a case of ex post facto rationalisation and, in any event, I have scrutinised the School's case carefully. Nor is it a case in which the Governing Body was labouring under significant factual misapprehensions.

Conclusion on Ground 1

208. Ground 1 therefore fails.

GROUND 2: INDIRECT RELIGIOUS DISCRIMINATION CONTRARY TO SECTION 85 OF THE EQUALITY ACT 2010?

Statutory framework

209. As is well known, the Equality Act 2010 prohibits discrimination in particular spheres of social or economic activity including the provision of services (Part 3), the management and disposal of premises (Part 4), and work (Part 5). Part 6 deals with its application to the provision of education, and Chapter 1 of this Part is concerned with schools. There was no dispute that section 85 of the 2010 Act applies to the School by virtue of section 85(7)(b), and that the *"responsible body"* for the purposes of this provision was *"the proprietor"* (section 85(9)(b)), in this case the Governing Body of the School.

210. Section 85 sets out the functions or activities of the responsible body which are subject to the duty not to discriminate. These include decisions about admissions (section 85(1)) and different types of treatment once a pupil has been enrolled. In relation to the latter, section 85(2) provides, so far as material, as follows:

> *"(2) The responsible body of such a school must not discriminate against a pupil—*
>
> *(a) in the way it provides education for the pupil;*
>
> *(b) in the way it affords the pupil access to a benefit, facility or service;*
>
> *(c) by not providing education for the pupil;*
>
> *(d) by not affording the pupil access to a benefit, facility or service;*
>
> *(e) by excluding the pupil from the school;*
>
> *(f) by subjecting the pupil to any other detriment."*

211. Ms Hannett relied on section 85(2)(d) and/or (f), although principally on the latter.

212. The characteristics to which the 2010 Act applies are defined in Part 2, Chapter 1. Being of a particular *"religion or belief"* is a *"protected characteristic"*: see sections 4 and 10. Echoing the caselaw under Article 9 ECHR, *"religion or belief"* is defined in section 10 as follows, so far as material:

> *"(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.*

(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief."

213. The different types of discrimination are then defined in Chapter 2 of Part 2. These include indirect discrimination, which is defined by section 19 as follows:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

"Detriment"

214. The List of Issues prepared by the parties put each of the limbs of section 19 in issue and then the question whether the *"provision, criterion or practice"* ("PCP") subjected the Claimant to a "*detriment"*. However, where there is a dispute as to whether a claimant suffered any detriment by reason of the conduct complained of, logically that is the first question and it may also be the best question to start with in practice. Section 85 sets out a series of forms of detrimental treatment, as the phrase *"any other detriment"* in section 85(2)(f) indicates. If the responsible body did not subject the pupil to a detriment, the claim fails because the 2010 Act is not engaged. If it did subject the pupil to a detriment, the question is whether the responsible body discriminated against the pupil in so doing.

215. Mr Coppel cited the decision in *Derbyshire v St Helens Metropolitan Council* [2007] UKHL 16, [2007] ICR 841 for the proposition that it is not sufficient that the Claimant perceived that the PRP was detrimental to her: the perception must be objectively reasonable. At [37], Baroness Hale said this:

"The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a "detriment" or, in the terms of the Directive, "adverse treatment"? But this has to be treatment which a reasonable employee would or might consider detrimental… As my noble and learned friend, Lord Hope of Craighead, observed in Shamoon…. "An unjustified sense of grievance cannot amount to 'detriment' …" (emphasis added)

216. The highlighted sentence in this passage endorses the test stated by Brightman LJ said in *Ministry of Defence v Jeremiah* [1980] ICR 13, 31. The following points were also confirmed in the *St Helen's* case:

i) The test is one of *"materiality"* [67];

ii) The question should be looked at from the point of view of the alleged victim [27], [66];

iii) *"If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought… to suffice."* [67].

217. In *Matovu v Temple Gardens Chambers* [2023] EAT 58, at [173], the Employment Appeal Tribunal said that the detriment hurdle is intended to be a low one for a claimant in a discrimination case. The question is not whether the defendant acted honestly and/or reasonably:

> *"References to an "unjustified" sense of grievance [in the case law] are to a sense of grievance which a claimant could not reasonably hold, rather than one with which the [court] disagrees and, as is well known, there may be a range of reasonable views on a matter. Consideration of whether a reasonable claimant would or might take the view that the treatment complained of was to their detriment may include consideration of the reasonableness of the [defendant's] actions but that is not the test. Obviously, reasonable conduct by a [defendant] might reasonably be considered by a claimant to be to their detriment given that each views the matter from a different perspective and brings different considerations to bear in making their assessment. The assessment may include consideration of whether the alleged detriment is minor or trivial but, again, that is not the test."* [174] .

"Particular disadvantage"

218. Mr Coppel's skeleton argument correctly conceded that the PRP amounted to a PCP for the purposes of section 19(1) of the 2010 Act. It was also common ground that the PRP applied to all pupils at the School, regardless of their religion or beliefs, so section 19(1)(a) was satisfied. Nor was there any dispute that the comparison for the purposes of section 19(2)(b) is governed by section 23(1) of the 2010 Act, which requires the circumstances relating the cases of the group which is said to be disadvantaged to be materially the same as in the case of the comparator group. So in this case the comparison to be made is between the impact of the PRP on Muslim pupils at the School and its impact on non-Muslim pupils.

219. In Mr Coppel's skeleton argument it was denied that the PRP put Muslims or the Claimant at a *"particular disadvantage"*, essentially on the basis of an argument that the ability to perform the Duhr prayer at school on the days in question was not, objectively, of exceptional importance (relying on *R (Watkins-Singh) v GB Aberdare GHS* [2008] EWHC 1865 (Admin), [2008] ELR 561 at [56B]-[57], considered in *G v St Gregory's Catholic Science College* [2011] EWHC 1452 (Admin) at [37]). However, that argument was not pursued by Mr Coppel at the hearing and, in my view, rightly so given the subsequent authorities to which I refer below. He also conceded that the PRP put or would put the Claimant at a particular disadvantage (section 19(1)(c)). He said

that this was because, on the evidence, Muslim pupils were more likely than pupils who were of other faiths or no religion to wish to undertake prayer rituals during the school day.

220. I agree with Mr Coppel's concession. Section 19(2)(b) assumes that the PCP does subject the claimant to a *"detriment"*. If it does not, then section 19 would not be engaged, as I have said. The section is concerned with relative disadvantage. The word *'particular'* in the phrase *'particular disadvantage'* was not intended to connote a disadvantage which is *'serious, obvious and particularly significant'* but simply to make clear that people with the relevant protected characteristic must be more disadvantaged than others: that the disadvantage must be particular to them. The subsection does not impose a second threshold requirement as to the severity of the impact on the protected group: see *McNeill & Others v Revenue and Customs Commissioners* [2019] EWCA Civ 1112, [2020] ICR 515 per Underhill LJ at [16] and *Pendleton v Derbyshire County Council* UKEAT/0238/15/LA, [2016] IRLR 580 at [31].

221. Given that the question is one of relative disadvantage as between two groups, it is not necessary to show that all members of the protected group are disadvantaged by the PCP or cannot comply with it, nor that there is no disadvantage to any members of the comparator group. In the present case, it is sufficient that the PRP disproportionately affects Muslim pupils and it does not matter whether all or only some Muslim pupils would wish to pray during the school day. Moreover, if group disadvantage is established under section 19(2)(b), all that is required under section 19(2)(c) is that the Claimant suffered the same disadvantage. *Why* she suffered the disadvantage is irrelevant: *Essop v Home Office (UK Border Agency)* and *Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] 1 WLR 1343.

Was the PRP a "proportionate means of achieving a legitimate aim"?

222. It was not suggested by Ms Hannett that I should adopt a different approach to proportionality under section 19(2)(d) of the 2010 Act to the approach which applied to the same question under Article 9 ECHR. Mr Coppel also pointed out that in *R (Ul Haq) v Walsall Metropolitan Borough Council* [2019] EWHC 70 (Admin), [2019] PTSR 1192, the Divisional Court decided the proportionality issue in the Council's favour under Article 9 ECHR. This included accepting that, when it comes to the questions whether there are less intrusive means of achieving the aims of the public body and whether a fair balance has been struck between the competing rights and interests, *"a certain margin of judgment must be afforded to public authorities in this sensitive area"* [73]. When the Divisional Court turned to the claim for indirect religious discrimination under the 2010 Act it said that in substance this claim raised the same issues as the claim under Article 9 and that it rejected the indirect discrimination claim for the same reasons: see [98].

223. As part of her overall submissions on the importance of process to the issue of proportionality, including her reliance on *In re Brewster*, Ms Hannett submitted that if the Claimant succeeded on the PSED ground the School was necessarily not in a position to show that the PRP was proportionate for the purposes of section 19 of the 2010 Act. For this proposition she relied on *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 at [133] and *R (Coll) v Secretary of State for Justice* [2017] UKSC 40, [2017] 1 WLR 2093 at [42].

224. I have dealt with the fundamentals of this argument at [159]-[168] above. It is also well established that the section 19(1)(d) question is an objective one for the court. There is therefore nothing to prohibit reliance on justifications which were not considered at the time of the decision, albeit this may mean that they are scrutinised more closely and/or the defendant is less able, or unable, to produce the evidence to prove its case and/or to show that there were no less intrusive means available to achieve the relevant aim. I accept Mr Coppel's submission that the rationale for the court giving appropriate weight to judgments made by the decision maker when considering issues of proportionality in the context of Article 9 ECHR applies equally in the context of section 19 where the challenge is to the type of decision made by the School in the present case. In contrast to a case in which, say, an employment tribunal applies section 19 to the decision or practices of an employer, the present context is one of judicial review of the exercise of a decision making power which has been conferred on the decision maker by Parliament. There are also limits to the ability of the court to second guess the factual judgments of the decision maker which are inherent in the applicable procedure (which rarely involves oral evidence) and in the relative expertise of the decision maker and the court.

225. Nor is there any logical reason why it should follow from a failure to have *"due regard"* to the matters required by section 149 of the 2010 Act that the decision taken is disproportionate for the purposes of section 19. The two sections define different duties of the defendant. Section 149 is essentially a procedural requirement to have due regard to the specified matters, whereas the proportionality of a measure is judged by reference to its aims and effect. Failure to comply with section 149 may or may not mean that the defendant is in practice unable to prove its case on proportionality. Moreover, the passages relied on by Ms Hannett from *Elias* and *Coll* do not in fact support the submission which she made:

    i) At [133] of *Elias* Mummery LJ went no further than to say that failure to comply with PSED added to the difficulties of the Secretary of State in defending the decision under challenge given that it meant that reliance was being placed on ex post facto justifications which *"in these circumstances the court should consider with great care"*.

    ii) The passage from the judgment of Baroness Hale at [42] of *Coll*, read in the context of the case as a whole, is not a statement of legal principle that breach of the PSED will necessarily mean that a prima facie indirectly discriminatory measure is not a proportionate means to achieving a legitimate aim. It is an observation that because the Secretary of State in that case had never addressed the possible impacts on women of the impugned measure, evidentially it was not able to discharge the burden of showing that the measure was proportionate.

