Neutral Citation Number: [2025] EWHC 1467 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 13/06/2025

Before :

THE PRESIDENT OF THE KING'S BENCH DIVISION
LORD JUSTICE NEWEY
MR JUSTICE CHAMBERLAIN

- -

Case No: AC-2024-LON-004232

Between :

THE KING
on the application of

(1) ALR (by their litigation friend ASG)
(2) ALN (by their litigation friend ALP)
(3) ABC (by their litigation friend AON)
(4) AON
(5) ALT (by their litigation friend ALV)
(6) ALV
(7) AMB (by their litigation friend AMY)
(8) AMY
(9) AMR (by their litigation friend AMF) **Claimants**
(10) AMF
(11) BYL (by their litigation friend BAU)
(12) BAU

- and -

Chancellor of the Exchequer **Defendant**

- and -

(1) Commissioners of His Majesty's Revenue and Customs **Interested**
(2) The Speaker of the House of Commons **Parties**

- and -

Secretary of State for Education **Intervener**

Case No: AC-2025-LON-000053

And Between :

THE KING
on the application of

(1) ALX (by their litigation friend ALF)
(2) ALW (by their litigation friend ALO) **Claimants**

- and -

Chancellor of the Exchequer **Defendant**

- and -

(1) Commissioners of His Majesty's Revenue and Customs
(2) The Speaker of the House of Commons **Interested Parties**

- and -

Secretary of State for Education **Intervener**

Case No: AC-2025-LON-000133

And Between :

THE KING
on the application of

(1) Emmanuel School (Derby) Limited t/a Emmanuel School
(2) Dewsbury Gospel Church t/a The Branch Christian School
(3) Hampshire Christian Education Trust t/a The King's School
(4) Wyclif Independent Christian Educational Association Limited t/a Wyclif Independent Christian School
(5) Yvonne Owusu-Ansah
(6) Stephen John White
(7) Josiah White (by their litigation friend Stephen John White)
(8) AHD
(9) AHN (by their litigation friend AHD)
(10) AHS (by their litigation friend AHD)
(11) ANF (by their litigation friend AHD)
(12) AWM
(13) ASK (by their litigation friend AWM) **Claimants**

- and -

Chancellor of the Exchequer **Defendant**

- and -

(1) Commissioners of His Majesty's Revenue and Customs **Interested Parties**
(2) The Speaker of the House of Commons

- and -

Secretary of State for Education **Intervener**

- -

Lord Pannick KC, Paul Luckhurst and Grant Kynaston (instructed by **Kingsley Napley LLP**) for the **Claim 1 Claimants**

Jeremy Hyam KC, Tom Cross KC and Oliver Jackson (instructed by **SinclairsLaw**) for the **Claim 2 Claimants**

Bruno Quintavalle and Thomas Chacko (instructed by **Andrew Storch Solicitors Ltd**) for the **Claim 3 Claimants**

Sir James Eadie KC, Sarah Hannett KC, Eleni Mitrophanous KC, Jason Pobjoy KC, Matthew Donmall, Tim Parker and Katy Sheridan (instructed by **HM Revenue and Customs Litigation Directorate Legal Group**) for the **Defendant, First Interested Party and Intervener**

David Manknell KC and Rajkiran Arhestey (instructed by **the Office of Speaker's Counsel**) for the **Second Interested Party**

Hearing dates: 1st – 3rd and 14th April 2025

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Approved Judgment

This judgment was handed down remotely at 10am on Friday 13 June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Victoria Sharp (President of the King's Bench Division), Lord Justice Newey and Mr Justice Chamberlain:

Introduction and summary

1. These judicial review claims concern a change in tax law heralded in the 2024 Labour Party manifesto. For the first time, value added tax ("VAT") is to be payable on private school fees. The change has legal effect under ss. 47-49 of the Finance Act 2025 ("the challenged provisions"). The claimants are children attending private schools, the parents of some of these children and schools. The individual claimants say that the change will make the fees unaffordable, so the children are likely to have to leave the schools they currently attend. The schools say that it will or may make them unviable.

2. There are three sets of claims: Claim 1 (AC-2024-LON-004232), Claim 2 (AC-2025-LON-000053) and Claim 3 (AC-2025-LON-000133). They have been heard together at a rolled-up hearing. The claimant children appear by their litigation friends, who are in most cases their parents, who in some cases are also claimants. In Claim 3, four of the claimants are private schools or the corporate entities which run them.

3. Some of the children have special educational needs ("SEN"); some are adherents of a particular religion; some say that they need to receive education in a single-sex environment; and some are foreign nationals who say that they need access to a foreign curriculum. A summary of the circumstances of the individual claimants and the claimant schools is set out in Annex A to this judgment. All the claimants seek declarations under s. 4 of the Human Rights Act 1998 ("HRA") that the challenged provisions are incompatible with the European Convention on Human Rights ("the Convention"). The children and parents rely on the rights guaranteed by Article 2 of the First Protocol ("A2P1") and Article 14 read with A2P1. The Claim 3 claimants also rely on Article 1 of the First Protocol ("A1P1") and Article 14 read with A1P1.

4. The defendant is the Chancellor of the Exchequer. The Secretary of State for Education was given permission to file evidence and make submissions in support of the defendant. In practice the Chancellor, the Commissioners for HM Revenue and Customs and Secretary of State (together referred to as "the Government parties") have made joint submissions. They say, in essence, that the tax change was a manifesto commitment. It is projected to bring in on average £1.6 billion per annum in revenue, which will help deliver the Government's commitments relating to education and young people, including the 94 per cent of school children who attend state schools. The Government decided that there should be no exemptions because they would diminish the revenue generated and would be unfair, unworkable and/or administratively onerous. The design of the policy, including the decision not to make exemptions, was the subject of consultation prior to the 2024 Budget and subsequent debate in Parliament.

5. The court's function when considering claims of this kind is not to assess the merits of the policy behind the challenged legislation, but to assess whether it interferes with any of the Convention rights relied upon and, if so, whether the choice made by Parliament lies within the margin of discretion that must be accorded to it. We conclude that the legislation interferes with the individual claimants' rights under A2P1 and Article 14 read with A2P1. In the circumstances of this case, however, the legislature has a broad

margin of discretion in deciding how to balance the interests of those adversely affected by the policy against the interests of others who may gain from public provision funded by the money it will raise. We have concluded that the challenged legislation falls within that broad margin. Even when considering the claims under Article 14, where the margin of discretion is somewhat less broad, we conclude that the challenged provisions fall within it. The Claim 3 claimants' rights under A1P1 are not engaged and in any event any interference is proportionate. In all three claims, we grant permission to apply for judicial review, but dismiss the claims.

6. An issue arose during the hearing about the admissibility of the reports of Parliamentary select committees and of the National Audit Office ("NAO"), given Article 9 of the Bill of Rights 1689 and the wider principle of Parliamentary privilege. We heard submissions on behalf of the Speaker of the House of Commons, the Comptroller and Auditor General and from the claimants and Government parties on that issue. Given its potential importance in other cases, we deal with it fully. We conclude that NAO reports fall within the scope of "proceedings in Parliament" and that, on the current state of the law, courts and tribunals may not admit Parliamentary materials attracting the protection of Article 9 for the purpose of establishing a contested fact. However, since most of the key facts contained in the relevant reports have now been agreed, the issue does not affect the outcome of these proceedings. We therefore set out our conclusions on this issue in a separate Annex B. The key statutory provisions relating to SEN are set out at Annex C. The agreed facts about special educational needs provision in the UK at the time of publication of the NAO Report in October 2024 are set out in Annex D.

The issues

7. The claims raise the following issues:

   (a) Are the challenged provisions incompatible with A2P1 because they:

      (i) impair the very essence of the right to education (Claim 1, Ground 1); and/or

      (ii) are disproportionate in all the circumstances (Claim 1, Ground 2)?

   (b) Are the challenged provisions incompatible with Article 14 read with A2P1 because they involve unjustified discrimination against:

      (i) children with SEN (Claim 1, Ground 3 in respect of claimants ALR and ALN; Claim 2);

      (ii) children and parents from Charedi Jewish, Muslim and Evangelical Christian families (Claim 1, Ground 3 in respect of ABC, AON, BYL, BAU, ALV and ALT; Claim 3, Ground 4);

      (iii) foreign national children who require a foreign curriculum (Claim 1, Ground 3 in respect of AMR); and/or

      (iv) children and parents with a claimed need for single sex education (Claim 1, Ground 3 in respect of AMB and AMY)?

(c) Are the challenged provisions incompatible with the Convention rights of the Evangelical Christian claimants under:

(i) A1P1; and/or

(ii) Article 14 read with A1P1 (Claim 3, Ground 2)?

(d) Are the challenged provisions incompatible with the rights of Evangelical Christian parents under:

(i) the second sentence of A2P1; and/or

(ii) Article 14 read with A2P1 (Claim 3, Ground 3)?

The challenged provisions

8. Many changes in tax law are given immediate effect before Royal Assent is obtained for the Finance Bill by a Budget Resolution of the House of Commons. Budget resolutions are not primary legislation but have statutory effect as if contained in an Act of Parliament. This effect continues while the Finance Bill is before Parliament, provided that certain milestones are met in the progress of the Bill. If the milestones are not met, or the relevant provisions are not enacted, any tax collected must be repaid. If they are, it is the Finance Act which provides the legal authority for the tax. See generally s. 1 of the Provisional Collection of Taxes Act 1968 ("1968 Act").

9. The tax change here was given effect by Budget Resolution 34, passed by the House of Commons on 6 November 2024. It provided for amendments to Sch. 9 to the Value Added Tax Act 1994 ("VATA 1994") by removing the exemption from VAT in relation to supplies of education and vocational training by private schools and related boarding and lodging.

10. When the current claims were filed, the Finance Bill was still before Parliament. The claimants therefore sought declarations of incompatibility in relation to the Budget Resolution. The Claim 3 claimants also sought to argue that the Budget Resolution was ultra vires s. 1 of the 1968 Act. The identification of the Budget Resolution as a target of the claims caused the Speaker of the House of Commons to submit that the proceedings were constitutionally improper, as they would inevitably involve an interference with proceedings in Parliament contrary to Article 9 of the Bill of Rights and the wider principle of Parliamentary privilege. He was joined as an interested party to enable him to advance this submission.

11. Shortly before the hearing, the Finance Bill received Royal Assent and became the Finance Act 2025. The sole legal basis for the levying of VAT on private school fees (both in the period between the Budget Resolution and the passage of the Act and after it) is now to be found in ss. 47-49 of that Act. That being so, all parties (including the Speaker) agreed that the claims could be amended to seek declarations of incompatibility in relation to those provisions. The Claim 3 claimants accepted that their argument that the Budget Resolution was ultra vires was now moot and did not pursue it. We granted permission for those amendments.

12. In those circumstances, all parties agreed that it was unnecessary for us to express any view about the justiciability of the claim as originally formulated, seeking a declaration of incompatibility in relation to the Budget Resolution. We make clear, however, that the Speaker does not resile from the position that such a challenge would have been constitutionally impermissible. This may fall to be considered in another case.

13. The claimants, in their written and oral arguments, submitted that the challenged provisions have the effect of imposing VAT on educational services, when such services have never been subject to VAT before. The Government parties, by contrast, refer throughout to the removing of an exemption or "tax break". This was, in our view, more a slogan than a legally significant description. We prefer to speak more neutrally of a "tax change". The compatibility of this change with Convention rights depends on its substance, not on any label attached to it for presentational purposes.

14. The claimants also placed some reliance on the fact that no other Council of Europe contracting state imposes VAT (or any similar tax) on educational services. In our judgment, however, neither side can draw much from this. Most Council of Europe states are in the European Union—and EU member states cannot impose VAT except in accordance with EU law. This is therefore one respect in which the UK's exit from the EU has increased the scope of Parliament's freedom to determine policy for the UK. We consider under ground (a)(ii) the circumstances in which convergence among contracting states is, and is not, material to the margin of discretion applicable when considering the proportionality of interferences with Convention rights.

The Convention rights

15. Articles 1 and 2 of the First Protocol provide as follows:

> "Article 1: Protection of property
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
>
> Article 2: Right to education
>
> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

16. Article 14 (headed "Prohibition of discrimination") provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government's evidence as to the decision-making process

17. The Government parties' evidence describes the process by which the decision to make the tax change was made.

18. The 2024 Labour Party manifesto said: "Labour will end the VAT exemption and business rates relief for private schools to invest in our state schools." The Government parties' evidence explains that, after the election on 4 July 2024, the Government sought to pursue and strike a balance between four interlocking principles.

19. First, it was necessary to raise revenue to support public finances and help deliver the Government's commitments relating to education and young people, including the 94 per cent of school children who attend state schools. Based on policy costing approved by the Office for Budget Responsibility ("OBR"), the Government forecasts that the imposition of VAT on private schools will raise an average of £1.6 billion per annum, rising to £1.7 billion in 2029-30.

20. Second, the policy should be fair, with all private schools paying their fair share. Applying the measure across the board (without any of the exemptions sought by certain lobby groups, such as for small faith schools) ensures that all users of private schools pay their fair share. It was assessed that the majority of the benefit of the existing exemption went to the UK's most wealthy families rather than lower- and middle-income families. In cases where the tax change resulted in increased fees, it was projected that only a minority of affected parents would be lower- and middle-income families.

21. Third, pupils with the most acute needs would not be impacted. Pupils with an education, health and care plan ("EHCP") which names a private school would continue to attend that school, with fees paid by the local authority, which would be able to reclaim VAT under existing arrangements.

22. Fourth, the administrative burden for taxpayers should be minimised and the policy should not be open to abuse. Any exceptions to the policy should therefore be made by reference to objectively assessable and easily monitored criteria.

23. The Government consulted on the policy design, including on the pros and cons of the various exemptions which had been lobbied for in respect of small faith schools, international schools and in connection with SEN, and on the timing of the introduction of the policy. It considered 17,502 consultation responses. It decided not to make any of the exemptions because they would diminish the revenue generated and would be unfair, unworkable and/or administratively onerous.

24. These and other matters were considered when the Budget Resolution was debated in and approved by the House of Commons on 6 November 2024 and when the matter was subsequently debated during the passage of the Finance Bill.

Issue (a)(i): Does the imposition of a tax on fees charged for educational services impair the very essence of the A2P1 right?

Submissions for the claimants

25. The principal submissions on this point were made by Lord Pannick KC. He argued that A2P1 confers a right of access to those educational institutions existing in a state at any given time. The state is permitted to regulate those institutions but must not impair the very essence of the right of access, nor deprive it of effectiveness. The A2P1 right includes a right to establish and access private institutions: *Kjeldsen v Denmark* (1976) 1 EHRR 711, *Jordebø v Sweden* (App. No. 11533/85, 6 March 1987) and *Verein Gemeinsam Lernen v Austria* (App. No. 23419/94, 6 September 1995).

26. While A2P1 imposes no duty on the state to fund or subsidise private schools, the importance of the right is such that it must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Reliance was placed on the *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (1968) 1 EHRR 252 ("the *Belgian Linguistic* case"), *Şahin v Turkey* (2007) 44 EHRR 5 and *Catan v Moldova and Russia* (2013) 57 EHRR 4, among other cases.

27. Lord Pannick submitted that the imposition of VAT on educational services involved a direct tax on the very service to which A2P1 guarantees a right of access. Reliance was placed on *SAE Education Ltd v Revenue and Customs Commissioners* [2019] UKSC 14, [2019] 1 WLR 2219 and *R (Tigere) v Business, Innovation and Skills Secretary* [2015] UKSC 57, [2015] 1 WLR 3820. Whilst A2P1 does not prevent states from imposing regulation (e.g. in the field of health and safety) or levying taxes (e.g. employer national insurance contributions) which incidentally affect the fees which private schools must charge, such regulation does not directly affect the service access to which A2P1 guarantees. It can be likened to a tax imposed on church-goers payable each time they attend church.

Submissions for the Government parties

28. Sir James Eadie KC for the Government parties submitted that A2P1 does not guarantee access to private education and does not oblige states to subsidise it: *Simpson v UK* (App. No. 14688/89, 4 December 1989), *R v Secretary of State for Education and Employment ex p. Begbie* [2000] 1 WLR 1115, the *Belgian Linguistic* case, *Şahin* and *W and KL v Sweden* (App. No. 10476/83, 11 December 1985). In oral argument, Sir James submitted that the state could in principle prohibit private schooling altogether, consistently with A2P1. It follows that the withdrawal of a subsidy does not engage A2P1 at all.

29. Relatedly, A2P1 does not confer a right to attend any particular type of institution or even an institution delivering education of any particular standard: *Belgian Linguistic* and *A v Head Teachers and Governors of Lord Grey School* [2006] UKHL 14, [2006]

2 AC 363. The right is infringed only where it is curtailed to such extent as to impair its very essence and deprive it of its effectiveness, that is, where the child is deprived of the possibility of education. That is not the case here.

The Strasbourg case law

30. In the *Belgian Linguistic* case, the European Court of Human Rights had to decide whether a Belgian law requiring education to be provided in the official language of the region and withdrawing subsidies from non-confirming schools breached A2P1. The Court held at p. 281-2 that A2P1 does not require contracting states "to establish at their own expense, or to subsidise, education of any particular type or at any particular level", but this did not mean that states had no positive obligations to ensure respect for the right. When the First Protocol was opened for signature, all contracting states already had a "general and official educational system". There was no question of any of them being required to establish such a system. States were required only to guarantee to those within their jurisdiction "the right to avail themselves of the means of instruction existing at a given time". There was no specific requirement that education should be provided in any particular language. However, "the right to education would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be".

31. The Court held that A2P1 does not impose specific obligations concerning "the extent of these means and the manner of their organisation or subsidisation". There is a right to official recognition of the studies completed. The right to education by its nature calls for regulation by the state, but the regulation "must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention". At pp. 299-300, the Court said that the first sentence of A2P1 "leaves intact the freedom of States to subsidise private schools or to refrain from so doing". There would therefore be no breach if the state made subsidies conditional on compliance with the requirements of the linguistic legislation. It noted that the measure under challenge did not affect the freedom to organise, independently of subsidised education, private French-language education.

32. *Kjeldsen v Denmark* involved a complaint by parents about a requirement to provide sex education in state primary schools. At [50]-[53], the Court noted that in Denmark private schools co-existed with state schools. The second sentence of A2P1 had to be read with the first. Neither of them distinguished between state and private teaching. The *travaux préparatoires* for the Convention demonstrated the importance attached by the contracting parties to the freedom to establish private schools, but did not reveal an intention to go further. The aim of safeguarding pluralism was to be realised above all through state teaching. Therefore, Danish state schools did not fall outside the scope of A2P1, which required states to respect parents' religious and philosophical convictions throughout the entire state education programme. The first sentence of A2P1 conferred a right of access to educational institutions existing at a given time and the second sentence was "an adjunct of this fundamental right to education" and forbade "indoctrination".

33. In *X & Y v United Kingdom* (App. No. 7527/76, 5 July 1977), parents complained about the non-availability of selective, denominational education following the abolition of grammar schools in their area. The European Commission on Human Rights ("the

Commission") noted that A2P1 did not oblige the state to establish a system of education and laid down no specific obligation as to "the organisation or subsidisation of any system which exists", citing the *Belgian Linguistic* case. The applicant had not been denied access to existing educational facilities because he could attend a non-denominational comprehensive school. There was therefore no appearance of a violation of A2P1, so the application was manifestly ill-founded.

34. In *X v United Kingdom* (App. No. 7782/77, 2 May 1978), the Commission rejected as manifestly ill-founded a complaint about the inadequacy of state funding for non-denominational schools in Northern Ireland. In doing so, it noted, again citing *Belgian Linguistic*, that there was no obligation on the state to establish at its own expense, or to subsidise, education of any particular type or at any particular level.

35. *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293 was about corporal punishment in Scottish state schools. The Court said at [33], citing *Kjeldsen*, that the second sentence of A2P1 was binding on the states in the exercise of "each and every" function that they undertake in the sphere of education and teaching. At [40] it noted, again citing *Kjeldsen*, that A2P1 was "dominated by its first sentence, the right set out in the second sentence being an adjunct of the fundamental right to education". At [41], it affirmed that the right to education by its nature calls for regulation by the state, but that "such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols".

36. In *W & KL v Sweden* (App. No. 10476/83, 11 December 1985), the local authority had refused to provide school social assistance to a Rudolf Steiner school to enable it to buy textbooks and other educational aids (which were free at state primary schools). The application was inadmissible because A2P1 imposed no positive obligation to subsidise a particular form of education in order to respect parent's religious and philosophical convictions.

37. The application in *Jordebø v Sweden* (App. No. 11533/85, 6 March 1987) was brought by a parent who was also the head of a private Christian school. She complained that the local authority's failure to permit her to teach children of a particular age meant that her daughter could not receive education in accordance with her religious beliefs. The Commission considered whether A2P1 could be interpreted as granting the right to start and run a private school. It held, citing *Kjeldsen*, that A2P1 guaranteed the right to start and run a private school, but the right could not be without conditions and had to be subject to regulation. Since the refusal challenged was based on the quality of the education that would be provided, it was in accordance with A2P1 and the application was manifestly ill-founded.

38. *Simpson v United Kingdom* involved an applicant who suffered from dyslexia and challenged the local authority's decision that he could be educated at a mainstream school. His mother struggled to pay the fees at a private special school. He complained that he had been denied the right to education in accordance with his educational needs, contrary to A2P1. The Commission observed that A2P1 is not an absolute right which requires states to subsidise private education at a particular level. It noted that there must be "a wide measure of discretion left to the appropriate authorities as to how to make the best use possible of the resources available to them in the interests of disabled

children generally". There was therefore no arguable denial of the right to education under A2P1.

39. *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112 concerned corporal punishment at a private school. The application alleged breaches of Articles 3, 8 and 13, not A2P1. However, when considering whether the state was responsible for the acts of teachers at private schools, the Court noted at [27], citing *Kjeldsen*, that "in the United Kingdom, independent schools co-exist with a system of public education. The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two." It followed that the acts of teachers at private schools could in principle engage the state's responsibility.

40. In *Verein Gemeinsam Lernen v Austria* (App. No. 23419/94, 6 September 1995), the applicant ran a private school which had been given the right to issue officially recognised certificates of attainment but which had been refused a public subsidy. The Commission reaffirmed, citing *Jordebø,* that A2P1 guaranteed the right to start and run a private school. There was no arguable violation because there was no positive obligation to subsidise any particular form of education.

41. *Konrad v Germany* (2007) 44 EHRR SE8 was an application by Christian parents who wished to educate their children at home but were required to send them to primary school. The Court noted that the right to education in A2P1 calls for regulation by the state and observed that there was no consensus between contracting states about compulsory attendance at primary school. The Court regarded it as relevant that the parents were free to educate their children after school and at weekends. Their right to educate their children in accordance with their religious convictions was therefore not restricted in a disproportionate manner. The complaint was therefore manifestly ill-founded.

42. *Şahin* concerned a requirement imposed by a university that students wearing beards or headscarves would not be admitted to lectures, courses and tutorials. One question for the Court was whether A2P1 extended to higher education. The Grand Chamber answered that question in the affirmative, saying at [136] that "it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory" and noting that the Convention was a "living instrument which must be interpreted in the light of present day conditions". At [137], it said this:

> "In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Art.2 of Protocol No.1 would not be consistent with the aim or purpose of that provision."

43. At [153], the Court (citing the *Belgian Linguistic* case and *Kjeldsen*) noted that the right conferred by A2P1 was "guaranteed equally to pupils in state and independent schools, without distinction". At [154], it added that the right was not absolute but may be subject to limitations. The contracting states enjoyed a certain margin of appreciation in this sphere. However: "[i]n order to ensure that the restrictions that are imposed do

not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim". Furthermore, a limitation would only be compatible with A2P1 if there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

44. In *Lautsi v Italy* (2012) 54 EHRR 3, the Court held that the display of crucifixes in the classrooms of state schools gave rise to no violation of A2P1. The Court held that curriculum planning fell within the competence of contracting states, subject to the principle that the state was forbidden from pursuing an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That was the limit the state must not exceed. The display of crucifixes did not amount to indoctrination in this sense and so fell within the area of contracting states' discretion.

45. In *Ponomaryov v Bulgaria* (2014) 59 EHRR 20, the Court held that there had been a violation of A2P1 when children who were lawfully resident in Bulgaria were required to pay fees for state primary and secondary education in respect of periods before they obtained permanent residence permits. The Court considered whether the applicants' situation fell within the scope of A2P1 for the purposes of Article 14. The answer was yes, because although A2P1 imposed no duty on contracting states to set up or subsidise particular educational establishments, any state doing so was under an obligation to afford effective access to them: [49].

46. In considering whether the rule at issue involved justified discrimination, the Court noted at [52] that "very weighty reasons" were required to justify differential treatment on grounds of nationality. At [54], it noted that "a state may have legitimate reasons for curtailing the use of resource-hungry public services—such as welfare programmes, public benefits and health care—by short-term and illegal immigrants, who, as a rule, do not contribute to their funding". However, at [55] it held that such arguments could not be transposed to the field of education without qualification. This was because education was "a right that enjoys direct protection under the Convention". It was "a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions". In addition, "in order to achieve pluralism and thus democracy, society has an interest in the integration of minorities". At [56]-[58], the court noted that the state's margin of appreciation in this domain increases with the level of education. Thus, at university level, higher fees to aliens were commonplace, whereas for primary education they were unheard of. But given the importance of secondary education in the modern knowledge-based society, stricter scrutiny was required of the proportionality of the measure.

47. The applicants in *Catan v Moldova & Russia* (2013) 57 EHRR 4 were parents and children at schools in Transdniestria, an area of Moldova over which Russian forces had effective control. The schools were shut down and, when permitted to re-open, teaching in their preferred language was banned. The Grand Chamber affirmed at [139] that the rights set out in A2P1 apply with respect to both state and private institutions and to primary, secondary and higher education. At [140], it restated the principles governing A2P1 in these terms:

> "…in spite of its importance, the right to education is not absolute, but may be subject to limitations. Provided that there

> is no injury to the substance of the right, these limitations are permitted by implication since the right of access 'by its very nature calls for regulation by the State'. In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to arts 8-11 of the Convention, it is not bound by an exhaustive list of 'legitimate aims' under art.2 of Protocol No.1. Furthermore, a limitation will only be compatible with art.2 of Protocol No.1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Although the final decision as to the observance of the Convention's requirements rests with the Court, the Contracting States enjoy a certain margin of appreciation in this sphere. This margin of appreciation increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large."

Domestic case law

48. *Begbie* concerned the withdrawal of the assisted places scheme under which pupils were offered state funding towards private school fees. The main argument advanced was that the withdrawal was contrary to a legitimate expectation created by statements made by the Labour Party when in opposition. Reliance was placed on A2P1. Peter Gibson LJ (with whom Sedley LJ agreed) said this at 1129-1130:

> "I confess that I find it startling that it should be suggested that in a country where education is available in a state school at public expense it should be a breach of the Convention for the state not to continue to provide the funding for a child to go to a private school. Nor in my judgment is that suggestion supported by the jurisprudence of the European Court of Human Rights. In the *Belgian Linguistic* case it was stated, at p. 281, that: 'the contracting parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level.' The Protocol proceeded from the premise that each member state possessed a state system of education and article 2 was designed to ensure that access to that system was not denied. Other decisions of that court support this: see *W and KL v. Sweden* (1985) 45 D&R 143 and *Simpson v. United Kingdom* (1989) 64 D&R 188."

49. In the *Lord Grey School* case, the claimant had been excluded from a maintained school. The appeal was argued on the basis that the exclusion had been unlawful under domestic law. At [24], Lord Bingham (with whom Lord Nicholls and Lord Scott agreed) summarised the Strasbourg authorities as follows:

> "The Strasbourg jurisprudence… makes clear how article 2 should be interpreted. The underlying premise of the article was that all existing member states of the Council of Europe had, and all future member states would have, an established system of state education. It was intended to guarantee fair and non-discriminatory access to that system by those within the jurisdiction of the respective states. The fundamental importance of education in a modern democratic state was recognised to require no less. But the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil… The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?"

50. In a similar vein, Lord Hoffmann held at [56]-[57], citing the *Belgian Linguistic* case, that "article 2 of the First Protocol does not confer a right to an education which the domestic system does not provide". A2P1 does confer a right to be educated to a minimum standard, "but the right under article 2 extends no further". It followed, he held at [58], that "if suitable and adequate alternative arrangements are available but the pupil's parents decide that the child should not use them, neither the school nor the LEA will have acted inconsistently with the child's rights under article 2 of the First Protocol".

51. In *A v Essex County Council* [2010] UKSC 33, [2011] 1 AC 280, a disabled child with severe learning difficulties was withdrawn from school due to behavioural problems. It took the local authority 18 months to find an alternative. He complained that the local authority had breached his rights under A2P1 because he had received no effective and meaningful education in that period. Lord Clarke said this:

> "15. As I see it, the critical point in all the speeches is that under article 2 of the Convention a person is not entitled to some minimum level of education judged by some objective standard and without regard to the system in the particular state. The question is that posed by Lord Bingham, namely whether the pupil was denied effective access to such educational facilities as the country provides…
>
> 16. The question is then whether the pupil has been denied effective access to the system in place. That question will only be answered in the affirmative where his right to education has been so reduced as to 'impair its very essence and deprive it of

> its effectiveness': 44 EHRR 99, para 154. Lord Hoffmann's reference to systemic failure must be viewed in the context of the education system provided..."

52. *Tigere* was about the policy of making aliens without settled status ineligible for a student loan. Lady Hale (with whom Lord Kerr agreed) noted at [23]-[24] that education played such a fundamental role in the furtherance of human rights that A2P1 should not be given a restrictive interpretation. Making it "prohibitively expensive" for some students to gain access to higher education would make the right conferred by A2P1 "theoretical or illusory". It was therefore accepted by the Secretary of State that in certain circumstances eligibility for financial support was capable of coming within A2P1. Whether analysed under A2P1 alone or Article 14 read with A2P1, the question was whether the rule at issue was justified: [26]. Lady Hale and Lord Kerr held that it was not. Lord Hughes agreed with the result, but at [51] entered an important qualification:

> "This appeal was presented on the basis that there was both an infringement of A2P1 and unlawful discrimination. It was always accepted by the appellant that these two legal arguments went together. On inspection, I agree with Laws LJ in the Court of Appeal that the case depends on a complaint of unlawful discrimination only. The jurisprudence of the Strasbourg court, and in particular *Ponomaryov v Bulgaria*…, makes it quite clear that, whatever may be the uncertain ambit of A2P1, it does not impose on any state an obligation to provide, or to fund, tertiary education. If, therefore, the UK were simply to decline to provide any university funding, that, whilst it would clearly not be acceptable publicly, would not entail any infringement of A2P1. Equally, it follows that A2P1 does not impose a requirement on the UK to fund tertiary education at any particular level or in any particular way, and whether or not it were to be asserted that such education had become prohibitively expensive for some individuals. This is an example of the UK's social and political realities being more exacting on the state than the European Convention on Human Rights… (and the Human Rights Act) require; it is not the only one. The law is not the only, nor even the principal, regulator of the provision of public services."

Lord Sumption and Lord Reed dissented, citing *Ponomaryov* as showing that the case would have been "most unlikely to succeed in Strasbourg".

53. In *SAE Education*, the appellant provided education and training services. The question was whether these fell within an exemption from VAT in the 1994 Act on the basis that it was a "college… of… a university". In answering that question, Lord Kitchin (with whom the other members of the Supreme Court agreed) made these observations at [43] about the exemptions in Articles 131-133 of the Principal VAT Directive (which the 1994 Act implemented):

> "The general objective of the exemptions in articles 133 to 135 is, I think, readily apparent and, so far as university education is concerned, it is to ensure that access to the higher educational services this necessarily involves is not hindered by the increased costs that would result if those services were subject to VAT."

Discussion

The key relevant principles

54. The authorities disclose two relevant strands of thought about the nature of the right guaranteed by A2P1.

55. The first concerns the importance of education in a modern, integrated, knowledge-based society (see e.g. *Ponomaryov*, [55]-[58]) and as the foundation for a functioning democracy and therefore for the furtherance of other human rights (*Şahin,* [137]). It is significant that the first sentence of A2P1 is framed in the negative ("No person shall be denied…"). The denial of the right can be a potent instrument of social exclusion. This explains why the cases often focus on policies which are said to result in particular groups being excluded from, or disadvantaged in, the education system. It also explains why the second sentence of A2P1 has been described as an "adjunct" to the first (see *Kjeldsen,* [53]; *Campbell and Cosans*, [40]). The requirement for respect for the religious and philosophical convictions of parents flows from the need to ensure that children are not de facto denied the right to education. But the policies which are said to exclude particular children or groups are sometimes aimed at fostering social cohesion (for example, the linguistic rules in the *Belgian Linguistic* case or the ban on religious dress in *Şahin*) or understanding of the mainstream culture (for example, the crucifixes in *Lautsi*).

56. The Strasbourg Court has navigated these difficult waters by allowing states a broad margin to decide on the educational curriculum and on ancillary matters, such as language and dress, subject to a requirement that the regulation of education should not "impair the very essence of the right". This generates minimum requirements which, if not respected, might result in the exclusion of children or groups of children from the education system and thus from full participation in society. In the field of the curriculum, the broad margin of discretion is bounded by the minimum requirement that the state is forbidden to pursue an aim of "indoctrination" (*Kjeldsen,* [53]; *Lautsi*, [63]). As to language, the limit is that education must be provided in the national language of the state or one of the national languages (otherwise the right would be "meaningless": see the *Belgian Linguistic* case, p. 281). Subject to compliance with these minimum requirements or limits, the way in which education is regulated is up to the state.

57. The second important strand of thinking in the Strasbourg jurisprudence flows from the fact that the right to education is unusual among the rights expressly guaranteed by the Convention. Most such rights preclude specified sorts of interference by the state. The fulfilment of the right to education, by contrast, typically involves the deployment by the state of limited public resources. This in turn requires a state to make a series of policy choices about the organisation of the educational system, some of which are

likely to be controversial. This is why the Strasbourg Court was so cautious, in the *Belgian Linguistic* case, to frame the right conferred by A2P1 as a right of access to the educational system existing at any given time and as excluding any obligation on states "to establish at their own expense, or to subsidise, education of any particular type or at any particular level" (p. 280). That statement was made 56 years ago, but it has been reaffirmed by the Strasbourg Court since (see e.g. *Şahin,* [135]) and has been repeatedly cited by domestic courts: see e.g. the *Lord Grey School* case at [11]; *A v Essex County Council* [2010] UKSC 33, [2011] AC 280, [15]-[17] and [76]; *R (Kebede) v Secretary of State* [2013] EWHC 2396 (Admin), [2014] PTSR 92, [24].

58. This explains why complaints to the Commission and Strasbourg Court about the denial of funding for schools of a particular type (denominational grammar schools in *X & Y v UK,* non-denominational schools in *X v UK,* the Rudolf Steiner school in *W & KL v Sweden*) have generally failed, whether the complaint was directed at a withdrawal of funding that had previously been provided or the non-availability of funding simpliciter. In all these cases, it was a sufficient answer that there was another school which the child could attend, so that there was no denial of "effective access to such educational facilities as the state provides" (as Lord Bingham put it in the *Lord Grey School* case at [24]). Even in the field of SEN, there was "a wide measure of discretion left to the appropriate authorities as to how to make the best use possible of the resources" (*Simpson v UK*) and, if a mainstream state school is available, that will generally satisfy the A2P1 right.

Does a measure which impedes access to private education engage A2P1 at all?

59. At one stage in the oral argument before us, Sir James for the Government parties submitted that the margin of appreciation accorded to states under A2P1 to choose how to configure their educational systems was wide enough to permit them to prohibit private schools altogether. That submission was, in our judgment, wrong. The Court in *Kjeldsen* drew attention at [50] to the importance attached by many contracting states (as apparent from the *travaux préparatoires*) to the "freedom to establish private schools". That the right conferred by A2P1 includes such a freedom, subject to regulation by the state, can also be seen from the Commission's decisions in *Jordebø* and *Verein Gemeinsam Lernen*. If it is not within a state's margin of appreciation to prohibit private schools altogether, a regulatory measure which had the same practical effect would presumably impair the very essence of the right. We therefore consider that the Government parties were wrong to submit that A2P1 has no relevance at all to measures which affect access to private schools.

Does the imposition of VAT impair the very essence of the A2P1 right?

60. The fact that the right conferred by A2P1 is "guaranteed equally to pupils in state and independent schools, without distinction" (*Şahin,* [153]; *Catan,* [139]) does not mean that the state is obliged to ensure that every child currently attending a state or private school can continue to attend the same school. There are many reasons why a child may be unable to do so. The child may be expelled, in which case there will be no violation of A2P1 provided that there is alternative educational provision available: see e.g. the *Lord Grey School* case at [24]; *A v Essex County Council*, [12]. In the case of a private school, one obvious reason why the child may be unable to continue to attend is that the fees become unaffordable to his or her parents. Lord Pannick for the claimants in

Claim 1, in submissions adopted by Messrs Hyam and Quintavalle for the claimants in Claims 2 and 3, accepted that in this situation there is no duty on the state to provide a subsidy to ensure that a child can continue to attend. That is so even where the state has previously provided such a subsidy, provided that alternative state-funded education is available (see *Begbie*, p. 1129).

61. In principle, one might seek to draw a line between the provision of a subsidy and the imposition of regulation which makes it more expensive to provide private education. But Lord Pannick does not, and could not, rely on any such distinction. The authorities make clear that private education may properly be subject to regulation as to its quality (see e.g. *Jordebø*). Such regulation no doubt has an impact on the costs that private schools must pay and therefore on the fees they have to charge. Likewise, Lord Pannick accepts that there could be no difficulty with health and safety regulations, or with taxes levied on employers or on occupiers of property, which are liable to have the same impact and may make the fees unaffordable for some parents.

62. On Lord Pannick's case, what makes the measure challenged here objectionable is that it is a tax on the very service (education) to which A2P1 guarantees a right of access. This is a superficially attractive submission, but it does not withstand analysis. Why should a measure which results in a 20 per cent increase in fees (if the tax is fully passed on) be consistent in principle with A2P1 if it is a tax imposed on employers or occupiers of property, but impair the very essence of the right if and because it is a tax imposed on the provision of educational services? In both cases, the impact is the same: it makes the fees unaffordable for a proportion of parents currently sending their children to private schools. This puts them in the same position in which the great majority of parents already find themselves: their options are limited to those which the state makes available free of charge.

63. It may be that the object of the VAT exemption for private education was, as Lord Kitchin said in *SAE Education*, to ensure that access to the relevant services was "not hindered by the increased costs that would result" otherwise. But, as the examples of the employer and property taxes show, there is no general obligation not to hinder access to private education. We can see no principle identified in the Strasbourg case law which would warrant singling out a measure imposing a tax on the fees charged for educational services—alone among the things a state might do that would hinder access to private education—as one which impairs the very essence of the A2P1 right.

64. We did not find Lord Pannick's analogy with the imposition of a tax on attendance at religious services helpful. First, if such a tax were imposed, those wishing to attend a service would presumably have no alternative option that was free of charge. Second, one reason why Lord Pannick's hypothetical example sounds problematic is that it would turn something that, for most religions in most places, is open to all into something that excludes those who cannot pay. Private schools, by contrast, are already inaccessible to the vast majority of children on financial grounds. Imposing a tax on the educational services offered by private schools does not alter the fundamental nature of those services as ones which, in general, are available only to those with sufficient means. Third, and in any event, the Strasbourg Court has in fact upheld as compatible with Article 9 a tax recognised by law and imposed on members of a particular religious denomination (even in circumstances where there were tax implications for the spouse,

who did not profess the same faith): see *Klein v Germany* (App. No. 10138/11, 6 April 2017).

65. For these reasons, we conclude that the challenged provisions do not impair the very essence of the A2P1 right, nor deprive the right of its effectiveness simply because it is imposed directly on the fees paid for the provision of educational and associated services by private schools.

Issue (a)(ii): Are the challenged provisions a disproportionate interference with A2P1 rights?