226. Both passages relied on by Ms Hannett reflect the practical point that if the matter is not carefully considered at the time of the decision to introduce a measure, there may be errors or omissions which it mean that it is subsequently difficult to justify it, and the court will be alive to this.

Was the Claimant subjected to a "detriment" in this case?

The submissions

227. It is noteworthy that the first point at which the School raised any issue as to detriment for the purposes of the indirect discrimination claim was in Mr Coppel's skeleton argument. The point was not taken in his pleaded case. Even then it was entwined with a submission (which was abandoned, as noted above) that the PRP did not put Muslim pupils or the Claimant at a particular disadvantage for the purposes of section 19(2)(b) and (c), which was based on the same arguments.

228. Mr Coppel's arguments were essentially that the Claimant was unable to show that, objectively, her belief was of exceptional importance given that, on her evidence and that of Professor Siddiqui, she was not obliged to perform Duhr during the school day if she was prevented from doing so. Qada was therefore available to her when she was unable to pray at the allotted time. The Claimant's view that the relevant 25 minutes are *"free time"* and that it is not right to apply Qada to a situation such as the present is based on a mischaracterisation of the period of time in question. Mr Coppel also pointed out that the PRP is only said to be a detriment during the winter months and that therefore it only had any relevant effect on the Claimant for 2 or 3 days at the end of March 2023 and then from October of that year. He submitted that it was not enough that the Claimant perceived the PRP to be detrimental to her if her perception was not objectively reasonable, and it was not. This is a case of an unjustified sense of grievance.

Conclusion on "detriment"

229. I accept Ms Hannett's submission that the Claimant was subjected to a *"detriment"* in this case for the purposes of section 85(2) of the 2010 Act. The test for whether an act or omission amounts to a detriment is not the same as the test for an interference with the freedom to manifest beliefs under Article 9 ECHR. Nor does the test require a claimant to show that the matter is one of *"exceptional importance"* to them: see [214]-[217] above. The PRP did prevent the Claimant from praying in school from 27 March 2023 to the end of term. In my judgment she was also entitled to bring a claim based on its future effect given that it was and is a continuing feature of the School's regime. Mr Coppel did not argue otherwise.

230. Notwithstanding my finding that the PRP itself constitutes *"good reason"* not to perform Duhr for the purposes of deciding whether Qada is available, a person in the Claimant's position could reasonably complain that its introduction subjected her to a detriment in that it prevented her from praying at a time when she could and should otherwise do so. The Claimant's evidence that performing Qada is second best to performing a prayer at the allotted time, and that she was upset by the introduction of the PRP, was not challenged. This, then, is a case in which views may reasonably differ. Whatever view is taken of the reasonableness or proportionality of the School's decision, it cannot be said that no Muslim pupil could reasonably take the view which the Claimant takes.

231. In coming to this conclusion, I have not relied on the Claimant's evidence, in her second witness statement, that *"the way I have been treated by the School has fundamentally changed how I feel about myself as a Muslim in this country"*. If that is the case, it is a very unfortunate consequence of this dispute. I do not doubt that she has strong feelings but she says that they are based on the whole of the events which have led to this Claim, including the FTEs, and on her views that she has been treated differently because she

is a Muslim, that she is the victim of discrimination, and that she has effectively been told that she does not *"properly belong here"*, none of which is in fact the case.

Was the PRP "a proportionate means of achieving a legitimate aim"?

232. I have concluded that it was, essentially for the reasons given above in the context of Article 9 ECHR: see [192]-[207]. The disadvantage to Muslim pupils at the School caused by the PRP is in my view outweighed by the aims which it seeks to promote in the interests of the School community as a whole, including Muslim pupils.

Conclusion on Ground 2

233. Ground 2 therefore fails.

GROUND 3: BREACH OF THE PUBLIC SECTOR EQUALITY DUTY UNDER SECTION 149 OF THE EQUALITY ACT 2010?

Statutory framework

234. There was no dispute that section 149 of the Equality Act 2010 applies to the School. This defines the PSED as follows:

> *"(1) A public authority must, in the exercise of its functions, have due regard to the need to—*
>
> *(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
>
> *(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
>
> *(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."*

235. The section goes on to give a further explanation of this duty. Section 149(3) provides:

> *"(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*
>
> *(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
>
> *(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
>
> *(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."*

236. Section 149(5) provides that:

> *"(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*
>
> *(a) tackle prejudice, and*
>
> *(b) promote understanding."*

237. Section 153 of the 2010 Act also provides for regulations which impose duties on certain public authorities, including the School *"for the purpose of enabling the better performance"* of the PSED by the public authority in question. The relevant regulations for present purposes are the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, regulation 5(1) of which requires the preparation and publication by the public authority of one or more objectives which it thinks it should achieve to do any of the things mentioned in section 149(3)(a)-(c) of the 2010 Act.

Caselaw

238. Ms Hannett took me to a number of the authorities in relation to the requirements of section 149 but, as she said, the key principles are helpfully set out in *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058, [2020] 1 WLR 5037 at [175], citing McCombe LJ's well known judgement in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2104] EqLR 60 at [26] to which she also referred me. The Court in *Bridges* emphasised the following principles:

> *"(1) The PSED must be fulfilled before and at the time when a particular policy is being considered.*
>
> *(2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.*
>
> *(3) The duty is non-delegable.*
>
> *(4) The duty is a continuing one.*
>
> *(5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.*
>
> *(6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision."*

239. Ms Hannett particularly emphasised:

i) Principle (3), which means that the question is whether there was *"due regard"* to the relevant matters by the Governing Body rather than Ms Birbalsingh. She pointed out that there was no statement from any member of the Governing Body to explain what was or was not taken into account in making the decision of 23 May 2023.

ii) Principle (5). In addition to what it said at [175], the Court in *Bridges* said that the PSED requires *"the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics…."* [181]. *"the whole purpose…is to ensure that a public authority does not in advertently overlook information which it should take into account"* [182].

iii) The aspects of principles (2) and (6) which identify the need for rigour etc and a proper appreciation of the potential impact of a proposed measure. In this connection, she also referred to similar parts of [77] of the judgment of Elias LJ in *Bracking* where he referred to the question whether the Minister in that case *"properly appreciated and addressed the full scope and import of the matters which she [was] obliged to consider pursuant to the PSED…a vague awareness that she owed legal duties to the disabled would not suffice",* albeit these words were spoken in a particular context. Ms Hannett also relied on *R (Good Law Project and Runnymede Trust v (1)Prime Minister and another* [2022] EWHC 298 (Admin) at [113] as an example of reliance on *"generalities"* rather than specific consideration of the relevant matters which resulted in a finding that there had not been compliance with the PSED.

240. Relying on *R (DMA) v Secretary of State for the Home Department* [2020] EWHC 3416, [2021] 1 WLR 2374 at [312] Ms Hannett also submitted that the PSED includes a requirement to monitor. I do not agree. *DMA* and the relevant authorities, do not establish a rule to this effect. The true position is that what *"due regard"* entails is fact specific: depending on the context and the evidence, the PSED *may* require monitoring. The possibility of a need to monitor the impact of a measure or system is a function of the fact that the PSED is a continuing duty (*Bridges* Principle (4)) and the need to be properly informed before taking decisions.

241. In *DMA*, Robin Knowles J was applying the following passage from [85] of the judgment given by Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1507 in the particular factual and statutory context of the *DMA* case, which concerned the duty to provide accommodation under section 4(2) of the Immigration and Asylum Act 1999 and the impact of delays in doing so on failed asylum seekers who were disabled. Aikens LJ said:

> *"85….the public authority concerned will, in our view, have to have due regard to the <u>need</u> to take steps to gather relevant information in order that it an properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration…"* (emphasis in the original)

242. Knowles J accepted a submission that, on the facts of the *DMA* case, the failure of the Secretary of State to undertake monitoring meant that there was a fundamental obstacle - the lack of information as to the impact of the delays on people with disabilities - which prevented the Secretary of State from having *"due regard"* to the matters required by section 149: see [311] and [324] of his judgment. (See, further, *R (SA) v Secretary of State for the Home Department* [2023] EWHC 1787 (Admin) and *R (Dxk) v Secretary of State for the Home Department* [2024] EWHC 579 (Admin) which consider *DMA* in a materially similar statutory context but by reference to impacts on pregnant and new mother asylum seekers.)

243. Finally, Ms Hannett emphasised the importance of the School's equality objectives, set out pursuant to the 2017 Regulations. The School had stated that the objective which it thought it ought to achieve was to *"promote cultural understanding and awareness of different religious beliefs between different ethnic groups within our school community"*. Failure to consider this objective, she submitted, would be indicative of a lack of the required conscientious approach.

244. For his part, Mr Coppel emphasised the passages from the authorities which make the following points, a number if which he took from the judgment of Dyson LJ in *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2009] PTSR 809 although they are also made in other authorities, and *Baker* itself has been approved or followed in a number of cases including *Hotak v Southwark London Borough Council* [2015] UKSC 30, [2016] AC 811 at [74]-[75]:

i) Section 149 is a procedural requirement, rather than requiring a particular outcome: *Baker* at [31], albeit that does not diminish its importance for the reasons explained in, for example, *Bridges* at [176].

ii) The duty of the decision maker is to have due regard to the *need* to achieve the relevant statutory objectives, rather than actually to achieve those objectives: *Baker* [31].

iii) *"Due regard"* means taking the need into account and giving it such weight as is *"appropriate in all the circumstances"*: *Baker* [31]. In the light of the word *"due"* it is not possible to be more precise or prescriptive than this given that *"the weight and extent of the duty are highly fact sensitive and dependent on individual judgment"*: *Hotak* at [74].

iv) Whether there has been due regard is a matter of substance, not form – has the decision maker in substance had regard to the needs set out in section 149(1)(a)-(c) - rather than there being a requirement that they demonstrate, in the language in which the decision is expressed, that they are or were conscious of discharging the relevant duty: *Baker* [34]-[37].

v) It is for the decision maker to determine how much weight to give to the relevant need. Provided that there has been *"a proper and conscientious focus on the statutory criteria…..the court cannot interfere simply because it would have given greater weight to the equality implications of the decision": Hotak* at [75], approving Elias LJ in *R (Hurley and Moore) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin), [2012] HRLR 13 at [77]-[78].

vi) Provided there has been regard to the matters required by section 149, challenges on the basis that there was insufficient regard, or there was insufficient inquiry, may only be made on irrationality grounds, albeit taking into account to the aims of section 149 and its statutory context. There is no duty to make further inquiries *"if the public body properly considers that it can exercise its duty with the material it has."*: *Hurley* at [90].