Submissions for the claimants

66. Under this ground, Lord Pannick submitted that the challenged provisions are a disproportionate interference with A2P1 rights because they apply across the board with no exceptions, irrespective of the reasons why a child may need to attend a private school. He noted that the right to education is of central importance, so interferences with it require strict scrutiny and states enjoy a correspondingly narrow margin of appreciation, particularly where the measure under challenge relates to primary and secondary education: *Şahin*, [137]; *Ponomaryov* [54]-[57]. The effects on pupils with disabilities and on those with religious beliefs supply further reasons why a narrow margin is appropriate. So does the fact that no other Council of Europe state imposes VAT (or any similar tax) on the fees payable for private education: see *Tyrer v United Kingdom* (1978) 2 EHRR 1, [31]; *Dudgeon v UK* (1982) 4 EHRR 149, [60]; *A v SSHD* [2005] UKHL 56, [2005] 2 AC 68, [39].

67. When considering the proportionality of the measure, Parliament's view is not determinative. It is relevant that the challenged provisions apply irrespective of the means of the parent. Even if some parents are wealthy, many are not. The claimants are not wealthy. Many of them are in receipt of state benefits. A submission to the Chancellor and Chief Secretary to the Treasury recognised that 25 per cent of households affected would fall into the bottom half of the household income distribution. This would affect 159,000 of the 636,000 pupils currently attending private schools, assuming that affected pupils are equally distributed among households.

68. Lord Pannick submitted that there was abundant evidence that state provision for children with SEN was in disarray. He pointed to statements made by the Secretary of State for Education herself to this effect and a report of the Local Government and Social Care Ombudsman. These made it appropriate to conclude, as ASG (the father of ALR) had concluded, that it was not worth applying for an EHCP. (Lord Pannick also referred to a report of the Public Accounts Committee. We did not have regard to this, because—for the reasons we have explained in Annex B—it is inadmissible, but this did not matter because the same points could be seen from evidence which was admissible.)

69. The case law makes clear that a bright line approach may be inappropriate: see e.g. *Hirst v United Kingdom* (2006) 42 EHRR 41, [82]. It would not be unfair to make an exception for those children who require private education because of the inability of the State system to cater to their needs. The State cannot rely on its own inadequate

provision of SEN to justify a tax on all. This "equality of misery" does not make a policy proportionate. Other tax regimes recognise various exemptions, so there is no real reason why such exemptions should be regarded as administratively unworkable here. Any potential for abuse could be addressed. Insofar as exemptions would result in decreased revenue, acting proportionately invariably imposes costs on the State.

70. The timing of the introduction of the tax change (in the middle of the school year) is also relevant to its proportionality. It meant that parents who could not afford the fee increases were forced to disrupt their children's education in the middle of an academic year.

71. For the Claim 2 claimants, Mr Hyam contended that there is no rational connection between the measure and the objectives the Government parties sought to achieve. The Government failed to ask the relevant questions about the cost of imposing VAT on the families of children with SEN, who might then move to the state sector. For the Claim 3 claimants, Mr Quintavalle added a further reason for challenging the rational connection between the measure and the objectives: some smaller private schools can educate pupils at a lower per-place cost than is possible in the state sector.

Submissions for the Government parties

72. Sir James submitted that the decision not to continue the exemption for VAT on private schools was justified, applying the four-stage test in *Bank Mellat v HM Treasury No 2* [2013] UKSC 38, [2014] AC 700, [74].

73. Since the challenge is brought ab ante, the Claimants must surmount the high hurdle of demonstrating that the legislation is incapable of operating proportionately in almost all cases: *R (Joint Council for the Welfare of Immigrants) v National Residential Landlords Association* [2020] EWCA Civ 542, [2021] 1 WLR 1151 ("*JCWI*"), [115]-[119], applying the approach in *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29, [88] and *In re Abortion Services (Northern Ireland)* [2022] UKSC 32, [2023] AC 505, [12]-[19].

74. In this case, the margin of discretion is broad because the measure challenged involves the raising of public money through taxation, involves judgments which are essentially legislative in nature and falls within the field of social and economic rights. Moreover, the decision was made by Parliament, in primary legislation, after full debate and was a manifesto commitment: see *SC*, [115(2)], [158]-[162], [209]; see also Leggatt LJ in the same case in the Court of Appeal [2019] EWCA Civ 615, [2019] 1 WLR 5687, [158] and *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719, [45], [87], [92] and [158].

75. Insofar as reliance is placed on the discriminatory effect of the measure, any discrimination is indirect only and a lower level of review is therefore appropriate: *R (The Motherhood Plan and another) v HM Treasury* [2021] EWCA Civ 1703, [2022] PTSR 494, [127]. Consensus among Council of Europe States is relevant only where the case concerns social values and the "living instrument" doctrine applies (such as *Tigere, R (Elan-Cane) v SSHD* [2021] UKSC 56, [2023] AC 559 and *Goodwin v UK* (2002) 35 EHRR 447). This case concerns tax policy and is not in that category.

76. Applying these principles to the facts, Sir James submitted that the measure under challenge here is projected to raise £1.2 to £1.4 billion annually, taking into account the displacement of children currently at private schools into the state system. Although this revenue is not hypothecated, substantial parts of it are to be spent in state education. Separately, the Government expects to spend an additional £1 billion on SEN provision. In the Labour Party manifesto, there was a commitment to fund 6,500 new teachers. The legislative judgment prioritised fairness. 94 per cent of children—those in state education—will benefit from a measure that is applied to the families of the 6 per cent of children who attend private schools. Only a minority of parents affected will be from lower- or middle-income brackets. Those with the most acute SEN will have an EHCP, in which case their educational provision will continue to be funded by the local authority in full, even if the EHCP specifies a private school. Any exemptions must be framed by reference to objective criteria which are capable of being verified and monitored. The exemptions proposed do not meet that test.

77. Sir James submitted that there is an obvious rational connection between the legislation and the above aims. Insofar as complaint is made about the failure at the time when the measure was introduced to calculate the cost of pupils with SEN transferring into the state sector, the question of proportionality is one for the court. The question is whether the measure *is* proportionate, not whether the Government's conclusion was reached after a proper process. In any event, even if the figures relied upon by the Claim 2 claimants were correct (which is not accepted), the numbers entering the state sector would represent only a 0.1 per cent increase in the pupils with SEN but no EHCP.

78. As to the position of smaller schools with lower per-place costs, the measure is assessed by the OBR to raise very significant sums in net terms: £1.7 billion by 2029-2030. The measure will generate revenue fairly and will raise revenue to invest in the state education system. The OBR's assessment does not support the Claim 3 claimants' assertion that the movement of pupils from private schools to state schools will offset the revenue generated.

79. As to the proposed exemptions, Sir James submitted that there are no less intrusive means that would have been acceptable and would not have compromised the intended aims. Timing was a matter of judgement for Parliament. There was a clear fiscal incentive to implement sooner: the introduction of the VAT from 1 January 2025 as opposed to September 2025 was estimated to raise additional revenue of over £900 million. The final recommendation to maintain the January 2025 start date took into account the effect on parents, but also projected that there would be only about 3,000 displacements.

80. As to the fair balancing exercise, Sir James submitted that the rights of the vast majority of children who stand to benefit from the revenue raised by the measure are highly material. Even if the revenue is not hypothecated, significant revenue will be raised and is to be allocated for state education. Parliament was well aware that some families would no longer be able to afford private school fees, including those with SEN, those with religious convictions or those who prefer single-sex education. Parliament was entitled to consider these factors to be outweighed by the expected revenue raised for public services.

Discussion

The test for proportionality

81. In *Bank Mellat*, at [74], Lord Reed explained the four-stage approach to the assessment of proportionality. It involves asking:

> "(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".

82. All parties agreed that we should structure our analysis of the proportionality of the challenged measure by reference to these four questions. We have done so.

Margin of appreciation/discretion

83. In assessing the breadth of the margin of discretion to be accorded to Parliament, we begin by accepting that the right to education is foundational. In some circumstances (see e.g. *Ponomaryov*), this will constrain the margin of discretion. But the facts of *Ponomaryov* were very different. There, access to the state-funded educational system was being systematically denied to lawfully resident children because of their immigration status. Here, as noted above, the effect of the challenged measure is to place a proportion of parents currently sending their children to private schools into the same position in which the great majority of parents already find themselves. Whilst the measure may make certain schools uneconomic, it cannot be said that the imposition of a 20 per cent tax on private school fees (the same rate as is applied to most other services provided for consideration) is tantamount in practice to removing the right to establish a private school. The effects of the challenged measure do not, on their own, justify a particularly narrow margin of discretion.

84. In considering the breadth of the margin, it is necessary to consider two kinds of factors. First, there are those which relate to the subject matter and nature of the challenged measure. These factors are relevant to what is known at the international level as the "margin of appreciation". They apply irrespective of how the state implements the measure under its own constitutional arrangements. Secondly, there are considerations which arise from the way the measure was implemented domestically. These affect the breadth of the margin of discretion which a domestic court must accord to the relevant domestic decision-maker. They are relevant to the extent to which it is appropriate under our particular constitutional arrangements for one branch of government (the judiciary) to substitute its view for that of another (the executive or legislature).

85. It is possible to imagine cases where these two kinds of considerations pull in different directions. In this case, however, both point towards a broad margin of discretion. The

subject-matter considerations include the fact that the policy decisions under challenge here fall squarely into the fields of economic or social strategy. The Strasbourg Court typically accords a broad margin to national authorities on such decisions (including those in the area of taxation: see *Guberina v Croatia* (2018) 66 EHRR 11, [73]), because of their "direct knowledge of society and its needs" and because they are "in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds": *Wallishauser v Austria (No. 2)* (App. No. 14497/06, 20 June 2013), [65]; see also *SC*, [115(2)].

86. Furthermore, and in our view importantly, the aim of the measure was redistributive. It was well understood, and indeed expressly justified, as involving the imposition of a burden on one group (the 6 per cent attending private schools) for the benefit of another (the 94 per cent relying on state educational provision). For decisions of this kind, there is "no process of legal reasoning which can justify one view in preference to the other" and courts are not "attuned in the way that democratically elected institutions are attuned to reflect a collective sense of what is fair or where the balance of fairness lies on questions of distributive justice": see *SC* in the Court of Appeal, [158] (Leggatt LJ). Thus, contracting states are likely to differ in the answers they give.

87. These same features also explain why, in our constitution, such decisions are typically for Parliament. In this case, the domestic decision-making process had a number of features which serve to place the challenged measure in the category which attracts a particularly broad domestic margin of discretion. It was a manifesto commitment, so the electorate was fully on notice of the proposal when they cast their votes in the General Election on 4 July 2024. It was debated in Parliament, where all the objections which are now advanced by the claimants, and others, could be made. Although it is not open to us to consider the quality or cogency of the debate in Parliament (see Annex B, [50], [63] and [85]), we can properly and do have regard to the fact that the debate included consideration of the extent to which the measure would raise revenue, the effect of the measure on children with SEN, the position of children attending faith schools and the timing of the measure. All these features suggest a broad margin of discretion. The measure takes the form of primary legislation, enacted very recently: see *SC*, [180]-[181].

88. For all these reasons, we consider that in deciding whether the challenged measure was proportionate, we should accord a broad margin of discretion.

The relevance of convergence and consensus

89. As we have noted at the start of this judgment, the claimants placed some reliance on the fact that the UK is the only Council of Europe state which imposes VAT or any similar tax on educational services. In some circumstances, the existence of common standards among contracting states may serve to narrow the margin of appreciation at the international level. In *SC*, at [115(3)], Lord Reed cited two Strasbourg cases as authority for this proposition. The first was *Petrovic v Austria* (2001) 33 EHRR 14, where the applicant challenged as discriminatory an Austrian rule granting paid parental leave to mothers but not fathers. The Court cited as relevant to the breadth of the margin of appreciation the fact that the majority of other contracting states had regimes similar to Austria's: [38]-[39]. The second case was *Markin v Russia* (2013) 56 EHRR 8, which also concerned parental leave, this time for service personnel. By

this time, the countries limiting parental leave to women were in a small minority, from which it could be deduced that "contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition": [140].

90. In both cases, the Strasbourg Court inferred from the convergence in state practice an emerging moral consensus that men and women should share childcaring responsibilities equally. This could be used as a starting point when considering the proportionality of a challenged measure. The same analysis applied in *Tyrer* (where the question was whether corporal punishment was morally acceptable) and *Dudgeon* (where the court was considering whether there was a need on moral grounds to maintain a criminal prohibition on homosexual acts).

91. In cases like these, there is good reason to regard the degree of convergence between contracting states as material. Council of Europe members together account for almost all the states in the territory of Europe and a substantial proportion of the world's democracies. Moral standards develop over time. Where there is significant disagreement between contracting states about such standards, it is unlikely to be appropriate for a supranational court to impose its view. Where, however, there is a consensus among other contracting states on a moral issue, judgments informed by that consensus can be more easily accepted as legitimate by an outlier state with the self-awareness to recognise that it may have something to learn from the combined wisdom of its neighbours. Very occasionally, as *Tyrer* and *Dudgeon* show, it is the United Kingdom that is the outlier. Few today would doubt that the decisions in those cases had salutary effects.

92. Convergence in state practice is not, however, always attributable to a common moral position. It may emerge for other reasons. Common rules in respect of food or product standards or data protection arrangements, for example, might be thought desirable because they promote international trade. If a state decided in its own interest to take a different position, there would be no reason to regard the common practice of other states as material to the breadth of the margin of appreciation. The Convention does not promote uniformity for its own sake, nor does it set its face against novel approaches to political questions.

93. In the present case, the common practice of other states does not seem to us to imply any common moral view that there should be no VAT (or other similar tax) on the fees paid for private schools. As we have noted, most Council of Europe states are members of the EU and thus bound to impose VAT only in accordance with EU law. Other Council of Europe states have not chosen to impose VAT on private school fees, but there is nothing to suggest that they consider themselves constrained in this respect by the Convention or any moral standard reflected in it.

94. The current EU law on VAT is contained in Council Directive 2006/112/EC ("the Directive"), Article 132(1)(i) of which makes it mandatory for member states to exempt "the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects". Mr Quintavalle for the Claim 3 claimants submitted that it was relevant that Article 132

of the Directive is found in a chapter entitled "Exemptions for certain activities in the public interest".

95. We accept that the mandatory exemptions grouped together in Article 132 relate to services whose provision is regarded by EU law as serving the public interest. There is no dispute that the services provided by private schools do serve the public interest. The question is whether the mandatory requirement to exempt them from VAT reflects a common moral position that they should be so exempted. When the scheme of the Directive is considered as a whole, we find it hard to accept that it reflects such a moral position. We note, for example, that Article 135 requires Member States to exempt, among other things, insurance and reinsurance transactions and betting, lotteries and other forms of gambling. Viewed as a whole, the object of the Directive is to harmonise national rules so as to promote the operation of the single market. The fact that one of the services it requires members states to exempt from VAT is private school fees seems to us to imply nothing, one way or the other, about the breadth of the margin of appreciation applicable to a state which has decided to leave the EU so as to be able to set its own rules on matters such as these (among other reasons).

96. Nor, in our view, do any of the other international instruments relied upon by Mr Quintavalle take the matter any further. Article 26(3) of the Universal Declaration of Human Rights affirms the right of parents to "choose the kind of education that shall be given to their children". Article 18(4) of the International Covenant on Civil and Political rights obliges state parties to "respect the liberty of parents… to ensure the religious and moral education of their children in conformity with their own convictions". Article 13(3) of the International Covenant on Economic, Social and Cultural Rights is in similar terms. These provisions are consistent with, but add nothing of substance to, to the second sentence of A2P1.

97. The Convention against Discrimination in Education requires state parties to abrogate statutory provisions which involve discrimination (defined to include "Depriving any person or group of persons of access to education of any type or at any level" and "limiting any person or group of persons to education of an inferior standard": Article 1). Article 3 contains a specific prohibition on allowing "differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees" but says nothing about the imposition of taxes on such fees. Article 5 asserts the liberty of parents to choose institutions other than those maintained by public authorities and declares that it is essential to ensure "in a manner consistent with the procedures followed in the state for the application of its legislation, the religious and moral education of the children in conformity with their own convictions". This goes no further than the second sentence of A2P1 (which, as interpreted by the Strasbourg Court, includes a right to establish private schools). The same can be said of Articles 28(1) and 29 of the Convention on the Rights of the Child.

98. In our view, none of these instruments says anything relevant about the question whether contracting parties may impose VAT on private schools. Insofar as there is a convergence in practice between states on this question, this convergence is in our judgment not relevant to the breadth of the margin of discretion available to Parliament.

Does this case engage the special rule for "ab ante" challenges?

99. In *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68, 1 WLR 5055, the claimants challenged an immigration rule that required certain applicants for entry clearance to show evidence of knowledge of English, save in "exceptional circumstances". Rather than applying for entry clearance and seeking to bring themselves within the exception, they challenged the rule itself as incompatible with Article 8 and Article 14. At [2], Lady Hale (with whom Lord Wilson agreed) said that they had "set themselves a difficult task". At [60] she explained that she would not strike down the rule or declare it as invalid because its application would not give rise to an unjustified interference with Article 8 rights in all cases and it was capable of being operated in a manner compatible with Convention rights. Lord Hodge (with whom Lord Hughes agreed) said at [69]: "The court would not be entitled to strike down the rule unless satisfied that it was incapable of being operated in a proportionate way and so was inherently unjustified in all or nearly all cases."

100. In the *Christian Institute* case, a group of charities and individuals sought to challenge legislative provisions in an Act of the Scottish Parliament as outside legislative competence in advance of their application in individual cases. At [88], Lady Hale (with whom Lord Reed and Lord Hodge agreed) held that "if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with Art 8 rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights".

101. *JCWI* was a challenge to the compatibility of legislation prohibiting landlords from letting their properties to those without regular immigration status. Hickinbottom LJ (with whom Henderson LJ agreed) noted at [116] that "this claim was not brought by any individual claiming that he or she has been the victim of discrimination as a result of the operation of the Scheme". Rather, it was a challenge to the statutory provisions themselves. That being so, the test in *Bibi* and *Christian Institute* applied: [117]-[119].

102. Finally, on this point, *In re Abortion Services (Northern Ireland)* [2022] UKSC 32, [2023] AC 505 concerned the Abortion Services (Safe Access Zones) (Northern Ireland) Bill, which had been referred directly to the Supreme Court by the Attorney General for Northern Ireland. At [12]-[19], Lord Reed (with whom the other six members of the Court agreed) sought to answer a question which appears in the heading above those paragraphs: "What is the test of whether a provision is beyond legislative competence on the ground that it will result in a disproportionate interference with a Convention right?" Having set out [88] of Lady Hale's judgment in *Christian Institute*, Lord Reed said this at [14]:

> "The rationale of that approach is that where there is an ab ante challenge to a legislative provision (that is to say, a challenge to the provision in advance of its application to any particular facts), the striking down of the provision is only justifiable if the court is satisfied that it is incapable of being applied in a way which is compatible with the Convention rights, whatever the facts may be. If the legislation is capable of being applied compatibly with the Convention, then it will survive an ab ante challenge."

103. At [15]-[16], Lord Reed discussed *In Re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250, which concerned a provision of Northern Ireland primary legislation which made the eligibility of a surviving parent to a widowed parent's allowance dependent on whether the parents were married to one another. At [18]-[19], Lord Reed said that Lady Hale had misstated the test in that case. However, at [17], he observed:

> "It is not immediately apparent why, in *In re McLaughlin*, the compatibility of the legislation with article 14 of the Convention depended on the facts of the individual case. One might think that the conclusion reached—that a rule which prevented the children of unmarried parents from benefiting from an allowance available to the children of married parents, by reason of the marital status of their parents or their own birth status, was unjustifiably discriminatory—would apply in any case concerning the denial of the same allowance for the same reason. If that were so, then no issue would arise of the kind which arose in *Christian Institute*, where the measure was not inherently incompatible with the Convention but might be applied incompatibly in particular cases."

104. Sir James's submission, based on these authorities, was put as follows at para. 44 of the skeleton argument for the Government parties:

> "The relief sought in this case is a declaration of incompatibility in respect of Resolution 34 as a whole. The challenge is therefore systemic, not individual. It follows that the Claimants must demonstrate that the legislation is incapable of operation in a proportionate way in all, or almost all, cases."

105. In our judgment, this submission is based on a misunderstanding of the authorities. The test in *Bibi* and *Christian Institute* applies because a challenge is brought "ab ante", not because the relief sought relates to a legislative provision. The scope of the term "ab ante" can be seen from the words in parentheses in [14] of Lord Reed's judgment in the *Abortion Services* case. It refers to "a challenge to the provision *in advance of its application to any particular facts*". That is why, when he applied the *Bibi/Christian Institute* test in *JCWI*, Hickinbottom LJ observed that none of the claimants before him had claimed to be the victims of discrimination as a result of the operation of the scheme.

106. Ab ante challenges to legislation may take different forms. There are statutory provisions permitting such challenges to be brought directly to the Supreme Court in respect of devolved legislation of the Scottish Parliament, the Northern Ireland Assembly and the Senedd. The *Abortion Services* case is an example. Ab ante challenges can also be advanced in judicial review proceedings by a claimant with a sufficient interest, which could be a non-governmental organisation (as in *JCWI*) or a potentially affected individual to whom the relevant provisions have not yet been applied (as in *Bibi*). In such cases, the court will not declare the provision incompatible (or, in the case of secondary legislation, quash it) unless its application would be incompatible with Convention rights in all or nearly all cases.

107. This rule has no application, however, in cases brought by a claimant challenging a legislative measure which has been applied to him or her. In some such cases (e.g. *Bibi*), the measure will itself allow for exceptions, so the court may be able to find that its application gave rise to a breach of the claimant's Convention rights without declaring the provision itself incompatible with those rights. In other cases, the measure will allow for no exceptions. In such a case, if a claimant can show that the application of a statutory provision *to him* gives rise to a breach of his Convention rights, the only relief available will be a declaration of incompatibility. A claimant in this position who seeks such a declaration does not have to show in addition that the legislative measure gives rise to a similar breach of Convention rights in all, or nearly all, other cases.

108. In this case, ss. 47-49 of the Finance Act 2025 affect the individual claimants now. There is no relevant exemption, whether for exceptional circumstances or otherwise. Indeed, the absence of such exemptions is one of the matters under challenge. If any of the individual claimants could establish that the challenged provisions are incompatible with *their* Convention rights, it would, in our judgment, be appropriate to grant a declaration of incompatibility, framed by reference to the class to whom the incompatibility relates. The class would depend on the reason why the legislation was found to be incompatible and would reflect any characteristics of the claimants which made it so. On the facts of this case, we would in that event declare the legislation incompatible either generally or in its application to children with particular characteristics or children attending schools with particular characteristics.

Legitimate aim and Bank Mellat stages 1 and 2: Is the objective of the measure sufficiently important to justify the limitation of a protected right? Is the measure rationally connected to the objective?

109. The four objectives of the challenged measure were raising revenue, ensuring fairness, protecting those with acute needs and minimising the administrative burden and the potential for abuse. These were, in our judgment, both legitimate aims for the purpose of A2P1 and, in principle, sufficiently important to justify the limitation of the important right guaranteed by that provision. We accept that, if there had been no adequate basis for concluding that the proposal would raise net revenue, there would be no rational connection between the measure and its principal objective. In that case, the Government parties' case on justification would fail at stage 2. However, it is important to note that a party seeking to justify an interference with Convention rights does not have to show that the measure being justified *will* achieve its objective. It is sufficient that there is a *rational connection* between the measure and its objective.

110. On this aspect of the case, the claimants' arguments focussed on the calculation of the projected net revenue gain. Projections of this sort will typically involve a number of variables whose values cannot be predicted with certainty. In this case, the main variables related to the extent to which the tax would be passed on to parents in increased fees and the price elasticity of demand for private schools. These two variables would be likely to govern the expected displacement of pupils currently at private schools into the state sector. The net revenue gain would in principle be dependent on this, but might also be sensitive to the mix of pupils in the displaced cohort.

111. The evidence filed by the Government parties in this case includes a witness statement by Scarlett Graham, a Deputy Director at HM Treasury. This explains the process undertaken to produce the projection that the tax change would raise £460 million in 2024/25 (because the change would apply to only one term's fees in that year), £1.505 billion in 2025/26, rising to £1.725 billion by 2029/30. HMRC modelled the impact of the tax change. The outcome was presented in submissions to ministers and updated in the light of advice from the independent OBR. The final net revenue estimate, independently certified by the OBR, was included in a summary of responses to consultation and a tax impact and information note, both of which were published at the Budget on 30 October 2024. Separately, the additional costs generated by educating a projected 35,000 displaced pupils in the state sector was estimated at about £270 million per annum in the long term.

112. The precise methodology is set out in more detail in a witness statement by Katherine Peters, a Deputy Director at HMRC. This explains how the model assessed static costing and behavioural costing. The main elements of the latter were reductions in gross fees, loss of VAT income from other expenditure by parents, reduction in numbers of children educated at private schools (which included consideration of price elasticity of demand and the phasing of the reduction in demand). The final figure for price elasticity of demand used in the model (0.5) was the result of advice from the OBR.

113. In our judgment, while it is possible to argue that different variables should have been used, this process supplied a rational basis to conclude that the net revenue gain (after accounting for increased costs to schools in the state sector) was likely to be around £1.5 billion per annum in the long term. In this regard, we attach particular importance to the involvement of the OBR and its certification of the final estimates.

114. Mr Hyam complains about the alleged failure to take account of the additional cost of educating displaced pupils with SEN. The Claim 2 claimants estimate that 6,500 SEN pupils will be displaced. We note that the Government parties dispute that figure and that, in any event, the figure used as the average cost to the state sector of educating a child (upon which the net cost of £270 million per annum was based) takes into account that a proportion of children have SEN and are thus more expensive to educate. Although there was evidence that a relatively high proportion of children currently being educated in the private sector have SEN, there was no robust evidential basis for any conclusion about whether, or if so by how much, the SEN children in the displaced cohort would increase the average cost of educating state sector pupils. Accordingly, we do not consider that this point undermines the rational connection between the measure and its principal objective (raising revenue).

115. Nor do we accept the argument of the Claim 3 claimants that the rational connection is absent in relation to private schools which can educate pupils for less than the state sector average. Even if some of these schools are forced to close, the OBR-certified analysis shows that the challenged measure will still generate significant revenue overall. Furthermore, where a school is forced to close, some pupils may switch to other private schools. There is nothing to indicate that the prospect that some schools will close invalidates the overall estimate of the numbers likely to be displaced. In any event, the lack of an exemption for lower cost schools is more naturally considered at stage 3 of the *Bank Mellat* analysis.

Bank Mellat stages 3 and 4: Could a less intrusive measure have been used without unacceptably compromising the achievement of the objective? 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, does the former outweigh the latter?

116. So far as less intrusive measures are concerned, there are two kinds of alternatives on which the claimants rely. First, the measure could have been introduced at the start of the 2025/26 academic year rather than in January 2025. Second, exemptions could have been introduced to cater for the position of particular groups of children.

117. As to timing, the phasing analysis produced by HMRC assumed that there would be approximately 3,000 displacements in the 2024/25 academic year. The evidence filed on behalf of the Claim 1 claimants by Julie Robinson, Chief Executive Officer of the Independent Schools Council, provides no basis for doubting these projections. For these pupils, the imposition of VAT in the middle of the academic year will cause greater disruption than if the introduction of the measure had been delayed to the start of the 2025/26 academic year.

118. It is, however, important to bear in mind that the question at stage 3 of the *Bank Mellat* analysis is whether a less intrusive means could have been used *without unacceptably comprising the achievement of the objective*. In this case, the effect of delaying the measure to the start of the 2025/26 academic year would have been to forego some £900 million in net revenue (on the OBR-certified projections). On any view, that would compromise the achievement of the objective. Whether such a compromise was acceptable involved a macroeconomic judgment in circumstances when many parts of the public sector were facing significant financial constraints. Parliament specifically considered the issue. We do not consider that the decision to introduce the measure from January 2025 exceeded Parliament's broad margin of discretion.

119. The proportionality of the absence of exemptions depends on an individual analysis of the various categories for whom it is said such exemptions should have been made. This analysis is, in our judgment, better examined under the rubric of Article 14 read with A2P1.

120. As to the question of fair balance, the Claim 1 and Claim 3 claimants made a general argument that VAT is a regressive tax in that it is payable without regard to the income or wealth of those who use the relevant services. This is correct, as far as it goes. The data available to the Government parties were to the effect that the majority of those attending private schools fall into the top two income deciles and that 94 per cent of pupils then attending private schools would continue to do so. Ms Robinson's evidence (filed by the Claim 1 claimants) was to the effect that 90 per cent of families with children at private schools have a household income of more than £50,000. None of this undermines the claimants' points that significant numbers of those affected were in lower-income households and some were in receipt of benefits. But this information was all available to MPs and peers. The conclusion reached by Parliament that the revenue which would be raised justified the impact on those on lower incomes in our judgment fell squarely within Parliament's margin of discretion.

Conclusion

121. For these reasons, and subject to further consideration of its effects on the groups relied upon, we conclude that the challenged provisions serve legitimate aims and are proportionate to those aims and, therefore, are compatible with A2P1.

Issue (b): Article 14 read with A2P1

Overview

122. Article 14 prohibits discrimination in the enjoyment of other Convention rights "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

123. The requirements for a claim under Article 14 are comprehensively explained in the decision of the Supreme Court in *SC*. In a claim alleging discrimination under Article 14, it is necessary for the claimant to establish two preliminary matters. The first is that the alleged discrimination falls within the "ambit" of one of the substantive articles of the Convention. The second is that the discrimination is on one of the grounds expressly referred to or (where the claimant relies on "other status") on the ground of an identified characteristic or status: see at [36] and [37(1)].

124. Once these hurdles are surmounted, the prohibition in Article 14 encompasses three distinct species of discrimination: first, direct discrimination (which requires the claimant to establish "a difference in the treatment of persons in analogous, or relevantly similar, situations": [47]); secondly, what is often referred to as *Thlimmenos* discrimination (failing to treat differently persons whose situations are significantly different: [48], citing *Thlimmenos v Greece* (2000) 31 EHRR 15); and thirdly, indirect discrimination (where a measure or policy is based on an apparently neutral ground, which in practice causes a disproportionately prejudicial effect on a group characterised by a salient attribute or status: [49]-[53]). This latter type of discrimination can be established by showing statistically that the measure in practice applies to a disproportionate number of persons in the relevant group (see e.g. *DH v Czech Republic* (2008) 47 EHRR 3) or by showing that, although it applies to everyone equally, it has a disproportionate adverse impact on persons in one particular group (see e.g. *SAS v France* (2015) 60 EHRR 11, where a ban on face coverings had a greater adverse impact on Muslim women).

125. At [62], Lord Reed said this:

> "I should observe at the outset that there may be an issue as to the scope of the concept of indirect discrimination. As explained earlier, the concept is concerned with measures which, although neutral in appearance, have a disproportionately prejudicial impact upon a group sharing a common characteristic. Every case to date in which the European court has treated the concept as relevant has concerned a group sharing a common characteristic corresponding to a 'suspect' ground of differential treatment such as sex, sexual orientation, ethnic origin, nationality, religion or disability. 'Suspect' grounds are

> discussed at paras 100-113 below… The view has been expressed that indirect discrimination is confined to 'suspect' grounds: Van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights*, 5th ed (2018), p 1006. Without necessarily going so far, one might in any event question whether children, considered as a whole, constitute a group of the relevant kind. I do not, however, need to examine that point, which was not raised in argument."

126. *JD v United Kingdom* [2020] HLR 5 is a recent example of a case where the Strasbourg Court analysed a modification of the housing benefit rules (known colloquially as the "bedroom tax") as giving rise to *Thlimmenos* and indirect discrimination. One of the applicants was disabled; the other had been the victim of gender-based violence. The Court said this:

> "91. The question to be examined is whether there has been a discriminatory failure by the authorities of the respondent State to make a distinction in the applicants' favour on the basis that their relevant circumstances were significantly different from those of other recipients of the Housing Benefit who were adversely affected by the contested policy. More specifically, the issue is whether, as a result of a failure to make a distinction, the impugned general measure, in the form of the legislative changes affecting the recipients of the Housing Benefit, was put in place in such a manner as to produce disproportionately prejudicial effects on the applicants because of their particular circumstances which, in respect of the first applicant, were linked to her daughter's disability and, in respect of the second applicant, to her gender.
>
> 92… The court accepts the applicants' arguments that in this respect, they were in a significantly different situation and particularly prejudiced by the policy because they demonstrated they had a particular need to be able to remain in their specifically adapted homes for reasons directly related to their status. In the case of the first applicant, loss of her home would cause exceptional hardship given her daughter's severe mental and physical disabilities. In the case of the second applicant, loss of her home would risk her personal safety. Thus, for these reasons, the consequence of the measure was much more severe for the applicants than for others whose entitlement to Housing Benefit was reduced."

127. The measure challenged here is uniform in application, so does not involve direct discrimination on any relevant prohibited ground. The claimants put their case on two alternative bases: that the measure fails to treat differently groups whose situations are significantly different (*Thlimmenos* discrimination) and that the uniform rule has disproportionately adverse effects on various groups, each defined by reference to a relevant status (indirect discrimination).

128. If a claimant can establish that he or she has been subject to any kind of discrimination, the burden shifts to the state to establish justification. The question of what exactly it is that must be justified is not entirely straightforward. In *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, [189], Lady Hale said that, in a direct discrimination case, it was the differential treatment that had to be justified, whereas in an indirect discrimination case, the measure was ex hypothesi neutral, so what had to be justified was the measure itself. That is consistent with the language used in *SC* at [53] to explain the state's burden in an indirect discrimination case: "to demonstrate that the measure in question has an objective and reasonable justification: in other words, that it pursues a legitimate aim by proportionate means".

129. In our judgment, however, *Thlimmenos* discrimination has more in common with direct discrimination in this respect. If the thing that must be justified in a direct discrimination case is the differential treatment, logic would suggest that, in a *Thlimmenos* discrimination case, what must be justified is the *lack* of differential treatment—in other words, the uniform nature of the rule or the absence of exemptions, rather than the policy in some broader sense. This is consistent with the approach taken by the Supreme Court in: *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289, [53], [109], [124], [136(iv)] and [162].

130. In assessing the breadth of the margin of discretion, the factors we have mentioned when assessing proportionality under A2P1 will be relevant, as will the question whether the discrimination is on a "suspect" ground: see *JD*, [89]; *Royal Cayman Islands Police v Commissioner of Police* [2022] ICR 117, [87]. However, "a less intense level of review may be appropriate where the discrimination complained of is indirect (even involving a 'suspect ground')": see *R (The Motherhood Plan) v HM Treasury* [2021] EWCA Civ 1703, [2022] PTSR 494, [127] (Underhill and Baker LJJ, with whom Nicola Davies LJ agreed). The Court of Appeal in that case drew particular attention to what was said in *SC* at [162], which bears quoting in full:

> "It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in *JD* [2020] HLR 5, para 11:
>
> > 'Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts.'
>
> In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of

> continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented, at para 10:
>
> > 'Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated.'"

As the first internal quotation makes clear, this applies as much to legislative decisions *not* to differentiate as it does to legislative decisions to differentiate.

131. The Strasbourg Court's tolerance for "bright line" rules has varied. In *Hirst v United Kingdom (No. 2)* (2005) 42 EHRR 849 (which concerned the exclusion of prisoners from the franchise), *S v United Kingdom* (2008) 48 EHRR 1169 (which concerned the mandatory retention of DNA profiles taken from arrested offenders) and *Ponomaryov* (discussed above), the "blanket" nature of the rules was what made them disproportionate. On the other hand, in *Animal Defenders International v United Kingdom* (2013) 57 EHRR 607, the Court accepted a "bright line" legislative ban on political advertising in the broadcast media, taking into account that potential exemptions had been considered by Parliament and ruled out. As the Strasbourg Court said at [108] of its judgment in that case, it was for the state to assess the risk of abuse if a general measure were to be relaxed.

132. In their judgment in *Tigere*, Lord Sumption and Lord Reed noted at [88] that "[t]hose who criticise rules of general application commonly refer to them as 'blanket rules' as if that were self-evidently bad. However, all rules of general application to some prescribed category are 'blanket rules' as applied to that category. The question is whether the categorisation is justifiable". At [90], they said that the Strasbourg Court had always recognised that "the certainty associated with rules of general application is in many cases an advantage and may be a decisive one". At [98], they observed that "in a case where a line has to be drawn at some point in a continuous spectrum, proportionality cannot be tested by reference to outlying cases". To similar effect, see Lord Hughes' judgment in the same case at [60]. Although Lord Sumption and Lord Reed were dissenting in *Tigere*, their observations on the merits of "bright line" rules have since been endorsed as valid and of general significance: see *R (Z) v London Borough of Hackney*, [85] and *In re JR 123* [2025] UKSC 8, [2025] 2 WLR 435, [56].

133. Some of the case law on "bright line" rules focuses on the demerits in terms of administrative efficiency and certainty of a system which allows for a "case by case" analysis. The same demerits may also be found in a system which, although it consists of rules of general application, has complex exemptions. Another difficulty with such

a system is that creating an exemption for one category is liable to invite the question why it should not be extended to others. In our view, it may in principle be justifiable for a legislature to prefer a general rule with no exemptions over a system which requires fine and potentially invidious distinctions between categories of individuals who qualify for an exemption and categories who do not.

134. Relatedly, in *Carson v United Kingdom* (2010) 51 EHRR 13, the Strasbourg Court said this at [62]:

> "The Court observes at the outset that, as with all complaints of alleged discrimination in a welfare or pensions system, it is concerned with the compatibility with art. 14 of the system, not with the individual facts or circumstances of the particular applicants or of others who are or might be affected by the legislation. Much is made in the applicants' submissions and in those of the third-party intervener of the extreme financial hardship which may result from the policy... However, the Court is not in a position to make an assessment of the effects, if any, on the many thousands in the same position as the applicants and nor should it try to do so. Any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need."

The same reasoning applies to complaints of discrimination in the context of a taxation system. In our judgment, it applies squarely in the present context.

135. Drawing the threads together, when considering whether *Thlimmenos* or indirect discrimination on a "suspect" ground is justified, the margin of discretion which should be accorded to Parliament, though somewhat narrower than under A2P1 taken on its own, is nonetheless relatively broad.

Does the alleged discrimination fall within the ambit of A2P1?

136. The Government parties did not accept that the alleged discrimination falls within the ambit of A2P1. However, we have already concluded that the challenged measure engages the substance of that article. It follows that the alleged discrimination is within the ambit of A2P1 so as to trigger the application of Article 14.

137. Having concluded that Article 14 is engaged, we consider the groups relied upon in turn.

Charedi Jewish children (and parents) attending private faith schools

Submissions and evidence for the Claim 1 claimants

138. The submissions on Article 14 for the Claim 1 claimants were made by Paul Luckhurst. These were clear, cogent and precise. We were very much assisted by them.

139. Mr Luckhurst drew attention to the witness statement of Motty Pinter, Director of Communal Affairs at Chinuch UK, the organisation representing strictly Orthodox

Jewish schools across the UK. He explains that, due to their need for religious, educational and cultural infrastructure, as well as their historic experience of antisemitism, Charedi families tend to live in clusters in London (Hackney, Haringey and Barnet), Salford, Bury, Gateshead, and Essex. The curriculum and teaching environment is closely aligned with Orthodox Jewish customs and values and promotes knowledge of the Yiddish language. Mr Pinter says this:

> "For the overwhelming majority of the Charedi community, attending independent faith schools is a non-negotiable part of faith. There are a few Charedi maintained schools and in the short to medium term, low possibility of more opening. There is no 'choice' for these families to send their children to non-Charedi state schools, both due to their religious beliefs and because insufficient space in the state sector. In areas such as Gateshead and Stamford Hill, 100 per cent and well over 97 per cent of Charedi children respectively, attend Charedi independent schools. Every child attending a Charedi independent school in the UK is from Charedi background. The only state schools attended by Charedi children are dedicated Charedi state schools and not a single Charedi child attends a state school outside of Charedi state schools."

140. The vast majority of Charedi children live in large, low-income families. Charedi schools ask for minimal contributions, typically less than £100 per week. In practice children are typically not denied access if their parents cannot afford these fees, "as the community tends to find a way to support specific students". In general, Charedi schools are in poor financial health, with deficits equivalent to 3 months of operating costs and cash reserves averaging just 3 per cent. An analysis of 30 out of the total 65 Charedi schools shows that nearly half have net negative funds.