245. Mr Coppel, in answer to a question from the Court, referred to [2.8] of the *Technical Guidance on the Public Sector Equality Duty: England* issued by the Equality and

Human Rights Commission. This states that although the PSED applies to all relevant bodies, *"the way in which it is implemented should be appropriate to the size of the body and its functions"*: *Brown* at [78]. Apart from this, neither party placed particular reliance on the Technical Guidance although certain extracts, which I have read, were placed in the Bundle of Authorities.

The Claimant's case on Ground 3

246. It is fair to say that the Claimant's case under this heading underwent a degree of mutation with each iteration. In the Amended Statement of Facts of Grounds, breach of the PSED was pleaded as Ground 3 and it occupied 5 of the 106 paragraphs of the pleading. By the time of the hearing it had been promoted, in the Claimant's skeleton argument, to the first Ground to be argued, apparently with a view to establishing a foundation for the submission that because there had been a breach of the PSED, and a poor decision making process overall, the School could not satisfy section 19(2)(d) of the 2010 Act and/or Article 9(2) ECHR, and its decision therefore was not justified.

247. Mr Coppel also complained, with some justification, that Ms Hannett's arguments under Ground 3 had altered over time. New arguments were introduced in her Reply to the Summary Grounds of Defence dated 26 June 2023 ("the first Reply"). There was then a Reply to the Detailed Grounds of Defence dated 13 October 2023 ("the second Reply") which did not add to these arguments. But then new arguments and criticisms were introduced in her skeleton argument dated 22 December 2023, whilst some earlier arguments appeared to have been abandoned. As I understood him, Mr Coppel did not object to Ms Hannett pursuing points which were made for the first time in the first Reply, but he did object, in the context of Ground 3, to a series of allegations that the Governing Body was provided with inaccurate information which appeared at [28.1] to [28.6] of the Claimant's skeleton, and to what he said were new arguments at [29] and [30].

248. Mr Coppel's position, relying on *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 at [66]-[69], was that procedural rigour is important and that the Claimant's skeleton argument reflected the sort of evolution of the grounds of challenge which, as is well known, the Court of Appeal deprecated in that case, and said should be robustly discouraged. The new criticisms of the Governing Body which were said to support Ground 3 and the arguments on justification should have been pleaded in the Statement of Facts and Grounds or, at least, pleaded, so that the School had notice of them; decisions about what evidence to call had been taken on the basis of the pleaded case and it would not be fair to allow Ms Hannett to run new arguments which were introduced so late in the day. The new points also lacked merit. Ms Hannett needed to apply to amend if she wished to run these points and, if such application were made, it would be resisted.

249. Ms Hannett's position was that she did not need to apply to amend as she was not seeking to rely on grounds other than those for which the Claimant had been given permission (see CPR 54.15). Breach of the PSED was pleaded in the Amended Statement of Facts and Grounds and permission had been granted to argue this Ground. She pointed out that she had pleaded, in reliance on *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin), [2010] 1 CMLR 43 that the PSED requires the decision maker properly to understand *"the problem, its degree and extent"*. She said that the factual inaccuracies alleged in her skeleton argument were examples of a lack of

understanding of the full scope of the problem based on the School's own evidence in the form of the Briefing Note and the minutes of the meeting of the Governing Body. She had also pleaded some of the points which Mr Coppel said she had not pleaded and, in any event, there was an air of unreality about his suggestion that, had any of the points been pleaded more specifically and/or earlier, the School might have called additional evidence. At no stage had the School, in its evidence, suggested that the Briefing Note or the minute of the meeting on 23 May 2023 was inaccurate or deficient.

250. I disagree with Ms Hannett's suggested analysis of the rules of pleading in the context of a claim for judicial review. It is true that CPR r54.15 specifically requires that there be an application to amend if a claimant wishes to rely on a ground other than those for which permission has been granted. But this is a minimum requirement which must be met, rather than an exhaustive statement of when permission to amend is required or, at least, a point may not be allowed to be raised because it has not been pleaded. For example, [4.2(1)] of Practice Direction 54A (which must be complied with: see r54.6(2)) states that:

> *"(1) The Claim Form must include or be accompanied by the following documents—*
>
> *(a) a clear and concise statement of the facts relied on set out in numbered paragraphs—"the Statement of Facts"; and*
>
> *(b) a clear and concise statement of the grounds for bringing the claim—"the Statement of Grounds". The Statement of Grounds should: identify in separate, numbered paragraphs each ground of challenge; identify the relevant provision or principle of law said to have been breached; and provide sufficient detail of the alleged breach to enable the parties and the court to identify the essential issues alleged to arise. The Statement of Grounds should succinctly explain the claimant's case by reference to the Statement of Facts and state precisely what relief is sought."* (emphasis added)

251. No doubt Singh LJ was referring to these requirements when he said in *Talpada* that the courts should be prepared not to permit grounds to be advanced *"if they have not been properly pleaded **or** where permission has not been granted to raise them"* (emphasis added). It would not be consistent with the requirements of [4.2] of Practice Direction 54A to allow material facts to be relied on which were not pleaded in the Statement of Facts, or for issues to be raised which were required by [4.2(1)(b)] to be identifiable in the Statement of Grounds, but were not identified. As Singh LJ indicated, the aim of these requirements is to avoid unfairness, not only to the other parties but also to the public. They seek to ensure the orderly and efficient management of the proceedings in accordance with the overriding objective and, in particular, to enable the other party to know, at an early stage, the case which it has to meet, and to prepare its evidence and arguments, and make decisions about the litigation accordingly.

252. It is with these considerations in mind that I have approached what has proved to be the time consuming task of examining what was or was not pleaded on behalf of the Claimant and when, and what is or is not fairly before the court in relation to Ground 3: a task which compliance with Practice Direction 54A would have rendered unnecessary. I have proceeded on the basis that the arguments in the Claimant's skeleton argument are the ones which she now wishes to pursue even if others were

pleaded earlier in the proceedings, and I will briefly give my view on the pleading of each of these arguments below.

253. As to what was pleaded and was pursued in the skeleton argument:

i) It has always been the Claimant's case that there was a failure to consider each or any of the three specific needs required by section 149(1)(a)-(c) of the 2010 Act: see [98] of the Amended Statement of Facts and Grounds. The specific point, at [29] of the Claimant's skeleton argument, that there was a failure to consider how the PRP would impact relations between Muslim and non-Muslim pupils is encompassed within this and is therefore unobjectionable. [29] also complains of a failure to monitor the PRP's effects. This is a new point. [29] also refers the Claimant's evidence that it has had the effect of creating strong sense of Muslim group identity which was not previously there, and a belief that their religion is not seen as important enough to engage in a discussion about how prayer might be facilitated. This has been part of her evidence since her second statement dated 12 October 2023. On balance, I do not think that it would be unfair to allow the monitoring point to be raised as it forms part of the Claimant's duty of inquiry argument (see below) and is capable of being disposed of on the existing evidence.

ii) Since her first Reply it has been part of the Claimant's pleaded case that the School failed to comply with the requirement of the PSED that the decision be properly informed and that there is a duty of reasonable inquiry. I therefore accept that the School was on notice of the need to provide evidence of such inquiries as the Governing Body made before coming to its decision.

iii) In the first Reply it is specifically alleged that the following matters were not known to the Governing Body and were not inquired into:

a) How many Muslim pupils wished to pray in the course of the school day. This point was also pursued in the Claimant's skeleton argument at [28.3] alongside an argument that Ms Birbalsingh's opinion on this question was inconsistent.

b) Whether those who did wish to pray were disproportionately represented within other protected groups such as racial groups. This point was not pursued in the skeleton argument and is in any event not a compelling one given that the matter clearly was considered by the Governing Body.

c) The views of the pupils as to how disadvantageous they considered the PRP to be. I am prepared to accept that this is an aspect of the allegation that there was a failure to consider how the PRP impacted relations between Muslim and non-Muslim pupils at [29] of the skeleton argument and therefore another reason to allow this argument to be put forward by the Claimant.

d) How other schools approached the question of Muslim pupils who wished to pray at lunchtime. This point was also pursued in the Claimant's skeleton argument.

iv) Since her first Reply it has been part of the Claimant's case that:

a) The School failed to consider its own equality objectives and that this was indicative of a lack of conscientious consideration of the matter. This point was pursued in the skeleton argument.

b) The School's consideration of alternative measures to the PRP was cursory in that no measures short of a ban were considered. In particular, there was no consideration of whether prayer could be permitted subject to a strict behavioural policy and/or education of pupils about the need to respect the religious views and practices of others. *Watkins-Singh* (supra) at [84] was relied on. I accept that this is the contention at [30] of the skeleton argument which, on this basis, is unobjectionable.

254. The allegation that the Governing Body was provided with inaccurate information, which is then particularised at [28.1], [28.2] and [28.4]-[28.6] of the Claimant's skeleton argument, does involve a series of new points. ([28.3] is not in fact about providing inaccurate information – it is about a lack of information and was raised in the first Reply, as noted above). In my view these points ought to have been pleaded as part of Ground 3, even if they are merely put forward as examples of the Governing Body not properly appreciating the full scope of the problem. They make factual allegations that inaccurate information was provided to the Governing Body and that therefore it misunderstood the factual position in coming to its decision, and they raise further issues in relation to the allegation that there was a breach of the PSED: see [4.2(1)(a) and (b)] of Practice Direction 54A, above. The School therefore ought to have been put on notice of that these points were relied on as part of Ground 3 so that it could consider whether it wished to adduce evidence to address them as part of its response to the complaint that there had been a breach of the PSED.