141. Hackney has the largest Charedi community outside Israel and New York. There are over 10,000 school-age Charedi children there, amounting to 1 in 3 children in Hackney. There is only one Charedi state school: the Yesodey Hatorah Senior Girls' School, with 358 pupils enrolled. All the other Charedi children attend independent Charedi schools. Hackney had only 2,425 vacant spaces in the state sector in August 2024. In *R (Z) v London Borough of Hackney* [2020] UKSC 40, [2020] 1 WLR 4327, Lord Sales (with whom Lord Reed, Lord Kitchin and Lord Kerr agreed) noted that there was a strong correlation between the poverty and deprivation and the religion (see [35]) and that "the needs of members of the Orthodox Jewish community are different from those who are not members of it" (see [39]).

142. As examples of the circumstances of Charedi Jewish families, Mr Luckhurst relied on the witness statements of AON (father of ABC, an 8-year old girl attending a single sex private Charedi school) and BAU (father of BYL, a 13-year old boy), whose details are set out at paras 6-9 of Annex A.

143. In a letter dated 24 September 2024, the Director of Education for the London Borough of Hackney expressed his concerns about the effect of proposed imposition of VAT on private school fees on Charedi families in Hackney. He pointed out that other parents might respond by sending their children to a less expensive private school or to a state

school, but Charedi parents might opt for home education, which would mean that the local authority had less oversight over their education.

144. The Government's own internal documents show that ministers were advised that faith schools serving narrow religious communities were generally smaller schools with lower fees on average than other private schools. They would face a proportionately larger net VAT liability because staff costs make up a larger proportion of their costs and these cannot be reclaimed. They generally catered for middle income families who were more price sensitive. They would be more at risk of insolvency and will be more likely to pass on a relatively larger proportion of a new VAT charge to parents. On this basis, it was expected that pupils at these schools would be disproportionately impacted. Later briefing materials for ministers made clear that the average fee charged by Charedi schools is £2,231 a year and that there is no alternative in the state sector. Although the Department for Education was talking to local authorities (including Hackney) about the potential for more state-funded faith schools catering to the needs of affected communities (through conversion of existing private schools into voluntary aided schools), this would not be a solution for all affected schools as some would be unlikely to meet state sector regulatory requirements.

145. It is clear that specific consideration was given to an exemption for small schools where the fees do not exceed the average per-pupil funding provided to state schools. A similar approach was taken in Australia when the Victorian Government introduced a payroll tax on non-government schools. HMRC analysis shows that only 200 schools would be covered by such an exemption. On a worst case scenario, this would cost £30 million, a very small proportion of the total revenue which the challenged measure is expected to raise.

146. Mr Luckhurst submitted that Charedi Jewish children are victims of *Thlimmenos* discrimination. They are treated in the same way as other children affected by the measure, but their situation is significantly different. There is no sufficient justification for the failure to create appropriate exemptions.

Submissions for the Government parties

147. Sarah Hannett KC for the Government parties submitted that any exemption framed to apply only to those attending a particular school because of their faith would have to be operated on a non-discriminatory basis and therefore include anyone attending a private school in order to receive an education in conformity with their faith or non-religious belief. There would be an obvious potential for abuse, and for the depletion of the revenue sought to be raised, if an exemption were framed in this way.

148. An exemption framed to apply to schools charging low fees would also be open to abuse and administratively unworkable and would require significant and new resources to collect and analyse data which the Department for Education does not currently verify, publish, or use in policy design. Such an exemption would in any event be unfair. State schools are able to educate children of all faiths and none through systems of mutual tolerance and respect. The State is not required to subsidise private education because some religious communities do not wish to avail themselves of pluralistic teaching or because some schools serving particular communities refuse to comply with their existing obligations concerning relationships and sex education.

Discussion

149. The evidence establishes three material features of the circumstances of most Charedi Jewish families. First, they have a strong religious and cultural preference for a Charedi education. Secondly, there are almost no state schools which offer such an education, so they do not have state alternatives which are religiously acceptable to them. Thirdly, they form a socio-economically deprived community and often have large families. These features show both that the challenged measure fails to treat differently groups whose situations are significantly different (and thus that its uniform nature requires justification under the *Thlimmenos* principle) and that it has disproportionately adverse effects on Charedi Jews, a group defined by a common race and religion (and thus that the measure is indirectly discriminatory and so requires justification).

150. Although the object of justification differs depending on whether the discrimination involved is *Thlimmenos* or indirect discrimination, in a case such as the present, the applicable considerations are similar. In practice, the question is whether, in light of the reasons for not creating relevant exemptions, the decision to impose a uniform rule fell within the applicable margin of discretion. In assessing the breadth of the margin of discretion, the factors we have mentioned when considering proportionality under A2P1 are relevant. In this case, we are considering a complaint of discrimination, which narrows the margin to some degree, subject to the considerations we have set out at [129]-[133] above.

151. There are many different ways in which an exemption could be framed so as to benefit Charedi Jewish families, but there are obvious difficulties with each of them. An exemption for all schools with a religious ethos would be over-inclusive. It would benefit schools such as Eton College, Harrow School, Westminster School, Cheltenham Ladies' College and Winchester College, where, as a group, the pupils and their families lack the special features said to justify the exemption. Any exemption for faith schools would presumably also have to be extended to those with a particular non-religious ethos based on a philosophical conviction which attracts the protection of Article 9 and A2P1. Sensibly, Mr Luckhurst did not devote any time to arguing for such a broadly drawn exemption. The arguments against it, both practical and principled, are overwhelming.

152. If the exemption were much more narrowly drawn—e.g. as applying to Charedi Jewish schools only—the question would arise why families at these schools were being given preferential treatment over other families in which children attend other faith schools with similar characteristics. How could these characteristics be defined? Two critical features said to justify the exemption are that Charedi Jews have a particular need for an education with special religious and cultural elements and that such an education is not available in the state sector. But other groups would presumably argue that the same applies to them. How would one decide whether a given child had a "need" for an education with particular religious and cultural elements? Any system which left such a judgment to individual parents would be obviously open to abuse. And even if a criterion or mechanism could be devised to determine "need", how would one decide whether adequate alternative provision was available in the state sector? If there was a state faith school in a different area, would the parents be expected to move? If that

school followed the principles of a different branch or sect of the same religion would that be an adequate alternative?

153. These are the kinds of questions legislators have to grapple with when practising "the art of wise differentiation" (as Judges Pejchal and Wojticzek put it in the passage cited by Lord Reed in *SC* at [162]), i.e. when deciding how broad or specific their legislation should be. Legislators may recognise that a general rule will cause hardship in individual cases, or to particular groups, but they do not have the luxury of stopping there. They have to go on to consider whether there is any rule or mechanism by which the hardship can be alleviated which is reasonably resistant to abuse, does not impose excessive administrative burdens, is rationally defensible and does not unacceptably undermine the overall purpose of the measure. Sometimes, the answer will be that there is no such rule or mechanism. In other cases, there may be various candidates but they would carry significant disbenefits and, in the judgment of the legislature, a uniform rule is preferable.

154. The most plausible solution suggested would exempt fees below a particular level. One possibility would be to exempt all schools charging less than the average amount that state schools receive per pupil. As Mr Luckhurst submitted, the Government's own figures show that such an exemption would have reduced by no more than £30 million the net revenue to be gained by the measure. In the context of a measure expected to raise some £1.5 billion net in the long term, this may be regarded as a relatively modest loss.

155. The Government, however, had both practical and principled reasons for rejecting such an exemption. There was a concern that schools would seek to bring their fees below the applicable limit by soliciting donations that would not attract VAT. To avoid this, HMRC would have to devote significant resources to collecting and analysing data and to monitoring the conduct of private schools. We do not completely discount this concern, but we doubt that it has more than modest weight given the small numbers of schools involved and the fact that, even without any exemption of the kind contended for, the introduction of VAT is likely to incentivise the same sort of behaviour on the part of some schools, which HMRC will presumably have to devise mechanisms to monitor.

156. The principled reasons advanced were, in our view, more substantial and carried considerable weight. The Government's general policy is that non-denominational state schools should be and are capable of providing a broad, pluralistic curriculum suitable for children from families of all religions and none. Moreover, as explained in the witness statement of Susan Whitehouse, Deputy Director at the Department for Education, there are ways in which private schools can move into the state sector. The one typically preferred by private schools currently serving orthodox and conservative communities is to apply to become a voluntary aided school, which can have 100 per cent faith-based admissions if the number of applicants professing the relevant faith is sufficient. However, many private schools would have to make significant changes before they could achieve voluntary-aided status. They would have to demonstrate, for example, that they have proper governance and management arrangements, broad curriculums and properly-qualified teaching staff.

157. The Government's evidence puts the point delicately, but the thrust of it is that many of the existing small private schools serving orthodox and conservative communities do not currently meet these standards. At present, VAT is not charged on any private school fees, so the Government's attitude to these low-fee schools may be described as neutral. Mr Luckhurst stressed that he was not arguing for any subsidy for low-fee schools, merely for an exemption from a tax which would cause real difficulties for a small category of mostly poor families. In our view, the matter is not that simple. Once it is conceded that the imposition of VAT on private school fees is in principle consistent with A2P1, any exemption for a particular group will necessarily be seen as a decision to grant special treatment to those to whom it applies. A special exemption for low-fee schools would be seen, and would have to be justified, as providing material assistance to a category of schools many of which do not meet the minimum standards applicable in the state sector.

158. Moreover, legislators facing claims for exemptions from particular groups are, in our judgment, entitled to consider matters more broadly. The creation of legislative exemptions invites questions in the form: "if A, why not also B?" If an exemption for low-fee schools were justified on the basis that many or most of the pupils attending such schools have a "need" for educational provision which is not available in the state sector, others who claim a similar "need" but attend schools where the fees are higher might well ask: "Why does the fact that a school charges lower fees justify special treatment?" There is, after all, no inherent public interest in children receiving an education which costs less than the state-sector average. More concretely, the evidence before us includes examples of children with SEN attending private special schools where the fees are higher, but only because of the more intensive resources required to teach children with disabilities. Why should they not also be exempt? In considering whether to create an exemption for low-fee schools, Parliament could properly anticipate questions like these. One possible response was to opt for a simple, uniform rule over one containing exemptions which threaten to unravel the justification for the general rule.

159. In our view, the task of weighing up the arguments for and against an exemption for low-cost schools was quintessentially one for Parliament. In this regard, we note that the case for an exemption for "all children at schools whose fees are lower than the average per capita funding for a state school place, and children at religious schools of denominations for whom there is no faith school provision in the state sector" was specifically made in an Opposition Day Motion in the House of Commons (HC Deb 8 October 2024, vol 754, col. 164). In other words, the matter was before Parliament, which decided not to create any exemption.

160. Although the cogent evidence of the likely effects of the measure on Charedi Jewish families concerned us, and despite our sympathy for the families whose circumstances were in evidence before us, we have concluded that the decision not to create a legislative exemption covering their cases nonetheless fell within the margin of discretion which must be afforded to Parliament in the circumstances of this case.

Muslim children (and parents) attending private faith schools

Submissions for the Claim 1 claimants

161. Mr Luckhurst noted that the Government's own evidence showed that there are about 21,000 children at 141 schools under the umbrella of the Association of Muslim Schools. These schools charge average fees of £2,959 a year. Only two of these schools charge more than £7,690 a year, the average per pupil funding received by schools in the state sector. At a meeting between the Exchequer Secretary to the Treasury and the Association in September 2024, it was pointed out that these schools were mostly in deprived areas, very few have the reserves necessary to absorb additional costs and there was "limited alternative provision in the state sector". Islamic state schools are mostly clustered in Birmingham, Tower Hamlets and Leicester and even here there is a lack of capacity.

162. As an example of the Muslim parents affected by the challenged measure, Mr Luckhurst drew attention to the witness statement of ALV, whose details are set out at paras 10-11 of Annex A.

Submissions for the Government parties

163. Ms Hannett for the Government parties submitted that the high point of the evidence about Muslim schools was the vague statement that such schools were "mostly based in deprived areas". However, there is no evidence that Muslim parents are less likely to be able to meet any increase in fees connected with the imposition of VAT. If particular parents are unable to afford the increase, the reason why is their impecuniosity, rather than their religion. There is also no evidence to show that Muslim pupils, who attend a broad range of schools, are likely to have greater difficulty than others in finding a religiously acceptable alternative in the state sector.

164. In any event, for the same reasons as canvassed in respect of Charedi schools, any exemption that would cover children attending Muslim private schools, or low-fee private schools generally, would be impracticable and/or unfair.

Discussion

165. We have no doubt that the evidence of ALV presents a true and accurate picture of his family's circumstances. It establishes that the measure challenged may well make the fees charged by ALT's current private school unaffordable and that ALT may therefore have to move schools. We accept that this would be destabilising for her and might well impact adversely on her ability to receive education that is aligned with her and her family's religious beliefs and cultural preferences. We sympathise with her and ALV's concerns in this regard, particularly given the unhappy experiences she had at one of her former schools.

166. The material relied upon by the Claim 1 claimants does not, however, supply evidence for the contention that Muslims, as a group, are more likely to find themselves in this position than others. In this regard, we note that the cohort of Muslim pupils currently attending private schools is a very large one. There is nothing to substantiate the

submission that this cohort is more socio-economically deprived than others attending private schools. There is also nothing to indicate in what proportion of cases Muslim pupils or families who do find themselves in this position would have a state sector alternative which they would find acceptable. In this regard, we note that Muslim families differ greatly in what kind of education they consider their children need. Many are happy to send their children to state schools which are non-denominational (or, indeed, to non-Muslim faith schools) and many others attend state Muslim faith schools.

167. For these reasons, we do not accept that the claimants have established that Muslim pupils form a group whose situation is significantly different from that of pupils attending private schools generally (so that the uniform nature of the challenged measure requires justification under the *Thlimmenos* principle) or that the challenged measure has disproportionately adverse effects on Muslim pupils as a group (and thus that the measure is indirectly discriminatory and requires justification).

168. If, contrary to our view, *Thlimmenos* discrimination or indirect discrimination were established (for example, because the relatively small number of state Muslim faith schools made it less likely that a Muslim pupil would find a religiously acceptable alternative in the state-sector), we consider that the discrimination would be justified for the same combination of practical and (especially) principled reasons as apply in the case of Charedi Jewish pupils.

Evangelical Christians

Submissions for the Claim 3 claimants

169. Bruno Quintavalle for the Claim 3 claimants submitted that the educational choice required by the claimant parents is one where Christianity infuses the entire curriculum. Such education could not be provided by the state, as it would constitute religious indoctrination: *Folgerø v Norway* (2008) 46 EHRR 47. The imposition of VAT interferes with the claimant parents' and children's religious and philosophical convictions.

170. Mr Quintavalle drew attention to the availability of an exemption for low-cost schools and pointed out that the evidence of Ms Owusu-Ansah, Mr White, AHD and AWM showed that the effect of not creating any such exemption was that many parents would choose to home-school their children.

Submissions for the Government parties

171. Ms Hannett for the Government parties emphasised that all Evangelical Christian pupils are entitled to a place at a state-funded school. There is nothing to suggest that, as a matter of generality, Evangelical Christian pupils and/or parents view what is on offer in state schools (including in Christian state schools) as unsuitable for their faith needs and nothing to suggest that there is a particular connection between attendance at private school and Evangelicalism. Both private and state-funded faith schools have significant freedom to protect their religious ethos, and both private and State-funded faith schools are attended by children of many faiths and none.

172. There is nothing to suggest that Evangelical Christian pupils are more likely to be displaced to the state sector than non-Evangelical Christian pupils. Indeed, schools run by or associated with religious communities may be proportionally less impacted due to the assistance such communities receive in the form of donations and community support.

173. To the extent that Evangelical Christian children (or children from any other faith group) contend that they are disproportionately likely to be deprived of an education because their parents will refuse to send them to state school, that is not a difference in treatment which is attributable to the state.

Discussion

174. The evidence of Ms Owusu-Ansah, Mr White, AHD and AWM seems to us to establish that they are unlikely to regard as acceptable any education which is available in the state sector and that this is because of their belief that education must be "infused" with Christian principles, as Mr Quintavalle put it. However, to make out a claim of discrimination, they have to go further than the facts of their own cases and show that Evangelical Christians as a group are in a relevantly different position from others in this regard (so as to found a claim of *Thlimmenos* discrimination) or that they are disproportionately prejudiced by the challenged measure (so as to found a claim of indirect discrimination).

175. Although we have doubts about whether this can be said of "Evangelical Christians" generally, we are prepared to proceed on the footing that there is some relevant sub-group into which the claimants fall who can show both that they are in a relevantly different position from others and that that they are disproportionately prejudiced.

176. Even if that were so, we consider that the discrimination would be justified for the same combination of practical and (especially) principled reasons as apply in the case of Charedi Jewish pupils.

<u>French national children attending a French lycée</u>

Submissions for the Claim 1 claimants

177. The evidence points to a small but material number of children attending a school which follows a foreign curriculum. Examples are the Lycée Français Charles de Gaulle de Londres (which follows the French national curriculum), the Japanese School (which follows the Japanese Ministry of Education, Culture, Sports, Science and Technology or "MEXT" curriculum) and the Deutsche Schule London (which broadly follows the curriculum of Baden-Württemberg). The nature of such schools is explained in the witness statement of Julie Robinson on behalf of the Independent Schools Council. Although the language of instruction is one factor in parental choice, the typical reason for choosing them is that parents expect that the family will return to their home country and want to minimise the disruption to their children's education when they do. Mr Luckhurst drew attention to the fact that diplomatic representations had been made to the Government in favour of an exemption for such schools.

178. The materials produced by the Government to inform ministers' decision-making process itself recognised that families in this sector would be "disproportionately impacted" because they had "no alternative in the state sector" (see the briefing slides prepared in July 2024). Ministers had received requests from the French and German Governments (among others) to create an exemption for these schools because there is no state sector equivalent to the education they provide. Insofar as subsequent briefing materials highlighted the possibility of "me too" claims—especially from schools in receipt of extra funding from the Department for Education or the devolved administrations—they proceeded on a misunderstanding. The position of schools offering foreign curricula was materially different because there are no schools offering such curricula in the state sector.

Submissions for the Government parties

179. Ms Hannett for the Government parties submitted that there were two principal justifications for the decisions not to create any exemption for schools offering foreign curricula. First, such exemptions would not be workable. To operate such an exemption on a non-discriminatory basis it would need to apply to all children who attend any sort of international private school "in order to receive education in conformity with their home country's requirements". No data are collected on the reasons why children attend particular schools. Such data collection would be administratively onerous and prone to abuse. Nor would it be safe to assume that all children attending international schools do so "in order to receive education in conformity with their home country's requirements". It may be noted that, even on AMF's evidence, in the school attended by AMR, the pupil population is only "predominantly" French. Any exemption on the basis of nationality would be directly discriminatory against British pupils for no justifiable reason.

180. Furthermore, any such exemption would be unfair. There will inevitably be some parents who would prefer their children to be educated in a particular language or according to a particular curriculum. They will be placed in exactly the same position as many other children and parents who would prefer to be educated in their first language, or according to a particular curriculum, but cannot afford to access it. This includes the parents of asylum-seeking children.

Discussion

181. In relation to this group, it is important to consider with some rigour in what respect the challenged measure is discriminatory, before considering questions of justification. A claim that the measure is discriminatory against pupils of French nationality simpliciter would not succeed. There are a great many French national pupils who attend private schools of all kinds. The great majority attend schools which follow the UK national curriculum and could transfer to a school in the state sector. There is no evidence that the impact of the challenged measure will have a disproportionately prejudicial effect on French nationals as a group. Nor could it be said that French nationals as a group are in a significantly different position from other pupils at private schools, so as to support a claim of *Thlimmenos* discrimination in respect of the failure to create an exemption for them. (Indeed, no-one is suggesting an exemption for French nationals as such).

182. The group against which the measure is said to discriminate is a much narrower one. In the skeleton argument for the Claim 1 claimants, it was said to be "French national children attending a French lycée". We are prepared to assume that the decision not to create an exemption for those attending schools following the curriculum of another country is likely to affect disproportionately children who are nationals of the relevant countries. In principle, nationality is a "suspect ground", but it is important to bear in mind that the main exemption contended for (one applicable to all children attending the relevant schools) would also benefit pupils of other nationalities (including British pupils).

183. In considering the various justifications advanced by the Government in this regard, we note that there are again arguments both of practicality and of principle. As to the former, we accept the Claim 1 claimants' submission that it would have been relatively easy to identify the schools to which the exemption applied by stipulating that the school must be accredited by the government of a foreign state. But the fact that such a distinction would have been administratively possible did not determine the issue. If such a distinction had been made, the Government would inevitably have faced the question "Why stop there?" Parents who send their children to other types of school will also have reasons, which will no doubt seem equally compelling to them, to wish their children to be educated in their family's native language, or in accordance with a particular curriculum informed by their culture or religion.

184. The claimants say that the comparison with asylum-seeking or refugee families was inapt, because (ex hypothesi) they do not intend to return to their country of origin. We do not agree. A refugee family may well hope that they, or at least their children, will one day be able to return to their country of origin. In any event, they may have other reasons which are every bit as legitimate as a French family's to want their children to grow up speaking, reading and writing the family's native language and knowing about the culture and history of their native country. The same might be said of families who are not refugees but are first or second generation immigrants. Creating an exemption which did not apply to these would, in our judgment, have involved drawing a distinction which some Parliamentarians may well have regarded as invidious. This was, in our view, aptly described as a consideration going to the overall "fairness" of the scheme, the importance of which was repeatedly stressed by the Government in response to the suggestion of particular exemptions.

185. These considerations were in our judgment sufficiently weighty to compel the conclusion that Parliament's decision not to create an exemption for children attending schools accredited by a foreign government fell comfortably within its margin of discretion.

<u>Girls who have suffered sexual harassment and abuse attending single-sex private schools</u>

Submissions for the Claim 1 claimants

186. Mr Luckhurst submitted that girls who have suffered sexual harassment and abuse are in a relevantly different situation from those who have not. AMB is an example (see paras 22-26 of Annex A). They have a particular need for single-sex education, which may not be readily available in the state sector in their area. The Department for Education's own statutory guidance makes clear that "it is more likely girls will be the

victims of sexual violence and sexual harassment and more likely it will be perpetrated by boys". This justifies an exemption, which could itself be framed on a non-discriminatory basis (as in *JD & A v UK*). Separately, it was argued that belief in single sex education for girls is a "political or other opinion" protected under Article 14. The absence of an exemption has not been adequately justified.

Submissions for the Government parties

187. Ms Hannett for the Government parties submitted that, on a detailed analysis of AMB's evidence, it is not said that she needs to attend a single-sex school as a result of previous harassment. The need for single-sex schools for pupils who have experienced sexual harassment or abuse was not raised by stakeholders in the technical consultation. There is no evidence that girls have a particular need for single-sex education. State schools have safeguarding responsibilities and Equality Act duties, and there has been no suggestion that these are generally ineffective (though there may have been defaults in individual cases).

188. Any exemption would in any event be unworkable. It would be very difficult to assess whether a pupil needs single-sex education, as opposed to simply needing to attend a different school in the state sector. There would be a potential for abuse. An exemption would be unfair to girls in state schools and would unacceptably reduce the revenue raised by the measure.

189. Belief in single sex education does not have the level of cogency, seriousness, and cohesion necessary to attract protection under Article 14: see *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, [25]. In any event, any discrimination on that ground is justified.

Discussion

190. AMY's evidence is that AMB suffered emotional and physical bullying from other students at a local state school. The perpetrators were mostly boys. The bullying had a serious effect on her well-being and mental health. At the same time, she was the victim of online grooming by a boy from an identified school and a sexually explicit video of her was shared. She was withdrawn from the state school and home-schooled for a period. She then attended a private, co-educational school, where her parents were "happy to see her safe again and beginning to recover from the emotional trauma". She is now at another private school for girls aged 3 to 18 with good academic and pastoral care and small class sizes. AMY strongly believes that an all-girls environment is the best place for AMB to feel safe, recover from her past trauma and realise her academic potential. She says that there is "no alternative state school in our catchment that is single-sex and safe from bullying".

191. It would be impossible to read the evidence of AMY without feeling sympathy for AMB. We accept that the perpetrators of the bullying were mostly (though apparently not only) boys and that the perpetrator of the online grooming was also a boy (though there is no evidence that he was at her school). However, the fact that she felt safe at her previous co-educational school seems to us to indicate that what mattered in her case was a safe and disciplined learning environment rather than a single-sex one. The online grooming could have happened even if AMB had been at a single-sex school at

the time. AMY's evidence seems to us to indicate that the main driver of the decision to send AMB to a single-sex school was AMY's belief that a single-sex education would be better for her academically. In those circumstances, we do not think that there is any evidence to show that AMB "needs" to be educated in a single-sex environment, although we accept that her mother would prefer that.

192. In those circumstances, we consider that the factual predicate for the claim of discrimination against AMB is not made out. Moreover, while sexual harassment of girls at school is undoubtedly a problem, we do not consider that the evidence establishes more generally that there is a significant cohort of girls who, as a result of having suffered such harassment, can *only* be safely educated in a single-sex environment. We bear in mind that, as Ms Hannett submitted, all schools (whether in the state or the private sector) have obligations to address bullying in general and sexual harassment in particular. Both in the state and the private sector, some schools discharge this obligation better than others.

193. In any event, we agree with Ms Hannett that there are considerable objections to an exemption framed to apply to those who have suffered sexual harassment at school. A large number of pupils at co-educational schools will have suffered some form of sexual harassment from other pupils at school. It was suggested at one point in argument that the exemption could require those claiming it to provide a police report showing that they had reported such harassment. The difficulties with such an approach are obvious. It would create a very strong incentive to complain to the police. It is unclear how it would then be decided in which cases the victim's experience of harassment was such as to make single-sex education necessary.

194. In our view, the decision not to create an exemption for girls who have suffered sexual harassment and as a result need to attend a single-sex school was well within Parliament's margin of discretion.

195. We have considered separately the argument that the challenged measure discriminates against those with a belief in the merits of single-sex education. We are prepared to assume without deciding that such a belief could in some cases qualify as a political opinion for the purposes of Article 14, though this may well have to be considered in another case where the point matters. Even so, the objections to an exemption applicable to those who hold such a belief are obvious and overwhelming. How would it be judged whether the view of a particular parent amount to such a "political belief" (as opposed to a mere preference)? The only possible evidence on which such a judgment could be made would be the say-so of the parent concerned, which would undermine the policy and produce a strong incentive to profess the relevant belief.

Children with SEN but without an EHCP

Submissions for the Claim 2 claimants

196. Mr Hyam for the Claim 2 claimants accepted that there is a statutory system applicable to children with SEN (an outline of which we have set out in Annex C), under which an EHCP which names a private school will continue to have their fees paid by the local authority. Under existing arrangements, the local authority will be able to claim back any VAT, so the imposition of VAT will not affect them at all.

197. He submitted, however, that "children who have SEN but no EHCP" have a status for the purposes of Article 14. This is either a form of, or a close analogue of, disability. In domestic law, to have SEN, a child must have either a disability (for the purposes of the Equality Act 2010) or a learning difficulty (i.e. "has a significantly greater difficulty in learning than the majority of others of the same age": s. 20(1) and (2)(a) of the Children and Families Act 2014 ("the 2014 Act")). Either way, the child has a disability for the purposes of Article 14: *TH v Bulgaria* (2023) 77 EHRR 18, [105].

198. Children with SEN but no EHCP are in a significantly different situation from other children at private schools and the challenged measure has a disproportionately prejudicial effect on them. This is because, unlike children who do not have SEN, they will be going into a system which either will not meet, or is highly unlikely to meet, their needs. The system is failing to meet the needs of those with SEN who are already in the state sector, whether they have an EHCP or not.

199. Mr Hyam relied on facts extracted from the 2024 report of the National Audit Office. There was a minor disagreement on the precise form in which these facts could be admitted without breaching Article 9 of the Bill of Rights or any wider principle of Parliamentary privilege. We did not think the dispute mattered, because even in the form agreed by the Government parties, the agreed facts amply support the view of the Local Government Ombudsman in her Annual Review of Local Government Complaints in July 2024:

> "The [SEN] system is simply not working for children, families or local authorities: the money available is not sufficient to provide the services that children are entitled to, many organisations are severely understaffed and in many areas suitable and affordable support does not exist. It means young people, and their families, don't get the help they need and lose vital weeks, months and years of education and development as a result. They don't get that time back."

200. We have accordingly taken as our starting point the facts agreed by the Government parties, which we have set out in Annex D.

201. Mr Hyam submitted that there is no rational connection between the challenged measure and the stated aims of raising revenue, fairness or workability because the Government has failed to ask three questions.

    (a) How much revenue will actually be raised by imposing VAT on the fees payable in respect of SEN children without EHCPs? The Government asked itself a different question, namely what revenue would be lost by exempting this cohort from the scope of the policy. If it had asked itself the right question, it would have realised that the income attributable to this cohort is only around £250 million, not £450 million. In any event, the figure of £450 million is based on an unevidenced assumption of significant abuse by private schools if there was an exemption for SEN children, resulting in the number of SEN children increasing by about a half (some 55,000 children). There is no reason to suppose that an exemption would give rise to abuse at that level.

(b) What would be the additional cost of accommodating displaced SEN children in the state sector? On its own evidence, it has not calculated this cost, which includes necessary increases to school budgets, increases to high needs funding, additional costs in respect of EHCPs, additional tribunal costs, and additional transport costs. It is not an acceptable substitute to rely on a high-level estimate based on per-pupil funding, because SEN pupils have additional needs and meeting these is more expensive than meeting the needs of a child who does not have SEN.

(c) Is it feasible that the SEN system, which is already admitted to be in crisis, will be able to cope with the influx of displaced SEN children without causing significant detriment to those being displaced and those currently receiving SEN provision in the state sector?

202. The Government's argument that there is no less intrusive means available and that the challenged measure strikes a fair balance should be rejected because:

(a) The relevant cohort are being displaced from provision in private schools that is currently well-placed to meet their needs to a system which is incapable of meeting them in a reasonable time or at all.

(b) The Government's argument is based on the fallacy that there would be only a 0.1 per cent increase in children with SEN in the state sector which (it is implied) the state can easily absorb. There is no evidence to support that proposition. The system in the state sector is already at breaking point.

(c) There is no evidence that the Government has ever considered the concern that the timing of the introduction of the legislation would lead to this even greater impact for displaced SEN children whose SEN makes transitioning difficult.

(d) It is no answer to say that the provision will be available through SEN Support (paid for by school budgets, or high needs funding from local authorities). The evidence shows it will not. There is no means of securing special educational provision ("SEP") absent an EHCP, but obtaining EHCPs is either impossible or significantly delayed and does not necessarily result in the required SEP.

203. Furthermore, the Government's insistence on including the cohort in scope to maintain workability is also misconceived. There is a well-established statutory definition of SEN at s. 20 of the 2014 Act. Further, private schools are already required to identify those of their pupils who have SEN or a disability and there is a very detailed SEN Code of Practice to help identify pupils with SEN. The Government's claim of potential misuse also fails to take account of the myriad reasons why that should not be supposed, not least that private schools do not currently "game the system" for EHCPs.

Submissions for the Government parties

204. Sir James for the Government parties submitted that the effect of the challenged measure would be different for different pupils. This can be seen from the claimants themselves. Some (ALR and ANF) are intending to apply for an EHCP. Some have not applied and do not intend to do so (ALN, ALX and ALW). Some do not appear to have SEN provision in their current private schools (ALX and ANF). There is a considerable

variation in the fees being paid (ALR's parent pays £27,930 per annum, ALX's parent pays £5,735 per annum).

205. Given that the status relied on is now "disability", it should be noted that not all pupils with SEN have a disability, not all pupils with disabilities have SEN and those with EHCPs may have a disability.

206. There is no evidence that children with SEN but without EHCPs are more likely to be in the cohort of children who are displaced from their chosen private schools. That is what is required by *SC*, [53].

207. In any event, children with SEN but no EHCP are not in an analogous position to children without SEN and are not treated by state schools as being in an analogous position: see *R (Simone) v Chancellor of the Exchequer* [2019] EWHC 2609 (Admin), [99]-[100]. When they enter the state system, children with SEN but without an EHCP are treated in ways which are fundamentally different from how children without SEN are treated. In particular, they benefit from the obligations on mainstream state schools: (i) to use their "best endeavours" to ensure that the provision necessary to meet a pupil's SEN is made; (ii) to appoint a suitably qualified or experienced Special Educational Needs Co-ordinator; (iii) to secure that a child with SEN engages in the activities of the school together with children who do not have SEN; (iv) to take action to remove barriers to learning and put effective SEP in place. As the Court recognised in *Simone*, the Government spends billions of pounds a year on SEN funding to support the detailed statutory regime. Moreover, if a child without an EHCP seeks one (and satisfies the relevant thresholds) the child's EHCP will make further provision for them. If the EHCP names a private school, the local authority will pay that child's private school fees (and be able to reclaim VAT). Any failure to make available the provision specified in the EHCP is enforceable by way of judicial review.

208. As to justification, Sir James relies on all the same matters as are relied upon in relation to the other groups against whom it is said the challenged measure discriminates. In addition, he argues that the Claim 2 claimants' critique of the Government's financial analysis is flawed. The Government's figure for the per pupil costs of additional children coming into the state sector is based on an average, which includes those with SEN. The analysis focussed on the right question: the cost of exempting pupils with SEN but no EHCP. It is not safe to assume that 34 per cent of displaced pupils with SEN will apply for an EHCP (since, if these pupils met the thresholds for an EHCP, there would already have been a strong incentive to apply for one). In any event, the projected cost of additional EHCPs (£40 million) is significantly lower than the expected yield of the policy (£1.5 billion). Legal and transport costs are likely to be negligible in terms of yield.

209. Moreover, there was no less intrusive measure that would not have unacceptably compromised the legitimate aims of the measure.

    (a) Carving out children with SEN but no EHCP would be unfair in principle to the 1.1 million pupils with SEN but no EHCP currently being educated in the state sector. Some parents may feel that a private school is better able to meet their child's needs than the state sector, but fairness required that, in the absence of a formal, objective assessment by the state (either by the local authority or the First-tier Tribunal) that

the child should be educated in a private school, no exemption is made for such pupils.

(b) Such a carve-out would be administratively unworkable. The definition of whether a child has SEN is not objective or independently verifiable. Two children with the same needs may be reported as having SEN, or not, depending on their school. There are significant local variations in the identification of SEN depending on resources and the practices of individual establishments.

(c) The carve-out would unacceptably decrease revenue, by an estimated £450 million in 2025/26 alone. The estimate properly included an estimate of the behavioural response to an exemption, which is not entirely accounted for by "abuse".

(d) An exemption would, however, incentivise abuse in the form of overcounting children with SEN.

Discussion: Overview

210. We have set out in Annex C the key statutory obligations owed by local authorities and schools in relation to special educational needs. It may be noted that, once a child is assessed as having SEN, the obligation on a mainstream school imposed by s. 66 CFA 2014 is only to "use its best endeavours" to secure that the special educational provision called for by the child's SEN is made. Unless the child has an EHCP, there is no hard-edged statutory obligation to make provision for the child's SEN.

211. The reality on the ground in October 2024 can be gleaned from the facts set out at Annex D. There is no real dispute that the system was in the very recent past in a parlous condition due to a chronic lack of funding. On 11 January 2025, the Secretary of State for Education, the Rt Hon. Bridget Phillipson MP, put it like this in an interview with The Northern Echo: "We all know that the SEND system isn't working for children and young people. Increasingly, parents have lost confidence and the outcomes of young people with SEND is just not good enough".

212. In our view, the claimants are fully entitled to take this as their starting point when considering whether the challenged measures give rise to discrimination contrary to Article 14 ECHR. It is, however, only a starting point. This is because, at the Budget in the same month (October 2024), the Government did two things. First, it confirmed the scope of the policy under challenge, which is projected to raise £1.5 billion of tax revenue per year. Secondly, it confirmed a £2.3 billion increase in the core state schools budget, including a £1 billion uplift in high needs funding.

213. Whether and if so when this additional funding will make a difference is not something we can predict. However, we are prepared to proceed on the assumption that a significant number of the pupils with SEN but no EHCP who are displaced from private schools into the state sector will receive materially worse provision for their SEN than they do now. In some cases, that provision is likely to be inadequate, at least in the immediate future.

Discussion: Status

214. The parties expended a great deal of time and effort on debating whether "children with SEN but no EHCP" were a group identifiable by reference to their disability. We have not found this debate helpful. In UK law, "disability" has a very specific definition: see s. 6 of and Sch. 1 to the EA 2010. Whether someone meets this definition matters because it affects the duties they are owed. Article 14 ECHR does not mention disability, but does prohibit discrimination in the enjoyment of Convention rights on the basis of "other status". The case law of the Strasbourg Court makes clear that this phrase includes disability, which encompasses "not only a physical but also a mental or behavioural impairment": *TH v Bulgaria,* [103]. As far as we are aware, these latter words have not been further elucidated.

215. As we see it, the key point for Article 14 purposes is not whether a characteristic counts as a disability but whether it counts as an "other status". In their Detailed Grounds of Defence, the Government parties accept that it does, but argue that discrimination on the basis of this status is not identical with discrimination on the ground of disability and, therefore, is not discrimination on a "suspect ground". We proceed for the purposes of this claim on the basis that an indirect discrimination claim can in principle succeed even if the ground of discrimination is a non-suspect one (although we note that the Supreme Court has said that this point may need to be decided in another case: *SC,* [62]). In any event, we see force in Mr Hyam's submission that there is at the very least a strong connection between the status identified—pupils with SEN but no EHCP—and disability. Some members of the class will be disabled within the meaning of the EA 2010. The others must, ex hypothesi, have a "significantly greater difficulty in learning than the majority of others of the same age": see s. 20(2)(a) CFA 2014. We doubt that the Strasbourg Court would draw a sharp line between these two categories.

Discussion: Significantly different situation/disproportionate prejudice

216. In our view, once the factual predicate for the claim is accepted, it is clear that the situation of pupils currently attending private schools who have SEN but no EHCP *is* significantly different from that of other pupils attending private schools. For those in the first group, if the imposition of VAT makes the fees unaffordable to their parents, there is a significant risk that the state school to which they transfer will not provide adequately for their needs. There is no equivalent evidence that this is so for pupils who do not have SEN. This means that, subject to justification, their claim of *Thlimmenos* discrimination is made out. For the same reason, the challenged measure will have a disproportionately prejudicial effect on them. This is not because those with SEN but no EHCP are more likely to have to move to the state sector but because, if they do, they are more likely to have to move to a school which does not adequately cater for their needs.

217. This analysis, which is essentially Mr Hyam's, does not involve the assertion that pupils at state schools who have SEN are treated in the precisely same way as those who do not have SEN. As a matter of law, the former cohort is owed legal duties that the latter cohort is not. In some cases, appropriate SEN provision is made. But, as the Strasbourg Court says, the Convention must be interpreted in a way which is "practical and effective, not theoretical and illusory": see, among very many other instances, *Şahin,* [136]. This includes taking account of the most up-to-date evidence about the reality of

SEN provision in this country, as well as the formal legal framework. The evidence on this topic is overwhelmingly negative. Nothing we have said here involves any disagreement with the decision of Lewis J (as he then was) in *Simone*. He was considering the position in 2019. The evidence we have seen deals with the position five years later. As Annex D shows, there has been a significant deterioration in the intervening period.

Discussion: Justification

218. We note at the outset a tension between the factual predicate for this claim (the underfunded state of SEN provision in the state sector) and the potential effect of the claim if it is successful (a significant reduction in the revenue raised by the challenged measure, which is intended to be available for spending on SEN provision in the state sector, among other things). This tension seems to us to run through this part of the claimants' attack on the challenged measure.

219. As we see it, the fundamental difficulty with the claimants' case is that the clear evidence they rely on (which is now materially agreed) shows not only how bad it might be for them if they had to transfer to the state sector, but also how bad it currently is for many of the 1.1 million children with SEN who are already being educated in that sector. The Government parties have quibbled on points of detail with some of the factual matters contained in the NAO report, but in substance they have acknowledged not only the existence but also the scale of the problem. They agree with the consensus view that the main thing required to remedy it is further funding on a very large scale.