255. Dealing with each of the new points in turn:

i) [28.1] is also a bad point in any event. Here, it is alleged that the Governing Body was told that pupils bringing prayer mats into school would have a significant impact on the logistics of the School in that pupils would have to carry their bags around whereas in fact prayer mats can be carried in pockets. It is plain from the minutes of the meeting of the Governing Body and Ms Birbalsingh's evidence that this is not the point that was being made. As she explained at the meeting, and explains in her evidence, the point was that there were insufficient teachers to supervise. If pupils were going in and out of classrooms there would be a concern about the security of pupils' bags and coats which are currently left at the back of the form room at the beginning of the day and remain there. This would mean that bags and coats would need to be carried around the School.

ii) [28.2] alleges that the Governing Body were told that children had been *"intimidated"* without being informed that no investigation into the intimidation had taken place. It also notes that no pupil appeared to have been disciplined for intimidation despite the zero tolerance approach of the School. I agree with Mr Coppel that this does not take the PSED argument any further. The point is not relied on as a relevant consideration for the purposes of an irrationality argument and I accept that there was not a failure to have *"due regard"* to the

considerations required by section 149 because the Governing Body failed to inquire into whether there had been an investigation of the accounts of intimidation of which they were informed. The Governing Body was fully entitled to take the view that the information which it had on this matter was sufficient. In any event, information about whether there had been an investigation beyond Ms Birbalsingh speaking to teachers about what they had heard or observed would not have made any difference to the decision of the Governing Body: see section 31(2A) of the 1981 Act.

iii) [28.4] alleges that the Governing Body was *"misinformed"*, in the Briefing Note, about the nature of Qada in that they were told that it was *"saving up"* a prayer. It is then said that *"Forcing children to do Qada instead of praying is a detriment"*. There is nothing in this point. In fact, the passage from the Briefing Note, which I have recited at [121] and above, states that: *"…some pupils considered it important that they pray during the lunchtime break at various times of the year. Many Muslim pupils feel able to 'save up' their prayer until the end of the day (Qadaa), but it was clear that some felt that….this is not permissible"*. The shorthand *'saving up'* is not materially inaccurate for the reasons explained above, including at [42]-[45]. As is apparent, the Governing Body were told that some pupils felt that this was not permissible and there was nothing in the Briefing Note or the minutes of the meeting to suggest that they were said to be wrong about this or that the PRP would be anything other than a detriment to those who took this view. On the contrary, as noted at [121] above, in her summary of the reasons for the PRP which Ms Birbalsingh gave the Governing Body, she said that pupils of a number of faiths had made *"concessions"* given the ethos of the School (i.e. they had had to compromise their beliefs): *"Muslim families have made the concession for their children to pray at the end of the day when they return home during Ramadan."*. The Governing Body was also well aware of what had happened in March 2023 and of the strength of feeling which had been generated.

iv) [28.5] complains that the Governing Body was not told that, in 2021, some Sixth form pupils had used a spare classroom to pray at lunchtime, as Ms Hassan attests. It is said that no threat to the ethos of the School appears to have arisen from this, and that this information tends to suggest that the breaches of the School's behavioural policy arose from a lack of clarity as to the position under the School's rules. The factual foundation for this argument has been in the evidence since Ms Hassan's statement of 12 October 2023, which was responded to by Ms Birbalsingh as I have noted. It is also accepted that the Governing Body was not told of this point. I will therefore address the argument below.

v) [28.6] alleges that the Governing Body appears to have proceeded on the basis that prayer must take place at a precise time, so that all pupils would have to pray at exactly the same moment, whereas the requirement is to pray during a window of time. The reference given for the purposes of this point is a subparagraph from Ms Birbalsingh's second witness statement which forms part of a series of subparagraphs which show a complete and accurate understanding on her part of the true position in relation to windows of time for prayer. I do not accept that the alleged misunderstanding is apparent from the Briefing Note

or the minutes of the meeting and I accept Mr Coppel's assertion, no doubt on instructions, that the point was well understood by Ms Birbalsingh and the Governors.

256. I therefore would not have allowed amendments to Ground 3 of the Statement of Facts and Grounds to plead [28.1], [28.2], [28.4] and [28.6] had an application to amend been made.

Discussion and conclusions in relation to Ground 3

257. Turning to Ms Hannett's remaining arguments, I accept Mr Coppel's submission that the relevant context includes the fact that the Governing Body is likely to have had a degree of familiarity with the School by virtue of its role. Absent evidence to the contrary, it can also be taken to have carefully considered the information with which it was provided. The Governing Body was made aware, in the Briefing Note and at the meeting, of the events of March/April 2023 and is likely to have been aware of them in any event. The Governors will therefore have been well aware of the controversy in relation to the issue which they were being asked to consider, albeit the impact of that decision was relatively confined: it affected current and future pupils at the School who wished to pray during the school day.

258. Secondly, I accept Ms Birbalsingh's evidence that:

> *"It was entirely obvious to everyone at the School and on the Governing Board that the [PRP] would have more of an impact on Muslim children and children from certain ethnic backgrounds than on other children, although it could also have adverse impacts on children of other religions."*

259. This, then, is not a case in which there were potential hidden impacts of the relevant measure, or the nature of the impacts was unknown, as in some of the cases discussed above. Moreover, the Briefing Note referred to the children who would be adversely impacted being *"protected under the Equality Act 2010"* and this adverse impact was rightly presented as the central equality issue in relation to the PRP.

260. As to whether the Governing Body had regard to the matters specified in section 149(1)(a)-(c), I am satisfied that it did.

i) Unquestionably it had regard to (a) - the need to eliminate discrimination etc - the discussion in the Briefing Note and at the meeting was effectively a discussion of whether the continuation of the PRP was justified given its prima facie indirectly discriminatory impact on Muslim pupils and other groups which were protected under the 2010 Act.

ii) As for (b) - the need to advance equality of opportunity etc – arguably this need was not engaged by the PRP or, at least, was not engaged to the same extent as the potential for the measure to be indirectly discriminatory. Section 149(3)(b) states that the need to advance equality of opportunity includes the need to take steps to meet the particular (in the sense of different) needs of people who share a relevant characteristic. Here, however, the decision proceeded on the basis that

the PRP disadvantaged (section 149(3)(a)) Muslim pupils who wished (or "needed") to pray. The Briefing Note and the considerations put before the Governing Body at the meeting on 23 May 2023 included whether prayer could and should be accommodated within the School given the wishes of a number of the Muslim pupils, and the implied premise for this discussion was that their wishes should be accommodated unless the PRP was justified: there was a need for their beliefs to be accommodated if it they could be from a practical perspective and consistently with the School's ethos. In substance, then, there was due regard to the needs identified in section 149(1)(b).

iii) As for (c) - the need to foster good relations between people who share a protected characteristic and others - section 149(5) explains that this involves having due regard, in particular, to the need to tackle prejudice and to promote understanding. An important consideration in the Briefing Note and at the meeting was Ms Birbalsingh's view that the PRP would do just this by promoting a secular, inclusive, environment and by not facilitating division into groups which were defined by reference to religion. The Governing Body was asked to consider her view that the PRP would promote the ethos of the School which was *"to build friendships across the faiths and not to allow segregation"*. It was also made aware of her concern about the intimidatory atmosphere, albeit between observant and less observant Muslim pupils, which had developed and which she considered was likely to develop if ritual prayer was permitted. Implicit in all of these considerations was a recognition of the need to tackle prejudice and promote understanding between people of different religions including Muslims and other religious groups.

261. I do not accept Ms Hannett's submission that the Briefing Note and the minutes of the meeting, taken with Ms Birbalsingh's evidence, show no more than *"vague awareness"* that legal duties were owed to or *"generalities"* of the sort which were referred to in *Bracking* and *Good Law Project*. The Governing Body was asked to consider the issues in the specific context of the School, and they did so. Whilst there is no specific reference to section 149(1)(a)-(c) of the 2010 Act in substance the relevant statutory needs were considered. The fact that others, including the Claimant, may take a different view about how best to address the statutory needs in the context of the present case does not mean that there was a failure on the part of the Governing Body to have due regard to the relevant matters under section 149.

262. As to the question whether there was *"due"* regard to the required matters, I accept that the duty was on the Governing Body and that this included a duty of reasonable inquiry. However, that did not prevent the Governors from relying on the inquiries which had been made by the Headteacher of the School and the information and judgments which she placed before them if it was reasonable for them to do so. It is evident that the Governing Body considered that the material which it had was sufficient to come to a decision and I do not accept that it could not properly or rationally do so. As for the matters which Ms Hannett argues the Governing Body ought to have investigated further:

i) I agree that they could in theory have asked for further analysis of how many Muslim pupils would wish to pray in the course of the school day but the position was that this could not be scientifically tested. Contrary to the suggestion that Ms Birbalsingh's opinion on this question was inconsistent, her

view was, in effect, that whilst many parents and pupils were content that prayer would not take place during the School day, if it was permitted a significant number of pupils would choose to do so. This, in turn, would increase the pressure on others to do so. Even if a survey was appropriate, which is debateable given the events of March 2023, its results were unlikely to be reliable. The Governing Body was therefore entitled to accept her judgment on this question. In any event, as a result of doing so the Governing Body evidently proceeded on the basis that a significant number of pupils had begun to pray within a short period of time in March 2023, and there would be significant take up if ritual prayer was permitted, so that the adverse impact on Muslim pupils would be significant. I therefore do not accept that it was irrational for the Governing Body not to seek further evidence on this point nor that failure to do so meant that it did not have due regard to the relevant statutory matters.

ii) As for seeking the views of the pupils as to how disadvantageous they considered the PRP to be, the Governing Body proceeded on the basis that a significant number of Muslim pupils would consider the PRP to be disadvantageous. They were also aware of the strength of feeling amongst this group indicated by the events of March 2023 and of the fact that this had not been an issue before then. I do not accept that it was irrational not to seek further information on how disadvantaged or resentful Muslim pupils would feel if the PRP was continued.

iii) As for asking for information on how other schools approached the question of Muslim pupils who wished to pray at lunchtime, the issue for the Governing Body fell to be considered in the particular context of the School, including the limitations of its building and its resources as well as its distinctive ethos and approach. Clearly, the Governing Body could rationally take the view that they would not be assisted by information about the approach at other, very different, schools.

263. As for the argument that the School failed to consider its own equality objectives, and that this is indicative of a lack of conscientious consideration, in substance the Governing Body did consider this objective. As I have noted, a key consideration in the Briefing Note and at the meeting was the School's aim of building friendships across the faiths and not allowing segregation etc and the relevance of the PRP to this aim. I appreciate that views may differ as to whether the PRP would be likely to promote these objectives but section 149 requires due regard to the statutory objectives rather than the decision-maker to adopt an approach to them with which the Court or others agree.