220. The principal justification for not creating an exemption for pupils with SEN but no EHCP is that to do so would be unfair to the 1.1 million children with SEN in the state sector. The Government would forego what on any view is a very substantial slice of the revenue it hopes to raise from the challenged measure, leaving less public money available for other pressing public purposes, including increasing provision for the pupils with SEN in the state sector. This seems to us to expose the nature of the choice that confronted Parliament. Whatever the precise calculation, the sums involved were very large. The aim was redistributive—and unapologetically so. Unlike the position in relation to Charedi Jews, for example, there was no evidence that those affected would come disproportionately from lower parts of the income scale. Parliament had to weigh up the interests of the cohort who would be displaced against the interests of the cohort who would stand to benefit. This is the kind of balancing exercise which Leggatt LJ talked about in his judgment in the Court of Appeal in *SC* at [158], where there is "no process of legal reasoning which can justify one view in preference to the other".

221. We have considered carefully the claimants' arguments that, in calculating the sum foregone, the Government asked the wrong question or made unwarranted assumptions. In our judgment, these criticisms are not justified. The question the Government asked was what revenue would be lost by exempting children with SEN but no EHCP from the scope of the challenged measure. In our judgment, that was the right question. Having decided on the general policy of imposing VAT on private school fees, the Government had to consider the case for exemptions. This was one proposed exemption. The revenue foregone as a result of the exemption had to include all the pupils who would claim the exemption if it were created. That included not only those

currently identified as having SEN but also those who would be so identified in a world where the financial incentives were different.

222. The Government's evidence in these proceedings makes clear that the criteria for identifying whether a pupil has SEN can lead to different results when applied by different institutions. This is not (or at least not only) because institutions are gaming the system. It is in part because the metrics and methods used to identify SEN are not uniform and allow for judgment in their application. In some cases, where a pupil's needs are very pronounced, every relevant professional will agree that the pupil has SEN. In others, the degree of impairment may be much more slight. A pupil who is on the borderline of being identified as (for example) dyslexic or dyspraxic or as having ADHD may be positively identified as such in one assessment, but not in another. At present, a parent with a child who is thought to be at or near the borderline might decide not to have the child assessed at all.

223. In considering what would happen if an exemption were created for children with SEN but no EHCP, the Government was not required to adopt an attitude of naïveté. It was entitled to assume that attaching a significant financial advantage to a SEN designation would have what it described as "behavioural effects". These might include effects on parents (some of those who would not otherwise have obtained a SEN assessment would be incentivised to obtain one), schools (they would be incentivised to use assessors with a track record of identifying more pupils as having SEN) and assessors (they would be incentivised to use assessment metrics or practices which, while falling within the range of professionally acceptable methods, increase the proportion identified as having SEN). An assumption that an exemption for pupils with SEN would have these effects does not involve attributing fraudulent intentions to anyone, though the exemption might also incentivise fraud in a smaller number of cases.

224. Having reached the view that these behavioural effects were likely to occur, the Government then had to predict how much difference they would make to the overall numbers identified as having SEN. There was no obvious, scientific way of doing this, so a rough and ready assumption was made that the numbers would increase by 50 per cent, with a risk that the figure might be higher. This produced the central estimate that the cost of excluding pupils with SEN from the scope of the challenged measure would be £450 million. We do not consider that the Government can be criticised for using this figure. It came from HMRC analysts. There is no evidence that it was artificially inflated. The claimants dispute it, but have not shown it to be wrong.

225. As to the criticism that the Government did not properly factor in the cost to the state sector of educating displaced pupils with SEN, the average cost of educating a pupil in the state sector (which the Government used in its calculations) included the cost of educating children with SEN, including those with needs for intensive support. Whilst the proportion of pupils with SEN in the displaced cohort may well be greater than the current proportion of pupils with SEN in the state sector, there may also be differences in the types of SEN typically seen in the private and state sectors. There was no obviously reliable way to model how these differences would affect the average cost. In the circumstances, and given the broad methodological discretion which must be accorded to the Government in assessments such as these, we do not think the Government can be criticised for using the average per pupil cost in the state sector.

226. As to the additional cost of displaced private school pupils applying for EHCPs, we consider that it was not unreasonable for the Government to be cautious about the claimants' estimate that 34 per cent of this cohort would do so. But even if that figure is accurate, the total additional cost would be about £40 million, which represents a small proportion of the expected net revenue gain from the challenged measure.

227. Having considered in detail, and rejected, the claimants' criticisms of the way the Government modelled the effect of creating an exemption for pupils with SEN but no EHCP, it is important to note that the challenged provisions are primary legislation. The main justification was to raise revenue for public spending, including on state education. The exemption now contended for was squarely before Parliament, which was well-placed to consider whether its redistributive aims were justified and what the practical effects of the exemption might be. Even if "weighty reasons" had to be shown to justify the exemption, we consider that there were such reasons. The decision not to create the exemption contended for therefore fell within Parliament's margin of discretion.

Issue (c): Are the challenged provisions incompatible with the Convention rights of the Evangelical Christian school claimants and/or the Evangelical Christian parents under A1P1 and/or Article 14 read with A1P1?

Submissions for the Claim 3 claimants

228. Mr Quintavalle for the Claim 3 claimants submitted that, while contracting states enjoy a wide discretion over taxation policy, that discretion is not absolute. Where a financial liability arising out of taxation adversely affects the peaceful enjoyment of property, including a business, that burden may violate A1P1.

229. Those who own and run the schools have a possession capable of protection under A1P1, that is to say their business and livelihood: see *Iatridis v Greece* (1999) 30 EHRR 97; *Breyer Group v Department of Energy and Climate Change* [2015] EWCA Civ 408, [2015] 1 WLR 4559, [23]. This is clearly not an example of loss of a future source of profits, as in *Iatridis*, the schools have established local client bases of parents which support their ongoing businesses. The Government parties' evidence (which indicates that many of these schools will receive direct financial support from their communities) supports this. The sudden imposition of VAT is a radical change which threatens the viability of these businesses: *Breyer* at [71]-[72].

230. Furthermore, this is an interference which has a disproportionate effect on religious minorities. The small private schools that are likely to suffer most from this are those that serve minority religious communities. UK law recognises that small religious groups should be permitted to operate schools in a manner more tailored to their community than state-funded schools (including academies) are permitted: see s. 124A SSFA 1998.

231. The challenged measure also interferes with the A1P1 rights of parents. As the English courts have recognised (see *Reeves v HM Revenue and Customs* [2018] UKUT 293 (TCC), [2019] 4 WLR 15, [101]) a realistic approach to the deprivation of a possession includes the case where a tax charge, or the unavailability of a relief, means that the person in question has to pay more to the state than they otherwise would have.

Education is not a service that can sensibly be looked at only prospectively. Once a child is enrolled in a school it is a severe disruption to move them. In that sense this is a "sticky" service and imposing a further charge on it should be seen not so much as presenting parents with a different economic environment in which to choose how to educate their children, but rather as requiring them to pay money over to the Crown in order to continue with the education that they have already chosen.

232. In any event, the primary justification given for the introduction of the VAT charge is to raise taxes: it is not intended to cause people to stop paying school fees (though it is acknowledged that this may happen). The intended effect is either that parents continue to do what they are already doing but to pay further sums over to the Crown (which is a deprivation) or for the schools to absorb the cost, i.e. take VAT out of their current income, which would be a deprivation of the property of the schools.

Submissions for the Government parties

233. A complainant "can allege a violation of Article 1 of Protocol 1 only in so far as the impugned decisions related to his 'possessions' within the meaning of this provision". A "possession" must be an existing possession at the time of the alleged interference with it: namely an asset, an enforceable property right, or a legitimate expectation of obtaining effective enjoyment of a property right. The mere hope of recognition of a property right, a conditional claim, and future potential but as of yet unearned income, do not qualify as "possessions" for the purposes of A1P1: *Kopecký v Slovakia* (2005) 41 EHRR 43 [GC], [35(c)]; *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792, [2007] 1 WLR 2067, [70]-[71]; *Denisov v Ukraine* (App. No. 76639/11, 25 September 2018 [GC]), [137]; *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] AC 719, [21] (Lord Bingham).

234. In the present case, the measure at issue does not interfere with any possession of the claimant schools. They, like other service providers, merely collect VAT to be accounted to HMRC and are not being taxed on their own property or income. See C-317/94 *Elida Gibbs v Customs and Excise Commissioners* [1997] QB 499 at [22]: "it is not, in fact, the taxable person who themselves bear the burden of VAT… they collect the tax on behalf of the tax authorities and account for it to them". This reality is implicit in the claimant parents' argument, which is premised on a contention that the whole amount will be passed through to them in the form of increased school fees. Insofar as the imposition of VAT on private school education may threaten a particular school with a decline in hoped-for future fee income, unearned future income is not a "possession" within the scope of A1P1.

235. The imposition of VAT on private school fees does not interfere with the claimant schools' ownership over or conduct of their businesses. The case-law relied upon demonstrates the flaws in the Claim 3 claimants' case.

236. In any event, any interference with the A1P1 rights of the claimant schools would be justified for the same reasons as the interference with the A2P1 rights of the claimant pupils. If anything, the margin of discretion is greater: see the third sentence of A1P1; *Gasus Dosier- und Fördertechnik GmbH v The Netherlands* (1995) 20 EHRR 403, [59]; and *Christian Religious Organization of Jehovah's Witnesses v Armenia* (2020) EHRR 71 SE9, [51].

237. As regards the claimant parents, the complaint appears to be that their children's school fees will increase if their schools decide to pass on the relevant VAT costs. However, A1P1 does not protect the "right" to pay school fees at a particular level. There can be no legitimate expectation that private school fees will not fluctuate, including by reason of future legislative measures such as taxes. Private school fees are set independently of Government and are inherently subject to market forces. Parents always have the option of not paying any school fees at all—and therefore no VAT—by sending their children to a state school or educating them at home. Accordingly, the challenged measure does not deprive the claimant parents of any possession. If the Claimants were correct, the imposition of VAT on any good or service would constitute an A1P1 interference, notwithstanding the fact that there is no obligation to purchase that good or service.

Discussion

238. A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

239. The case law of the Strasbourg Court discloses a distinction between the goodwill of a business (which may constitute a possession for the purposes of A1P1) and an expectation of future income (which does not). Examples of the former include *Van Marle v Netherlands* (1986) 8 EHRR 483, (where the unfair refusal of an application by accountants for registration interfered with the value of their clientele, which they had built up "by dint of their hard work") and *Tre Traktörer AB v Sweden* (1989) 13 EHRR 309 (where the revocation of the applicant's alcohol licence adversely affected the "goodwill and value" which the applicant had built up in the restaurant). Examples of the latter include *Ian Edgar (Liverpool) Ltd v United Kingdom* (App. No. 37683/97, 25 January 2000) (where losses to a firearms business flowing from the UK's ban on handguns were losses of future income and fell outside the scope of A1P1).

240. In *Nicholds*, at [73], Kenneth Parker QC (as he then was) explained that:

> "it is clear on Strasbourg jurisprudence, now confirmed by high domestic authority, that [A1P1] protects only 'goodwill', as a form of asset with a monetary value, and does not protect an expected stream of future income which, for mainly organisational reasons, cannot be or is not capitalised. In other words, the Convention… protects assets which have a monetary value, not economic interests as such."

241. This analysis was endorsed by the Court of Appeal in *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, [2007] 1 WLR 2092, where a general practitioner had been unlawfully suspended from the performance list of the defendant trust: see [42] and [48] (Auld LJ) and [65] (Rix LJ) and by the House of Lords in *Countryside Alliance*. There, the owners of businesses affected by the ban on hunting claimed that the ban interfered with their A1P1 rights. Lord Bingham summarised the jurisprudence in this way at [21]:

> "Strasbourg jurisprudence has drawn a distinction between goodwill which may be a possession for purposes of article 1 of the First Protocol and future income, not yet earned and to which no enforceable claim exists, which may not."

242. In *Breyer Group plc v Department for Energy and Climate Change* [2015] EWCA Civ 408, [2015] 1 WLR 4559, the claimants had installed rooftop solar panels in the expectation that the feed-in-tariff payable for energy returned to the grid would be maintained at a particular level for 25 years. The Government published a proposal, on short notice, to reduce the FIT on future installations. Although this proposal was abandoned, the claimants (which were businesses engaged in installing solar panels) alleged that the proposal had been unlawful, and had caused them to abandon many installations that would otherwise have been carried out, resulting in substantial losses, for which they claimed compensation under A1P1. A preliminary issue arose about whether the claimants had a relevant "possession".

243. Lord Dyson (with whom Richards and Ryder LJJ agreed), having reviewed the case law of the Strasbourg Court, said this at [43]:

> "The important distinction is between the present-day value of future income (which is not treated by the European court as part of goodwill and a possession) and the present-day value of a business which reflects the capacity to earn profits in the future (which may be part of goodwill and a possession). The capacity to earn profits in the future is derived from the reputation that the business enjoys as a result of its past efforts."

244. It followed that "[c]ontracts which have been secured may be said to be part of the goodwill of a business because they are the product of its past work. Contracts which a business hopes to secure in the future are no more than that": [49].

245. The domestic case law shows that the distinction drawn by the Strasbourg Court between marketable goodwill and the expectation of future income is conceptually unstable and, in some cases, difficult to draw. Be that as it may, in this case it seems to us very clear that the claimant schools fall on the wrong side of the line. As the Government parties submitted, there is no evidence that the challenged measure has caused any diminution in the present-day marketable value of the schools' goodwill. Unlike in *Iatridis*, there is no interference with the claimant schools' right to occupy the premises from which they operate their business. Unlike the measures at issue in *Van Marle* and *Tre Traktörer*, the challenged measure does not affect their legal right to operate the businesses they have worked hard to build up. Insofar as the challenged measure threatens the viability of the claimant schools, it does so because it affects the

income they can expect to receive in the future. In this respect, it is more akin to the ban on handguns in *Ian Edgar* or the ban on hunting in *Countryside Alliance*. If these did not engage the A1P1 rights of the owners of businesses affected then, a fortiori, neither does the measure challenged here (which is liable to make it more difficult for some customers to continue to purchase the relevant services, as opposed to preventing them being offered at all).

246. More generally, if in the present case there is an interference with the school claimants' A1P1 rights, it would presumably follow that any business could bring such a complaint whenever there is a change in the tax position which, in practice, makes their customers less likely to purchase their goods or services. Here, the tax change applies to the services provided by the business, but if the claimants' argument were correct, there is no reason why it should be confined to that situation. A change to income tax might have the same effect. This seems to us to confirm that the measure challenged here is one among many that has the potential to affect the school claimants' future income stream, and cannot be regarded as interfering with their existing goodwill.

247. It follows from the foregoing analysis that we do not consider that the challenged measure involves any interference with the school claimants' A1P1 rights. This means that it is not necessary for the Government parties to justify the interference. However, if justification were required, "in a complex sphere such as the imposition of VAT, the respondent State should be afforded a particularly wide margin of appreciation": *Christian Religious Organization of Jehovah's Witnesses v Armenia*, [51]. That being so, the conclusion that the challenged measure is justified for the purposes of A2P1 (the "fundamental" right to education) entails that it is also justified for the purposes of A1P1.

248. As regards the claimant parents, we do not think that the decision of the Upper Tribunal in *Reeves* shows that every decision to impose tax gives rise to a deprivation or interference with possessions of the person who will end up paying it. The decision in that case was about capital gains tax on the disposal of an interest in a limited liability partnership. In any event, as [101] of the judgment makes clear, HMRC conceded that the imposition of the tax engaged the A1P1 rights of the paying party. As the Government parties submitted, none of the parents currently sending their children to private schools are obliged to continue to do so. In those circumstances, it seems doubtful whether the challenged measure interferes with the possessions of the claimant parents any more than the imposition of VAT on future purchases of a particular class of goods would interfere with the possessions of those who have hitherto purchased that class of goods. However, we do not consider it necessary to resolve this point because, even if the A1P1 rights of the parents are engaged, any interference with those rights is justified for the same reasons as the interference with the more fundamental rights of parents and pupils under A2P1.

249. Nor, in our view is the analysis affected by the claimant schools' or parents' reliance on Article 14. If and to the extent that Article 14 is engaged at all, any *Thlimmenos* or indirect discrimination would, in our view, be justified for essentially the same reasons as discrimination in the enjoyment of A2P1 rights against Charedi Jewish, Muslim and Evangelical Christian pupils and parents is justified.

Issue (d): Are the challenged provisions incompatible with the A2P1 rights of Evangelical Christian parents under the second sentence of A2P1 and/or Article 14 read with A2P1?

Submissions for the claimants

250. Mr Quintavalle for the Claim 3 claimants adopts the arguments made by the Claim 1 claimants under A2P1 and Article 14 read with A2P1 but makes additional submissions based on the second sentence of A2P1. The challenged measure impermissibly obstructs access to the education the parent claimants consider necessary to conform to their religious and philosophical convictions. By imposing a fiscal obstacle to the access of the required education (which is not available in the state-funded sector), the state is failing to respect the parents' religious and philosophical convictions. Even if access to state education suffices for the first sentence of A2P1, it does not suffice for the second sentence, which is the lex specialis of Article 9 in the field of education: see *Lautsi,* [59].

251. The situation is directly analogous to that in *R (Williamson) v Secretary of State for Education* [2005] UKHL 15, [2005] 2 AC 246, where a neutral legislative measure (the prohibition of corporal punishment in schools) interfered with the rights of Christian parents to an education for their children in accordance with their religious beliefs. Here, there is additionally an Article 14 claim because for the claimant parents, the type of schooling that is required by their religious beliefs (one where Christianity infuses the entire curriculum) is unavailable (and on the evidence, not possible) in the state sector and so an apparently neutral measure impacts them disproportionately.

Submissions for the Government parties

252. Sir James and Ms Hannett submitted that the claimants' position is based on a misunderstanding of the scope of A2P1, which is aimed at preventing the indoctrination of children and does not confer a "right" to choose an education for their children. It does not require the State to organise, establish, or finance any particular type or quality of education, including schools catering for particular faiths (*Kjeldsen* at [53]), single-sex education (*W and DM* at p.100) or education in a particular language (*Belgian Linguistic* p.282 at [6]). In circumstances where (i) these matters are positively outside the scope of the second sentence of A2P1, and (ii) where the obligation to "respect" such convictions is not even breached by the compulsory attendance of children at schools with which parents take issue (*Konrad* at pp.143-144), the challenged measure (which merely may make a particular school of choice for particular parents unaffordable for some parents) cannot fall within the ambit of A2P1. There is no connection between the limited obligation created by the second sentence of A2P1 and the claim of the parents that the state has an obligation to continue exempting from VAT specific forms of private education that they wish to access. In any event, any discrimination is justified.

Discussion

253. In our judgment, the Claim 3 claimants' reliance on the second sentence of A2P1 does not assist them in this case. The Strasbourg Court has repeatedly affirmed that the two sentences must be read together and that the second sentence is an "adjunct" of the first:

see *Kjeldsen*, [53]; *Campbell and Cosans*, [40]. The analysis we have set out earlier in this judgment shows that the substantive rights guaranteed by A2P1 go no further than the right of access to whatever educational system the state chooses to provide (subject to the minimum requirements set out in [55] above) and the right to *establish* a private school. They do not include any right to require the state to facilitate one's child's access to a private school, even if the parent's reason for preferring a private school is a religious one. Nor do they impose any general obligation on the state not to hinder access to private education: see [62] above. For all the reasons we have given in relation to issue (a), the challenged measure does not impair the very essence of the right to education and constitutes a proportionate interference with that right. Reliance on the second sentence of A2P1—whether on its own or in conjunction with Article 14—does not alter the analysis.

Conclusion

254. For these reasons, in each claim, we grant permission to apply for judicial review but dismiss the claim.

ANNEX A: The Claimants

Overview

1. There are twelve claimants in Claim 1, seven of whom are children. Some of their parents are also claimants. These claimants argue that they require schooling in private schools either because they have special educational needs ("SEN"), practise a particular faith, have a need for single-sex education, or because they have a need for a foreign curriculum.

2. Claim 2 focuses solely on claimants with SEN who previously attended state schools and now attend private schools because only those schools can provide for the "special educational provision" ("SEP") which meets their SEN. These claimants do not have an Education, Health and Care Plan ("EHCP").

3. The claimants in Claim 3 are four Evangelical Christian schools providing for low-cost private education for parents requiring a holistic Christian education, four parents who wish to be able to continue sending their children to these schools, and three children who attend Evangelical Christian schools. The Ninth and Tenth Claimants no longer pursue their claims because their school put its expansion plans on hold indefinitely so as to remain below the VAT threshold.