264. As for the contention that the School's consideration of alternative measures to the PRP was cursory in that no measures short of a ban were considered, adequate consideration to this question was given. An argument that prayer could be permitted subject to a strict behavioural policy and/or education of pupils about the need to respect the religious views and practices of others was not particularly compelling for the reasons discussed above in the context of the issue of proportionality. Even if these steps could have been taken effectively, which has not been established on the evidence, they still would not have addressed the concerns about the effect on the Team ethos of the School, in terms of the risk of increased segregation etc, and the practical considerations and difficulties explained by Ms Birbalsingh. The Governing Body was entitled to reach its decision without further investigation of this possibility.

265. As for the point that the Governing Body was not told that some Sixth formers had, in the past, made use of a classroom to pray and that this had not caused difficulties, it is not easy to see how this meant that they did not have due regard to the needs identified in section 149. They could have asked for more information about the extent to which there had been praying at school in the past but it is not clear how the information in Ms Hassan's statement would have made a difference. No firm or reliable conclusions could be drawn from the fact that some pupils who were subject to the more relaxed regime in the Sixth form had made use of one classroom for what appears to have been a short period prior to July 2021. The Governors were concerned with the implications of giving permission to a significantly larger cohort of younger pupils in Years 7-11, who were subject to a significantly stricter regime.

266. As for monitoring, the challenge in this Claim is to the decision to introduce the PRP. The question of monitoring therefore does not arise, particularly given that I have concluded that the Governing Body was able to, and did, discharge its duty under section 149 on the information before it. Insofar as it is said that there should have been monitoring after its introduction, the Governing Body considered the impact of the decision of 27 March which, it was told, was that the School had returned to being a peaceful integrated community. It was entitled to accept that. Its decision on 23 May was, in effect, to keep the matter under review. The Claimant's pleaded case does not encompass a complaint that there has been a failure to do so, or to gauge opinion, since the 23 May decision under challenge. Although the Claimant says that Muslim pupils *"now know"* that a requirement of their religion is not *"seen as important enough even to engage in a discussion about how it might be facilitated"*, the issue does not appear to have been raised by or on behalf of pupils before March 2023 or since the decision of 23 May 2023, other than in the context of these proceedings.

267. For all of these reasons, I accept that the Governing Body had due regard to the matters required by section 149(1)(a)-(c) of the Equality Act 2010.

The argument under section 31(2A) of the Senior Courts Act 1981

268. In case I am wrong on the question whether there was a breach of the PSED, I turn to the School's argument under that Section 31(2A) of the Senior Courts Act 1981 applies. This provides, so far as material, that:

> *"(2A) The High Court—*
>
> *(a) must refuse to grant relief on an application for judicial review..*
>
> *(b) …*
>
> *if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred….."*

269. I have reminded myself of the distillation of the principles provided by Ms Kate Grange KC in *R (Cava Bien) v Milton Keynes Council* [2021] EWHC (Admin) at [52] which includes the following:

> *"i) The burden of proof is on the defendant.. ;*

ii) The "highly likely" standard of proof sets a high hurdle. Although s31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1988) 57 P & CR 306, the threshold remains a high one…: .

iii) The "highly likely" test expresses a standard somewhere between the civil standard (the balance of probabilities) and the criminal standard (beyond reasonable doubt)...

iv) The court is required to undertake an evaluation of the hypothetical or counterfactual world in which the identified unlawful conduct by the public authority is assumed not to have occurred….

v) The court must undertake its own objective assessment of the decision-making process and what the result would have been if the decision-maker had not erred in law..:..

viii) The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic..

ix) ....:

x) The Court can, with due caution, take account of evidence as to how the decision-making process would have been approached if the identified errors had not occurred..... Furthermore, a witness statement could be a very important aspect of such evidence…although the court should approach with a degree of scepticism self-interested speculations by an official of the public authority which is found to have acted unlawfully about how things might have worked out if no unlawfulness had occurred…

xi) Importantly, the court must not cast itself in the role of the decision-maker…. While much will depend on the particular facts of the case before the court, 'nevertheless the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law.': R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214 at [273].

> *xii) It follows that where particular facts relevant to the substantive decision are in dispute, the court must not 'take on a fact- finding role, which is inappropriate for judicial review proceedings' where the 'issue raised…is not an issue of jurisdictional fact'. The court must not be enticed 'into forbidden territory which belongs to the decision-maker, reaching decisions on the basis of material before it at the time of the decision under challenge, and not additional evidence after the event when a challenge is brought'. To do otherwise would be to use section 31(2A) in a way which was never intended by Parliament...*
>
> *xiii) ...:*
>
> *xiv) Finally, the contention that the section 31(2A) duty is restricted to situations in which there have been trivial procedural or technical errors….. was rejected by the Court of Appeal…"*

270. I also consider that the court should posit a decision-maker who not only approaches the matter correctly; they also do so conscientiously and with an open mind: compare *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649 at [141].

271. Applying these principles to the present case, I accept Ms Birbalsingh's evidence that:

> *"Even if the School had given greater weight to the impact that the prayer prohibition would have on Muslim children, and/or conducted a full consultation process with the parents or children, and/or given greater consideration to any other lesser options short of a prohibition, I believe that the Governing Body would still have voted to prohibit prayer rituals (noting that it did so with an overwhelming majority at the 23 May 2023 meeting)…."*

272. It is clear that the PRP was regarded as an important measure given the issues which there had been in March/April 2023, the ethos of the School and the practicalities. The questions from the Governing Body and the size of the majority in favour indicate that it very much agreed with the views of Ms Birbalsingh. In my view a greater focus on the specifics of the needs which were required to be considered under section 149(3)(a)-(c), the various inquiries which Ms Hannett advocated, the additional information which she says they should have had available to them, and/or the correction of the inaccuracies in the information provided to them which she says there were, would not have had a material impact on the outcome. I am therefore satisfied that it is highly likely that the decision of the Governing Body would not have been substantially different had the decision making process met the standards which Ms Hannett argues it should have.

273. It follows that, even if I had concluded that Ground 3 was well founded, I would have refused relief.

Conclusion on Ground 3

274. Ground 3 therefore fails.

GROUND 4: PROCEDURAL UNFAIRNESS IN EXCLUDING THE CLAIMANT?

Legal framework

275. Mr Coppel did not appear to dispute that the School had a duty to adopt a fair procedure in deciding whether to exclude the Claimant for a fixed term, and the parties agreed that what fairness and natural justice require depends on the context. Although there may have been some difference between the parties as to the basis for this duty – whether it arose at common law or under statutory guidance or otherwise – ultimately nothing turned on this in my view.

276. There was also no dispute that the September 2022 Guidance issued by the Department of Education – *"Suspension and Permanent Exclusion from maintained schools, academies and pupil referral units in England, including pupil movement"* – ("the Guidance") was in principle applicable to the School at the time of the FTEs of the Claimant. This Guidance was issued in relation to the exercise of powers under section 51A of the Education Act 2002 to exclude a pupil for a fixed period or permanently. By regulation 21 of the School Discipline (Pupil Exclusions and Reviews)(England) Regulations 2012, section 51A is applied to Academies with certain modifications which are not material for present purposes. And, by regulation 27, Ms Birbalsingh and the Governing Body of the School were required to *"have regard to"* the Guidance when considering whether to exclude a pupil.

277. There was, however, an issue as to the interpretation of the Guidance. The particular passages relied on by Ms Hannett appear in Part 3 under the heading: *"The headteacher's power to suspend or permanently exclude…."*. There is then a sub-heading - *"The headteacher's powers to use exclusion"* - under which the following appears:

> *"3. When establishing the facts in relation to a suspension or permanent exclusion decision the headteacher must apply the civil standard of proof, i.e., 'on the balance of probabilities' it is more likely than not that a fact is true,…This means that the headteacher should accept that something happened if it is more likely that it happened than that it did not happen. The headteacher must take account of their legal duty of care when sending a pupil home following an exclusion.*
>
> *4. Headteachers should also take the pupil's views into account, considering these in light of their age and understanding, before deciding to exclude, unless it would not be appropriate to do so. They should inform the pupil about how their views have been factored into any decision made…"*

278. In the *"Terminology"* section of the Guidance it is provided that:

> *"….The term should refers to recommendations for good practice as mentioned in the suspensions and permanent exclusions guidance and should be followed unless there is good reason not to."*

279. The second and third headings in Part 3 of the Guidance are *"Suspension"* and then *"Permanent exclusion"*, under which guidance is given as to what these concepts are, when they may be an appropriate sanction and the duties of a school during a period of suspension or permanent exclusion.

280. As I understood Mr Coppel's argument on the interpretation of the Guidance, it was that [4] of Part 3, i.e. the statement that the views of the pupil should be taken into account etc, only applies where the sanction is a permanent exclusion as opposed to a suspension. I had little hesitation in rejecting this argument. The Terminology section explains that:

> *"Use of the term suspend in this guidance is a reference to what is described in the legislation as an exclusion for a fixed period."*

281. Subject to the context indicating otherwise the word *"exclusion"*, where it appears on its own in the Guidance, refers to both types of exclusion. This is also demonstrated by the fact that, under the subheading *"The headteacher's powers to use exclusion"* in Part 3, all of [1]-[3] are expressly concerned with both suspensions and permanent exclusions. It is also demonstrated by [3], recited above, which is expressly applicable to both, and uses the word "*exclusion"* in the last line to refer to both.

282. There is a glimmer of an argument that because [4] then refers to a decision *"to exclude"* rather than repeating *"to suspend or permanently exclude"* it must be apply only to permanent exclusions. But why, then, did it not refer specifically to *"permanent exclusions"* if that was the intention? The word *"also"* in the first line of [4] also strongly indicates that the paragraph is intended to be a continuation of what is said about both suspensions and permanent exclusions - *"exclusions"* - in the preceding paragraphs, rather than a separate point which is only applicable to permanent exclusions.

283. I also note that [2] of Part 3 provides that:

> *"….Any decision of a headteacher, including suspension or permanent exclusion, must be made in line with the principles of administrative law, i.e., that it is: lawful (with respect to the legislation relating directly to suspensions and permanent exclusions and a school's wider legal duties); reasonable; fair; and proportionate."*

284. It would be curious if, on the other hand, there was no recommendation to take into account the views of the pupil in any exclusion case, of whatever duration, which fell short of a permanent exclusion.

The School's Exclusion Policy

285. The School's own Exclusion Policy, on which Ms Hannett also relied, is expressly based on the Guidance and the relevant legislative provisions. Consistently with my view as to the application of [4] of the Guidance, it provides, so far as material, that:

> *"Before deciding whether to suspend or exclude a pupil, the headteacher will:*
>
> *…*
>
> *Allow the pupil to give their version of events…*
>
> *The headteacher will consider the views of the pupil, in light of their age and understanding, before deciding to suspend or exclude, unless it would not be appropriate to do so.*

> *The headteacher will not reach their decision until they have heard from the pupil, and will inform the pupil of how their views were taken into account when making the decision.*
>
> *We will not normally consider a pupil's views if*
>
> *(a) the suspension is short-term (up to 5 days) and/or*
>
> *(b) either (i) the parent or carer has already had an opportunity to comment and advocate on behalf of the pupil; or (ii) the circumstances giving rise to the exclusion have already been investigated and the pupil had an opportunity to comment during that investigation; or (iii) the exclusion relates to conduct outside of school which has already been investigated by the police or another authority.*
>
> *Pupils who need support to express their views will be allowed to have their views expressed through an advocate, such as a parent or social worker"* (emphasis added)

286. Ms Hannett argued that, in addition to the School's statutory duty to have regard to the Guidance, it was bound to follow its own Exclusion Policy unless there was good reason not to do so. She also submitted that the Policy draws a distinction between an opportunity for the pupil *"to give their version of events"* which is required to be afforded in every case, and an opportunity for them to express their *"views"* which will be afforded *"unless it would not be appropriate to do so"*.

287. I do not accept the second point. Whilst one can see the linguistic basis for her argument, drawing distinctions between the views of the pupil, their version of events and, for example, *"an opportunity to comment and advocate"* for the purposes of deciding what is required of the Headteacher seems to me to be an unrealistic interpretation when the context is taken into account and the guidance in, for example, *R (JB)(Ghana) v Secretary of State for the Home Department* [2022] EWCA Civ 1392 at [67]-[68] is applied. The drafter of the Exclusion Policy cannot have intended to create a duty to allow the pupil to give their *"version of events"* whatever the circumstances but a power, in the same case, to decide that it was not appropriate for them to give their *"views"*. Moreover, if these were intended to be different concepts then logically the distinction would need to be carried through the rest of the passage recited above, with absurd consequences: e.g. that there is an obligation to tell pupils how their views were taken into account but not their version of events, and pupils who needed it would be given support to express their views but not to give their version of events.

288. Although the Exclusion Policy is not well drafted, I concluded that it was intended to provide that the Headteacher would give the pupil or their parent or carer an opportunity to respond to the allegation against them by evidence, comment or argument unless it was not appropriate to do so. The Exclusion Policy then gives guidance as to when it may or may not be regarded as appropriate for this opportunity to be given.

The overall position of the School

289. The overall position of the School in relation to Ground 4 is captured at [141] of Ms Birbalsingh's second witness statement where, having recounted her understanding of the facts of what occurred on 23 March and 27 April 2023, she says:

> *"I understand that the Claimant says that I should have asked her for her account of these incidents before giving her these two fixed-term exclusions. That would have been wholly against the School's ethos and practices. In any event, given the seriousness of her breaches of the behavioural policy, there is no doubt that she would still have received both fixed-term exclusions even if I had sought her views beforehand."*

290. Why it would be wholly against the ethos and practices of the School to hear what the Claimant had to say before punishing her is not specifically explained in any of Ms Birbalsingh's statements. It seems likely that she is referring to her view that an important corollary of the disciplinary ethos of the School *"is that teachers at the School are in unquestioned positions of authority over children"* (see [53], above), which would potentially address a case in which a disciplinary measure was based on the evidence of a teacher, as in the case of the 23 March 2023 FTE. But Ms Birbalsingh does not explain why it would be inconsistent with the ethos and practices of the School to hear the account of a pupil who was being accused of misconduct by a fellow pupil, as was the case in relation to the second FTE.

291. In this connection I note that, on 27 March 2023, Ms Birbalsingh met with the Claimant's mother and explained the reasons for the first FTE. A transcript of the meeting shows that the former repeatedly said that it was not the practice of the School to consider the pupil's account *"We don't do that, we're the strictest school in Britain"*. There was also this exchange between her mother (AS) and Ms Birbalsingh:

> *"AS I don't think the punishment is fair miss, I don't think the punishment is fair that [TTT], she hasn't even been given the chance to speak to someone.*
>
> *KB I understand but. We don't give them the chance, we never do.*
>
> *AS That's what it says in the exclusion policy, that you will have to meet people to hear from both sides before making a decision*
>
> *KB Oh oh yeah, if there's two pupils, if there's two pupils in a fight or something yes"*

292. When the Claimant's mother said that this was not what the Exclusion Policy said, she was told *"Listen, this is how all exclusions happen"* and that she had raised *"an interesting point maybe [the Policy] needs to change"*. Although Ms Birbalsingh describes the School's behaviour policy in detail in her written evidence, and the sorts of case in which there may be fixed term exclusions, it is striking that she does not claim to have had regard to the Guidance or even refer to it. Nor does she explain how her approach in relation to either of the FTEs is to be reconciled with the Exclusion Policy even after it was made clear, in the Claimant's second Reply, that this Policy was relied on.

293. Perhaps tellingly, Mr Coppel concentrated on his submissions on the application and interpretation of the Guidance and the Exclusion Policy which I have addressed above.

He also argued that there was a lack of reality to the contention that the Claimant should have been able to give her account in relation to either of the FTEs, emphasising the evidence against the Claimant and submitting, at least in relation to the first FTE, that it was not appropriate for Ms Birbalsingh to take the Claimant's views into account given that this would involve inviting her to challenge the account given by a senior teacher. There had therefore been no departure from the Guidance or the Exclusion Policy and the common law did not require more than was set out in these documents. In relation to both FTEs, his submission was also that it was unreal to suppose that the outcome would have been different had the Claimant been heard.

GROUND 4(a): the two day fixed term exclusion on 23 March 2023

294. I have summarised Ms A's account of the incident in the yard on 23 March 2023 at [102]-[103] above. In addition to the detailed note of what happened which she made on the day, she also made a record of the incident in the Claimant's behaviour log which is consistent with her more detailed account.

295. The Claimant gives her account in her first witness statement. She does not dispute that she was told to put her prayer mat away and that she resisted this instruction. She says that she tried to explain that the floor was dirty and that *"one should not pray on dirty ground"*. She says that there was then a series of exchanges in which Ms A maintained her position and the Claimant maintained hers, culminating in Ms A sending her inside rather than the Claimant agreeing to put the prayer mat away. She also implies that Ms A was dismissive of her concerns although she does not deny that she interrupted Ms A nor what is said about her tone, although she does not address these questions either.

296. I accept Ms Hannett's submission that, subjectively, Ms Birbalsingh appears to have had no regard to the Guidance or, insofar as the School's Exclusion Policy was the means by which the School had regard to it, the Exclusion Policy, in deciding to exclude the Claimant on 23 March and 28 April 2023. The appearance given by her exchanges with the Claimant's mother on 27 March 2023 is that at that point she did not know what the Exclusion Policy says on the subject of hearing the pupil or, at least, did not regard it as relevant. But it seems to me that the real point under this heading is one of substance: was it unfair and/or contrary to natural justice and/or the requirements of the Guidance and the Exclusion Policy for Ms Birbalsingh to accept the account and interpretation of the incident on 23 March 2023 given by Ms A without giving the Claimant an opportunity to challenge it before a decision was taken?

297. Ms Hannett accepted that the context matters, and the context here includes the fact that the allegation against the Claimant was made by a senior teacher. The purpose of any hearing would principally have been to give the Claimant an opportunity to challenge the account and perceptions of Ms A. Other aspects of the context were that the situation at the School more generally was that tension was building in relation to the issue of praying in the yard and the incident had happened in front of other pupils. Ms Birbalsingh no doubt felt that she needed to act and to act quickly and to support her senior management team. The exclusion which she imposed was a short one and one which the Exclusion Policy indicates would not normally call for the pupil to be heard (given that it was for less than 5 days). She also met with the Claimant's mother on 27 March to explain the decision, albeit this was after the event and she did so in a tendentious fashion.

298. I have therefore concluded that the first FTE was a case in which it was not appropriate for the Claimant to be heard and Ms Birbalsingh's failure to do so was consistent with the Guidance and the Exclusion Policy. Nor was it procedurally unfair to reach her decision in the way that Ms Birbalsingh did. In case I am wrong about this, and there was a breach of a public law duty in relation to this FTE, I have considered whether, if it had been taken, the approach advocated by Ms Hannett would have affected the result. Applying the terms of section 31(2A) of the Senior Courts Act 1981 and the caselaw referred to at [269]-[270] above I am satisfied that, contrary to her argument, it is highly likely that the outcome for the Claimant would not have been substantially different. Relief would therefore have been refused in any event.

299. If Ms Birbalsingh had had regard to the Guidance and/or the Exclusion Policy it seems to me to be clear that she would have decided that it was not appropriate to hear from the Claimant before making her decision. Even if the common law duty to act fairly would have required her to do so, it seems to me to be highly likely she would then have accepted Ms A's account in full and come to the same conclusion, and that she would have been entitled to do so. The substance of Ms A's account is not disputed by the Claimant. If she had been able to give her side of what happened, she may have sought to justify her actions or to contest Ms A's characterisation of her behaviour as very angry, repeatedly interrupting, aggressive and exceptionally contemptuous but she has not pointed to any evidence which would have compelled Ms Birbalsingh to reject Ms A's views in whole or in part, or made that likely.

300. Ground 4(a) is therefore dismissed.

Ground 4(b): the 5 day fixed term exclusion from 28 April 2023

301. Ms Birbalsingh gave her understanding of what happened in this incident in her second witness statement. She says that the Claimant told her friends that she would *"destroy"* the School and that it would *"involve fewer people than last time"*, which is believed by Ms Birbalsingh to be a reference to the events of the previous term. She says that the Claimant threatened one of the girls in Year 9, saying that she would *"stab her"* if the girl informed anyone of what the Claimant had said. Two teachers conducted an investigation, during which other children confirmed that the Claimant had said these things. It is also said to have *"emerged"* during the investigation that the Claimant was considered by some of the other children to be intimidatory, and had made racist remarks about Albanians and Somalis. Neither Ms Birbalsingh nor Mr A claims that the former read the evidence which was produced as a result of the investigation: Ms Birbalsingh apparently relied on what Mr A told her, but the detail of what he said to her is not recounted either.

302. The Claimant's account in her witness statement of 19 May 2023 is that her first proper day back after being in isolation was Thursday 27 April and she had a really good day and participated well, as is indicated by the fact that she was awarded 13 merits and no demerits on 27 and 28 April. However, she was pressed by several pupils about what was going on between her and the School given her suspension and time in isolation, and some of them appeared to be aware of there being "a court case" (a pre-action letter was sent on 30 March 2023 and responded to on behalf of the School on 24 April 2023). She says that one of the girls, Miss B, who was one of the first to pray in the yard and did so before the Claimant, was very persistent and said, in a joking way, that if the Claimant did not tell her she would have to kill her. The Claimant says that she gave

very little away but that, as Miss B was leaving, the Claimant jokingly said that if she told anyone about their conversation she would have to kill her. It did not cross the Claimant's mind that this would be taken as a serious threat and nor does she believe that it was. Miss B and her friend, Miss C, were laughing as they left the conversation. She denies that she said that she intended to harm or destroy the School as alleged.

303. The Claimant says that she recalls the alleged racist remarks: in both cases she was being teased about her short stature by reference to her ethnicity, as she often is at school; she teased them back about their appearances. All concerned were joking. According to Miss B, who reported these remarks during the investigation, they were made *"a few months"* before the FTE.

304. The Claimant's response to the allegations against her, which I have summarised, is broadly consistent with her position as recorded in the note of the integration meeting of 15 May 2023, albeit she gives greater detail. Her evidence is that on 28 April 2023 she was told that she was being sent home for *"threatening behaviour"* towards a *"member"* of the School but was given no further details. No one asked for her account and she was told by Mr B who apparently investigated the matter with Mr A, that he was not going to have a conversation with her. Her mother was notified of the exclusion by email in the early afternoon that day.

305. The Claimant says that on receiving the School's 24 April 2023 response to her solicitor's letter before action, which rejected her arguments, her mother had been cautious about taking the matter further and concerned about potential repercussions for the Claimant. The effect of the School's treatment of the Claimant in relation to the second FTE was that her mother decided to support her wish to proceed with the Claim.

306. As noted at the beginning of this judgment, Mr A produces statements written by Miss B, Miss C and the older sister of Miss B who gave an account of what she was told by Miss B. He also says that he took statements from 3 other pupils, although these are not exhibited, who he says were not directly part of the conversation between Miss B and the Claimant. It is difficult to think of any reason why, if it was appropriate or fair to interview six other pupils about what had happened during the conversation on 27 April, only two of whom had actually taken part in it, it was not appropriate, and fairness did not require, someone to ask the Claimant for her account. The exercise carried out by Mr A and Mr B was described by Ms Birbalsingh as an *"investigation"* but it is not clear how such an investigation could be fair, or its conclusions reliable, without hearing what the person who was being investigated had to say.

307. No answer to these questions or explanation of the approach which was taken is proffered by Ms Birbalsingh or Mr A in their evidence, and Mr B did not give evidence. Ms Birbalsingh's own evidence was that calm had now been restored at the School. So the situation was quite different to that which obtained on 23 March 2023, when hasty action was justified. Nor was this a case in which there was the risk of being seen to undermine the authority of a member of staff. To my mind there was also obviously the possibility that the Claimant would give a different version of events or supply context or, for example, that she or someone on her behalf would argue that it was unfair to rely on the alleged racist remarks which were brought up from a few months earlier in the context of a complaint about something else, and/or that the wiser course was not to be seen to be scapegoating the Claimant.

308. I am satisfied that in the case of the second FTE Ms Birbalsingh's failure to have any regard to the statutory Guidance or the School's Exclusion Policy did result in her and/or the School acting inconsistently with those policies and breaching their duty to act fairly. What she said to the Claimant's mother on 27 March 2023, noted above at [291], indicates that, unsurprisingly, when a conduct issue involves a potential conflict of evidence between pupils as to what happened, both sides would normally be given an opportunity to have their say before a decision is taken. Obviously, this would be necessary and appropriate in order to establish the facts. It is also relevant that the sanction meted out to the Claimant - 5 days' exclusion, followed by 5 days isolation - was a severe one and this added to the importance of giving the matter careful and fair consideration before coming to such a conclusion. As I have noted at [53] above, Ms Birbalsingh's own evidence emphasises that part of the reason for the School's disciplinary ethos is that children like consistency of treatment, and they want to know that they will be treated fairly by authority figures. By this measure her actions and the actions of those who investigated this matter were inconsistent, rather than consistent, with ethos and practices of the School.

309. I have therefore considered whether relief should be refused on the grounds that the School has shown that it is highly likely that the outcome would have been the substantially the same even if the investigation had included interviewing the Claimant. Having considered the evidence carefully, I do not accept Mr Coppel's submission that it has. Given that there were important conflicts of evidence as to what happened it would be difficult, without seeing or hearing the witnesses, to reach the conclusion that it is highly likely that the whole or substantially the whole of the factual case against the Claimant would have been accepted by a fair minded investigator and/or decision-maker and/or that no significant exculpatory factors would have been established – for example, that she was joking and/or was not making a genuine threat. The written evidence has not persuaded me of this. Mr A says in his evidence that he believed Miss B's account but this has a self-serving quality and, of course, at the point when he formed this belief he had not heard what the Claimant had to say.

310. In addition to the fact that the evidence against the Claimant is disputed, as at 28 April, there was also an argument, which might have been accepted by a fair minded decision-maker that, whatever the rights and wrongs of the Claimant's various alleged remarks, now was the time for a constructive discussion of how to resolve matters, rather than to take a step which was likely to aggravate the feelings of those who wished to pray. The Claimant's school record before 23 March had been good. Her alleged behaviour was out of character. It is not suggested by the School that she actually had a knife and it does not appear that she really intended to stab Miss B or would have done so. Nor has she taken any steps to act on what she said or is alleged to have said, other than to bring the Claim (for which it would not be lawful to punish her: see, for example section 85(5) of the Equality Act 2010). I do not know how matters would have turned out had the School acted fairly in dealing which this particular matter but, by the same token, nor can I say that they were highly likely to have turned out in substantially the same way, such that I should refuse relief pursuant to section 31(2A) of the 1981 Act.

311. I therefore uphold Ground 4(b).

APPENDIX 1: REASONS FOR DECISION ON DEROGATIONS FROM OPEN JUSTICE

The position in relation to reporting restrictions and anonymity before the hearing

312. On the date on which proceedings were issued, the Claimant applied for an anonymity order in respect of herself and her mother, who is acting as her litigation friend. This was on the basis that she is a child and her identity could not be protected without also ordering that her mother be anonymised. She also applied for reporting restrictions which would prevent them from being identified.

313. Shortly after this, on 23 May 2023, the School made a very urgent application for anonymisation of the School, its staff, pupils and the Interested Party together with reporting restrictions which would prevent them from being identified. Reference was made to a fear of abuse, threats, intimidation and violence during and as a result of the proceedings arising out of the experience of what had happened in March/April 2023. It was argued (somewhat differently to Mr Coppel's application of 10 January 2024) that the Court should protect the rights of staff and pupils under Article 8 ECHR, and that the ability of the School to defend the proceedings would be prejudiced if staff members were fearful of consequences if they were to assist the School to defend the Claim. The School's application also acknowledged that any order would need to be reviewed later in the proceedings but said that there could be no objection to the derogations sought, at least in the initial stages of the proceedings when permission had not yet been considered.

314. On 26 May 2023 an order was made by Julian Knowles J on the papers. This, broadly, granted the applications on both sides. Knowles J's order was subsequently varied by Eyre J in ways which are not material for present purposes, again on the papers, on 5 June and 7 August 2023. In making his order of 5 June, Eyre J commented that although the interests of justice necessitated anonymisation at that stage, the balance may alter during the course of the proceedings. It would therefore be open to the court subsequently to vary the order either in whole or in part. It was inevitable that the matter would need to be revisited when arrangements for the trial of the Claim were considered.

315. In addition to the fact that these Orders were necessarily interim in nature they were made before the Summary Grounds of Defence had been filed and therefore without a full awareness of how they would affect the ability of the Press to report on proceedings in court. Once the School's case had been pleaded, however, it became apparent that the distinctive operation and ethos of the School were central to its answer to the Claim. The prohibition on access to, or publication of, information which could lead to the identification of the School, including *"any characteristics of the operation or ethos of the Schol which could enable it to be identified"* therefore imposed very significant restrictions on the right of the public to scrutinise the proceedings, and on the Press reporting the details of the evidence and arguments which go to the heart of the case. The ability of the Court to publish a judgment which would be meaningful to readers was also likely to be very significantly impaired.

The applications

316. As noted at [18] of the Judgment, it was not until 22 December 2023, so one day after the end of the legal term, that the Claimant then made an application to vary the existing order. It appears that her representatives had appreciated, assuming that the hearing would be in open court, that it would be impossible to argue the case without referring

to the matters which would lead to the identification of the School whereas, by referring to these matters, they would technically be in breach of the Order which had been made. The solution which they therefore proposed was for the Order, including the restrictions on publishing information which could lead to the identification of the parties, to remain in place but for it to be varied so that it stated for the avoidance of doubt that the Order did not prevent reference to those matters in open court. Nor would it prevent the promulgation of any public judgment, but the parties would be given an opportunity to make representations as to any restrictions on what was made public having regard, in particular, to the prohibition on publishing information about the operation or ethos of the School which could lead to it being identified.

317. By an email dated 5 January 2024, the solicitors for the School indicated that the Claimant's application was opposed and that the School intended to make an application for the trial of the Claim to be held in private. That application was then made on 10 January 2024. It was supported by a witness statement of the same date from Ms Birbalsingh, the purpose of which was to bring the court up to date. In broad terms, the School did not dispute the Claimant's view, which I also shared, that it would be impossible to argue the case without referring to matters which would lead to the School being identified. However, its position was that the solution was to increase, rather than to decrease, the derogations from open justice which were then in place because, even with the derogations which were in place, it would not be sufficiently protected. The hearing should therefore be held in private.

318. When these two applications came to my attention I had concerns that the implications of the parties' proposals for the hearing and the judgment which followed may not have been fully thought through. This did not appear to me to be the sort of case where the court's findings of fact after the hearing would make a material difference to the position in relation to anonymity/reporting restrictions/a private hearing. If it was appropriate to hear the case in private or subject to substantial reporting restrictions it seemed likely that it would be said in due course that important parts of the judgment which followed would have to be confidential. Bearing in mind the obvious public interest in the case, I was doubtful that this could be justified. I therefore notified the parties by email that I wished to review the position at the beginning of the trial.

<u>The submissions on behalf of School</u>

319. Mr Coppel made his application under CPR rule 39.2(3)(b) which provides that a private hearing may be ordered where this is *"necessary to secure the proper administration of justice"*. He relied on the common law principle that it may be necessary make an exception to the open justice principle to protect the right to life and security of the person, and to ensure that the conduct of the proceedings does not risk life and limb. The test is whether holding a hearing in public would give rise to a real and immediate risk of harm: *"real"* in the sense that the risk is objectively well founded and not merely subjectively perceived, although subjective fears might be weighed in the balance in determining fairness in an appropriate case: see *In re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135 at [22]. *"Immediate"* in the sense that the risk will be present and continuing. If there is such a risk the court should act to avert that risk and there is no requirement for any balancing exercise as, for example, might be the case were Article 8 ECHR rights are required to be balanced with Article 10 ECHR rights in deciding the proportionality of any proposed restriction. In this connection Mr Coppel relied on the summary of the law provided by Warby LJ in *Clifford v Millicom*

Services UK Ltd & Others [2023] EWCA Civ 50, [2023] ICR 663, particularly at [36] and [41].

320. Mr Coppel submitted that:

i) There was a real and immediate risk of harm to the life or limb of Ms Birbalsingh and members of staff in March/April 2023 as a result of the campaign by those who supported the Claimant and other pupils who wished to pray in the school yard.

ii) Matters had calmed down since then as a result of the PRP and the anonymity and reporting restrictions ordered on 26 May 2023, but the School firmly believed that conducting the trial in open court, even with that Order in place, and without the caveat proposed by the Claimant, would give rise to the same sorts of behaviours and therefore the same real and immediate risk to the School and its staff. That risk would be increased by the relaxation of the existing Order proposed by Ms Hannett.

321. In addition to the evidence which I have summarised in the Judgment above, Mr Coppel relied on the further witness statement from Ms Birbalsingh dated 10 January 2024 in which she says that:

i) There is press interest in the case and, in June 2023, an article in the Daily Mail breached the reporting restrictions imposed in the Order to which I have referred by reporting information which would enable the School to be identified. The School therefore instructed its lawyers to require the Daily Mail to take down the online version of the article.

ii) There are people who know of the PRP, who have animosity to the School and who may be waiting to act, especially if there were a further campaign against the School.

iii) There was an incident at an open evening on 2 October 2023 when someone vandalised the guest toilet at the School by smearing excrement on the walls and ceiling. She has never known this to have happened before and, whilst she could not prove that it was related to the PRP, she believed that it would be too much of a coincidence if it were not connected.

iv) Her concerns were heightened given the situation in Gaza. She referred to evidence of an increase in anti-Jewish and anti-Muslim hate crime and to the fact that the School has some Jewish members of staff. Her view was that in this fragile and volatile context it was essential to avoid highly sensitive areas of dispute.

v) Overall, Ms Birbalsingh expressed concerns that permitting the trial to be conducted in public, even with the then Order in place, ran an unacceptable risk of the sorts of behaviours which took place in March/April 2023 occurring again. She feared for the safety and well-being of her staff, the pupils at the School, and herself and members of her family.

322. As to any suggestion that the current restrictions are sufficient, Mr Coppel submitted that they would not be effective to protect staff:

i) Policing the existing Order would be a problem – people who attended the hearing might not be aware of the terms and effect of the Order and, even if they were, they would be able to come in and out of court during a court session. There would also be difficulties in identifying who was responsible for any breach of the Order

ii) Members of the public would be able to listen to the proceedings in court and then discuss the case or, worse, post about it on line. People with whom they discussed the case, or who read things online, might not be aware of the current Order or its effect.

iii) The Press was likely to want to cover the case widely so that the story would be *"all over the national media"*. However diligently they sought to comply with reporting restrictions, the Press would publish further information which could be added to information which is already in the public domain and would lead to the School and its staff being identified more widely.

iv) The PRP was not a secret given that it was known to pupils of the School and their families. There was also a substantial group of people who were involved in the campaign in March 2023 who would quickly realise which School is the subject of these proceedings.

v) There was therefore an obvious risk that, even with the current order in place, the antagonism of March/April 2023 would be revived, and a very real risk and threat to the rights of School staff and other members of the School community under Articles 2 and 3 ECHR.

vi) The way to address that risk, and to allow public scrutiny of proceedings in court, was to promulgate a judgment with open and closed sections which did not serve to enable the School to be identified.

Submissions on behalf of the Press

323. Mr Coppel's submissions were opposed by Mr Tom Pilgrim of the Press Association, Mr Lucas Cumiskey of Schools Week, Mr Abul Taher of the Mail on Sunday and Ms Sally Weale of the Guardian. They made careful and helpful submissions which reflected slightly different positions as between them but, in broad terms, they emphasised the public interest in the case and said that, before this dispute, Ms Birbalsingh and the School had already sought and/or received significant media coverage; they said that they had no wish to identify the Claimant, her mother, or pupils or staff at the School other than the Headteacher; but, subject to this, they did wish to be able fully to report proceedings in court and the issues raised by the case more generally. This meant that they needed to be permitted to identify the School and it would not be possible to do this without identifying Ms Birbalsingh. They said that they would report the matter responsibly and had no wish to cover the case in a way which would aggravate matters, although the Claimant's representatives drew my attention to an article written by Mr Taher in the Mail on Sunday of 3 December 2023 which

showed that views were likely to differ as to what was and was not likely to enflame the situation.

Relevant legal principles

324. As is well known, the principle of open justice is an important pillar of our democracy. In *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38, [2020] AC 629 at [42-[43] Baroness Hale said:

> *"42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases—to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly….*
>
> *43. But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases…."*

325. In addition to *Dring*, I was referred to the well known decision of the Court of Appeal in *R (Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2012] EWCA Civ 420, [2013] QB 618. For ease of reference, I set out the key principles as stated in *Practice Guidance on (Interim Non-Disclosure Orders)* [2012] 1 WLR 1003, which includes a helpful summary of the applicable law where derogations from the open justice principle are sought:.

> *"9. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public…*
>
> *10. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional… Derogations should, where justified, be no more than strictly necessary to achieve their purpose.*
>
> *11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test…*
>
> *12. … Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case… Anonymity will only be granted where it is strictly necessary, and then only to that extent.*
>
> *13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence…."*

326. In a case where a balancing exercise is required, [14] of the Practice Guidance states:

> *"14. When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings…."*

327. I also referred the parties to the summary of the law in relation to anonymity orders provided by Nickin J in *Various Claimants v Independent Parliamentary Standards Authority* [2021] EWHC 2020 (QB) at [33]-[41] albeit what he said was in the context of breach of privacy litigation, and with a focus on the position where rights under the ECHR are in play.

Conclusions

328. I accepted Mr Coppel's submission that derogations may be made, including the ordering of a private hearing, where the application of the open justice principle with its full rigour will give rise to a real or immediate risk to life and limb. Where the risk is objectively well founded there is ordinarily no question of balancing competing rights: see *Millicom* at [41].

329. Where the necessary evidential threshold is not crossed, a balancing exercise is required. However, the court can take into account such evidence as there is of abusive and threatening words of behaviour and the subjective fears of a person or witness affected by the litigation, particularly in considering the effect of these fears on the fairness of the hearing: see *In re Officer L* at [22]. I note, however, that in the *Officer L* case the issue was whether the identity of a witness who was fearful of the consequence of giving evidence could be withheld from the public, rather than whether there should be a private hearing or restrictions on the ability of the Press to report the proceedings of the sort which are in issue in the present case.

330. I did not accept that the evidence before me established a risk to the lives or safety of members of the School's staff or its wider community which would justify holding the hearing in private, still less that I should make such an order without balancing the interests of the parties with the interests and rights of the Press and the public to understand these proceedings properly.

i) First, the School tells prospective parents at welcome events and open evenings that they have no prayer room, and presumably would tell anyone who asked that there was a prohibition on prayer rituals on the premises. The PRP is not, and cannot be a confidential or secret matter.

ii) Second, I did not underestimate the unpleasantness of the events in March 2023 and the high degree of stress that they are likely to have caused those who were affected. There were numerous and public accusations of Islamaphobia. Very unpleasant abuse was directed at the School and particularly at Ms A. The racial and misogynistic abuse directed at her was particularly disgraceful. There were also threats and implied threats to which I have referred as well as damage to property. But there was no evidence of any physical presence at the School during this period or any physical confrontation with any member of the staff or the School community, nor of any actual violence to the person.

iii) Third, as a result of the events of March 2023 it was reasonable to infer that the existence of the PRP is widely known. It was inevitably known to staff and to pupils and their families. It was also highly likely to be known to a number of those who were involved in the campaign directed at the School.

iv) Fourth, and yet the School's own evidence was that the introduction of the PRP had not resulted in violence. On the contrary the School's case is that, as it is put in [1] Mr Coppel's skeleton, the *"campaign stopped, and the damage ended, after the Headmistresses decision. Life had returned to normal by 17 April 2023, the start of the next school term"*.

v) Fifth, Ms Birbalsingh's statement of 10 January 2024 was broadly consistent with this analysis. She pointed to a breach of the reporting restrictions Ordered by Knowles J but did not suggest that this had any consequences at the School. She referred to the incident on 2 October 2023 but this did not involve violence to the person or the threat of such violence and it may or may not have been connected to the prayer issue. She referred to the situation in Gaza which, I agree, made the situation potentially more sensitive but, again, despite the existence of the PRP and the knowledge of it to which I have referred, there had been no further activity of the sort which occurred in March/April 2023.

331. Of course, I appreciated that, as a result of the matter being debated in court, the case might well be more widely reported than it had been, and this might well stir up memories of March 2023 and/or generate criticism of the School, including potentially hostile and abusive criticism. But I did not accept that this was a case in which the litigation of the issues in open court posed a threat to the safety of human beings which was of a magnitude which would automatically lead to derogations to open justice and, in particular, would necessarily justify a private hearing.

332. Turning to the balance of interests and rights, I took into account the concerns which have been expressed on behalf of the School. However, the School and Ms Birbalsingh were very much in the public domain before the issues which arose in March 2023, not least because of its distinctive approach to education and Ms Birbalsingh's willingness to publicise the School's approach and its academic success in various ways, including in the Press. The case itself raises issues of genuine public interest in circumstances where the School's approach has come into conflict with the religious perspective of an important section of society.

333. On the other hand, given the issues in the case and the publicity which the School has already received, a private hearing, or even the prohibition on identifying the School which was in place prior to the trial, would make it virtually impossible for the Press the report on the case in a meaningful way. It was also difficult to see any lesser measure which would meet the concerns of the School and strike a fairer balance in this regard. I therefore concluded that the School and Ms Birbalsingh could be identified in the reporting of the case. However, it seemed to me that there was no real need for the Press to identify other members of the School's staff, pupils including the Claimant, or the Claimant's mother. The members of the Press who were in court confirmed that they did not seek to do so and, in effect, that a prohibition on doing so would not materially affect their ability to report the case.

334. I therefore made my Order of 16 January 2024 accordingly.