4. The individual claimants in all three groups say that they will be unable to afford the increased fees as a result of the imposition of VAT on private schools. The claimants in Claim 1 and Claim 2 have been anonymised to protect their privacy, as have some claimants in Claim 3.

5. In this Annex, the claimants' details are set out by reference to the statuses upon which they rely for their Article 14 claims.

Charedi Jewish claimants

ABC and AON (Claim 1)

6. ABC attends a private Charedi school, which provides a curriculum that includes, besides general subjects like English, mathematics, science, history, geography and art, a comprehensive Torah education: Halacha (Jewish law), Mussar (ethics), Yiddish and Hebrew language, Jewish history, festivals, and weekly Torah portions. It emphasises prayer, character development and practical observance.

7. ABC's parents, including her father, AON, face a potential 20 per cent fee increase on the current fees of £4,420. ABC's mother cannot work due to her health, and her father AON provides full-time care for his wife and three children (including ABC). They rely on state support, including personal independence payment, universal credit, and carer's allowance, and on charity support. ABC would be left without an education because she depends on a Charedi school for an education aligned with their Charedi beliefs. In addition, AON fears that ABC would be exposed to the risk of antisemitic abuse or attacks if she were to attend a non-Charedi state school.

BYL and BAU (Claim 1)

8. BYL attends a Charedi private secondary school for boys from a strictly observant Jewish community. His current school has given him stability and provides both secular and religious education which fosters both Jewish and British values. The school teaches core subjects alongside an in-depth Torah-based education.

9. BYL's father BAU receives universal credit of £1,600 per month to help with rent. BAU and his wife have low incomes. After rent, they have little or no savings. There are no state-funded Charedi secondary schools for boys in their area. A secular state school is not considered a viable option. BAU is concerned about the safety of his son as a visibly Charedi child and the likelihood of antisemitic abuse against him.

Muslim claimants (ALV and ALT – Claim 1)

10. ALV works as a taxi driver. His wife works as a cleaner. They have four children. The family practises the Islamic faith, which deeply influences their daily lives and values. They perform prayers five times a day, study and reflect on the Qur'an, consume Halal food, observe Ramadan and wear modest clothing (including the hijab in the case of the female members of the family). The family lived for some years in another European country, where there were no Islamic schools available to them. They moved to the UK to provide ALT, their eldest daughter, with a faith-based education.

11. ALT currently attends a Muslim private secondary school, charging fees of £2,600 plus a £400 educational resource fee. She has flourished academically, social, emotionally and religiously there, having suffered from bullying at previous schools. The school indicated that it would increase its fees by 20 per cent to cover VAT. ALV does not know how he will be able to afford this and is deeply concerned about the impact on ALT of withdrawing her.

Evangelical Christian claimants (Claim 3)

Yvonne Owusu-Ansah

12. Yvonne Owusu-Ansah is the unemployed mother of three children who attend The King's School in Fair Oak. Her faith is very important to her. Her choice of The King's School was in pursuance of biblical injunction and her family moved house to be near the school. Her partner covers the costs of their home, and Ms Owusu-Ansah covers the school fees. She is unemployed and does not have the financial resources to pay higher school fees. A state school would not be religiously acceptable due to the broad and inclusive curriculum, which conflicts with the teachings of her faith. She says that a state school curriculum may include teaching about sexuality and gender identity and a secular world view that denies the fundamentals of her faith. The imposition of VAT would require her to home-school her children, which she considers would be detrimental and disruptive to their education. Two of them are in the middle of their GCSEs.

Stephen White and Josiah White

13. Stephen White is a self-employed father of six children aged between 9 months and 14 years. He and his wife believe that it is their duty as Christian parents to raise and educate their children in the fear and admonition of the Lord Jesus in every aspect of their lives. This means giving their children a positively Christian education and not a secular one that may attempt to be neutral on subjects on which they want a positively Christian view taught. Four of Mr White's six children attend Bradford Christian School. The family has moved home to be near the school. The imposition of VAT would require the children to be home-schooled and Mr White to curtail his self-employed business activities, with financial repercussions.

14. Mr White's son, Josiah, is 14 years old and preparing for his GCSEs. Interruption of his studies would have an impact on his future academic and employment prospects.

AHD and ANF

15. AHD is the mother of adopted children, three of whom attend the same fee-paying Christian school. Her eldest children, were home educated but after AHD's husband died, home education was no longer possible. The family has moved to live close to the school.

16. AHD's faith impacts every aspect of her life, including how she seeks to raise her children to instil faith and biblical values in them. This is why AHD chose the school for her children. The school upholds and instils biblical values and teaches the children from a Christian perspective.

17. The school has announced a new policy of indefinitely putting on hold its expansion plans, so as to remain under the VAT threshold. This removes the immediate risk of VAT on school fees, which AHD would not be able to meet, but creates a new problem with respect to ANF.

18. ANF is the adopted daughter of AHD. She has been diagnosed with conditions in respect of which there is a pending application for an EHCP. However, the school would not be able to receive local authority funding to enable her to remain there without risking exceeding the VAT threshold, which it is not prepared to do.

AWM and ASK

19. AWM is the guardian of children who attend a fee-paying Christian school. Her children were previously looked after. AWM is now a full-time carer, who has given up her job to look after her children and to ensure that their needs are properly met.

20. AWM's faith and the Christian education she received during her childhood informed her decision to send her children to this school. The school provides an education that each child is made in the image of God, focusing on their individual needs and instilling Christian principles which align with her Christian values, in contrast to education provided in state schools.

21. ASK is AWM's child. She had difficulties at previous schools and suffers from early childhood trauma and anxiety attacks. She does not yet have an EHCP. Home schooling is not possible and AWM does not wish to return her to state school.

Claimants who seek single-sex educational provision

22. AMY is the single parent of AMB.

23. AMB is at an all-girls private school, having faced severe bullying at her previous state school, predominantly from male peers. The school was unable to address this due to lack of time and resources. AMB had been groomed by an older boy from another school on Snapchat, who had also leaked a sexually explicit video to others at her school. This required involvement of both the police and a youth worker.

24. In the light of this history, AMY wishes her daughter to attend a single-sex school for her safety and in her best interests, socially and academically.

25. The fees at the private school she currently attends are expected to increase by 12 per cent (coming to over £6,000 per term).

26. AMY earns the minimum wage and is depleting savings and borrowing money to ensure her daughter can remain at her current school for years 10 and 11. There is no state school alternative offering single-sex education and AMY says that the co-educational state school to which she would likely have to go has a reputation for bullying.

Claimants seeking foreign education in a foreign language/according to a foreign curriculum (AMF and AMR – Claim 1)

27. AMF says that she and her husband chose to send their daughter AMR to a French lycée in London. The family's national and cultural identity is strongly French. They only moved to the UK for work. They anticipate moving back to France at some point while their two daughters are at school. It is important to AMF and her husband that their daughters are fluent in French and understand the French way of life, both as a matter of identity and to ensure their seamless assimilation into the French education system when they return. AMF has an income of just over £100,000. Her husband has started a new venture which has not yet reported an income. The proposed imposition of VAT on the fees for educating the couple's two daughters could be "crippling" for them. There are no alternatives in the state sector.

Claimants who seek provision for SEN which they say is not available in the state sector

ALR and ASG (Claim 1)

28. ALR has autism with a pathological demand avoidant profile, sensory processing difficulties, anxiety and depression indicators, and paediatric autoimmune neuropsychiatric disorders associated with streptococcal infections. This causes psychiatric symptoms including verbal and physical tics, obsessive-compulsive behaviours and episodes of rage and anger. The lack of an appropriate NHS treatment pathway made obtaining the required medical support and treatment challenging. Her

complex medical and psychological history has required extensive evaluation since 2016 and she was referred to a child and adolescent mental health services due to concerns about her well-being. She has a history of suicidal thoughts and self-harm.

29. ALR is currently at a private, co-educational school which provides tailored support for her condition and needs. The family had moved homes so that she would be able to attend that school. A small school environment is necessary because getting ill causes flare ups in her condition and brain inflammation. Her attendance is below 80 per cent due to her conditions, and her father ASG fears being fined for her non-attendance if she had to attend a state school.

30. ALR's parents have made enquiries with local schools and have been advised there are no places at any secondary schools nearby. The only place left is in an adjacent town which creates logistical challenges, as well as a safeguarding risk if ALR were required to take public transport. There is no state school in her area which can meet her needs.

31. ALR's parents face a 16 per cent increase on fees of £27,930 a year (bringing the fees to £32,400 per year). Extras like the Learning Enhancement will rise from £480 to £576 per term. ASG is the sole earner, since his wife takes on full-time care of ALR. They have no spare income or assets. ALR's parents have begun applying for an EHCP following imposition of VAT, amassing 300 pages of professional reports, but there is no certainty that the EHCP would name ALR's current school and the process can take more than 18 months. Any temporary uncertainty or long-term disruption, whether because she would have to move to a different school or be home-educated, could worsen her condition, and set back the progress she has achieved.

ALN and ALP (Claim 1)

32. ALN attends a single-sex private school. She has high functioning autism with dyslexia and dyspraxia and high levels of anxiety and processing demands with a tendency towards sensory overload. She needs information to be shared in a sequential way to avoid confusion, otherwise she experiences stress and anxiety. ALN has previously been at a state school, where her parents say her needs were not met. During the pandemic, ALN required counselling for her mental health, and her parents eventually obtained a report and diagnosis from a child and educational psychologist.

33. ALN's needs are met at her private school, which provides smaller class sizes and personalised support. At her current school, ALN has a teacher assigned to sit with her, as well as one-to-one tuition with special teachers who monitor her stress and anxiety levels. There are no SEN specialist state schools in the area.

34. ALN's parents (including ALN's father ALP) saw a 6 per cent increase in fees in September 2024 (to £24,000 per year) and an additional 12 per cent increase in January 2025 (to just under £27,000 per year). ALN does not have an EHCP and is said by ALP to be unlikely to get one. Her parents have built up debt due to the impact of the Covid-19 pandemic on their earnings. They have taken out a second loan on their property to have extra money to pay for the fee increase. They are striving to source yet more money to continue paying for ALN's school fees as they consider that a change in schools would disrupt her education and impact negatively on her mental health.

ALX and ALF (Claim 2)

35. ALX has high-functioning autism, social communication difficulties, an impaired ability to follow social cues and significant sensory processing difficulties. His leg muscles and ankles are weak, requiring daily physiotherapy, leg splints, and special boots to support his ankles. His sensory issues manifest in physical problems including toe-walking. Changes to his routine trigger high levels of anxiety, and he requires a quiet learning environment where he can receive clear verbal instructions.

36. ALX previously attended a state school in a class of around 30 pupils where his needs could not be met. He experienced anxiety attending school and was moved to a private school with a total of 60 pupils. He is in a class of eight. He no longer needs ear defenders and can now interact with teachers and peers. As his needs are being met well at his current school, ALX's mother ALF was advised that it would be difficult to establish the clear case for an EHCP.

37. ALF receives disability allowance, which funds ALX's school fees. She is separated from her husband and pays for the schooling of her children without any contributions from him through state support and donor support from the school. She is unable to afford any fee increase caused by the imposition of VAT. If there is such an increase, ALX will have to leave his current school and re-enter the state system, and then move again shortly thereafter when he enters secondary school. ALF believes that this will compound his sensory overload and diminish his education.

ALW and ALO (Claim 2)

38. ALW was diagnosed with autism and developmental trauma with suspected additional ADHD. He has anxiety and sensory overload and wears ear defenders.

39. ALW was in a state school, where his class had over 30 pupils and his needs were not met. He needed to be privately assessed for ASD because the state school did not agree he met the criteria for an assessment and NHS waitlists were too long. The state school was unwilling to support an application for an EHCP because they found he did not meet the criteria. The stress of school gave rise to anxiety and poor sleep and caused him to bite himself. Since moving to a private school where his class has about 10 pupils, he has received one-to-one teaching and additional support such as breaks during the day when needed. His current school will support his application for an EHCP but his guardian, ALO, has been advised by the school that the local council tends to refuse all or most EHCP applications as a matter of course.

40. ALO stretched herself financially to move ALW to a private school and is unable to afford any fee increase. The increase to date has been more than 10 per cent and is expected to be higher still in the coming school year. ALO receives disability allowance for ALW. Her post-tax income is almost entirely taken up by annual fees for ALW and she has considered accessing her pension fund to pay for ALW's education. Her inability to pay will mean that ALW will have to move to the state sector, with consequent setbacks in ALW's progress, or be home-schooled, which would mean that ALW would lose his school community and support.

The school claimants (Claim 3)

Emmanuel School (Derby) Limited

41. Emmanuel School (Derby) Limited owns and operates Emmanuel School, an award-winning, private Christian School in Derby. It was established by East Midlands Christian Fellowship with Christian beliefs at the centre of its foundation because the church believed that the secular education system was failing to supply children with solid Christian foundations. The school currently has 63 pupils aged 3-11. The tax changes will mean that some parents will be unable to afford fees, and the school will be unable to provide fee reductions. The school anticipates having to register for VAT by June 2025 and anticipates that the introduction of VAT will result in a drop in admissions and consequently in income which will threaten its financial viability.

Dewsbury Gospel Church

42. Dewsbury Gospel Church operates The Branch Christian School in West Yorkshire. The Branch Christian School is a private school founded in 1994 which provides a Christian education for children aged 3-18 and currently has 19 pupils. The school is currently just below the VAT threshold. In light of the imposition of VAT on private school fees, the Governors have blocked the school's expansion plans because they believe that exceeding the threshold would threaten the viability of the school.

Hampshire Christian Education Trust

43. Hampshire Christian Education Trust, a registered charity, owns and operates The King's School in Fair Oak, Hampshire. The King's School is an independent Christian faith school founded in 1982 as a result of concern on the part of parents about the ideologies and worldviews in the secular school system. It currently has 230 pupils from reception onwards. The school has both a primary and secondary school on one site and provides Christ-centred teaching where God is placed firmly at the centre of all that the school does. The school has registered for VAT but fears that the VAT imposition on school fees will threaten its financial viability.

Wyclif Independent Christian Educational Association Limited

44. Wyclif Independent Christian Educational Association Limited runs Wyclif School in Machen, Wales. The school was founded in 1982, with 199 pupils between the ages of 4-18. It places the Christian faith at the centre of all that it does. The vast majority of pupils in Wyclif School are from Christian homes and the school supports parents in their desire to give their children a distinctively Christian curriculum in a loving Christian community. The school anticipates having to register for VAT by May 2025 and is concerned that the VAT imposition on school fees will threaten its financial viability.

ANNEX B: Article 9 of the Bill of Rights 1689 and Parliamentary Privilege

How the issue arose

1. When the claimants first filed this claim, the decision challenged was Budget Resolution No. 34, which had temporary effect while the Finance Bill was before Parliament, under and subject to the conditions set out in the Provisional Collection of Taxes Act 1968.

2. The Speaker considered that such a challenge would interfere impermissibly with proceedings in Parliament. He applied to be joined as an interested party to argue that point. The application was granted. The claimants maintained that the court had jurisdiction to make a declaration of incompatibility in respect of the Resolution.

3. On 20 March 2025, shortly before the hearing, the Finance Bill received Royal Assent and was enacted as the Finance Act 2025. The claimants applied to amend their claims to challenge the 2025 Act, instead of the Resolution. There was no opposition to these applications and we granted them. This meant that the justiciability of the Resolution became academic. In the circumstances, the parties agreed that it was not necessary for us to determine the issue.

4. The Speaker, however, remained a party and, through David Manknell KC, made submissions on other aspects of the case.

5. The first such aspect was the Government parties' application to rely on the witness statement of Natalie Reeder dated 31 March 2025. This contained a chronology of the consideration of the Finance Bill by Parliament, with references to Hansard. At the hearing on 1 April 2025, the Speaker objected to the admission of this material on the basis that it went beyond the limited purposes for which reports of proceedings in Parliament may be admitted.

6. In response to this, Sir James for the Government parties made clear that the purposes for which the material was relied on went no further than those identified as permissible by Lord Reed in *SC*, at [183]. On this basis, Mr Manknell indicated that the objection was not pursued. In the light of this, we need say no more about the issue at this stage.

7. A separate point arose, however, from references made by the Claim 1 and Claim 2 claimants to excerpts from certain reports. The reports fell into two categories. First, there were reports from two Parliamentary committees: a report of the Women and Equalities Committee of the House of Commons entitled *Sexual harassment and sexual violence in schools* (HC 91, 13 September 2016) and a report of the Public Accounts Committee entitled *Support for children and young people with special educational needs* (HC 353, 15 January 2025). These were relied upon by Lord Pannick in written and oral submissions for the Claim 1 claimants. Second, there was a "Value for Money" report by the National Audit Office ("NAO") entitled *Support for children and young people with special educational needs* (HC 299, 24 October 2024) and a similar report from the NAO entitled *Support for pupils with special educational needs and disabilities in England* (HC 2636, 11 September 2019). These were referred to in the evidence filed by the Claim 2 claimants and by Mr Hyam in written and oral submissions.

8. Shortly before the start of the hearing on 3 April 2025, Mr Manknell notified the court that the Speaker objected to the admission of excerpts from these reports, on the ground that they infringed Article 9 of the Bill of Rights 1689 and/or the wider principle of Parliamentary privilege, because they were relied upon to establish facts that were in dispute. That being so, the Chancellor could not fairly respond without "questioning" or "impeaching" Parliamentary proceedings. The excerpts were therefore inadmissible.

9. It was agreed on all sides that the committee reports attracted the protection of Parliamentary privilege. The claimants in Claims 1 and 2 did not accept, however, that the NAO report fell within the term "Parliamentary proceedings". Furthermore, the Claim 1 and Claim 2 claimants submitted that all the excerpts relied upon (both from the Select Committees and from the NAO) were admissible in the context of a claim which put in issue the proportionality of an interference with Convention rights.

10. At the hearing on 3 April 2025, it became clear that the admissibility of these excerpts raised issues of potential importance in this case and more widely. We accordingly invited the parties to file further submissions and held a further hearing on 14 April 2025. At the end of that hearing, we suggested that the claimants may wish to identify particular facts stated in the NAO report and invite the defendant to agree those facts. If and to the extent that the facts were agreed, they could be taken into account without the need for reliance on the NAO report.

11. On 15 April 2025, the Claim 2 claimants produced a schedule of facts. The Government parties responded on 23 April 2025 with a schedule of their own indicating what was and was not agreed, accompanied by brief submissions. The Claim 2 claimants made written submissions in reply on 25 April 2025.

12. We address two questions. First, do the NAO reports attract Parliamentary privilege? Second, are the reports admissible for the purposes for which the claimants seek to adduce them?

The law

Article 9 of the Bill of Rights and Parliamentary privilege generally

13. Article 9 of the Bill of Rights 1689 (Will. & Mary sess. 2, c.2) provides as follows (using updated spelling):

> "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

14. In *Prebble v Television New Zealand* [1995] 1 AC 321, at 324, Lord Browne-Wilkinson (for the Privy Council) said this:

> "In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as

> the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges... As Blackstone said in his Commentaries on the Laws of England, 17th ed. (1830), vol. 1, p. 163: 'the whole of the law and custom of Parliament has its original from this one maxim, "that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere"'."

"Proceedings in Parliament"

15. Erskine May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament* (25th ed), says this at para. 13.12:

> "The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of Article IX. An individual Member takes part in a proceeding usually by speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking.
>
> Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Members of the public also may take part in the proceedings of a House, for example by giving evidence before it or one of its committees, or by securing the presentation of a petition… Letters to the Parliamentary Commissioner for Standards are not considered to be privileged unless and until the Commissioner decides that the complaint is appropriate for inquiry (see para 5.22)."

16. In *R v Parliamentary Commissioner for Administration ex p. Dyer* [1994] 1 WLR 621, the Divisional Court considered whether decisions of the Parliamentary Ombudsman were amenable to judicial review. The argument was that, as an officer of the House of Commons, whose reports were laid before Parliament and considered by a House of Commons Select Committee, the Ombudsman was subject to control by Parliament alone. Simon Brown LJ (with whom Buckley J agreed) rejected that argument at 625:

> "Many in government are answerable to Parliament and yet answerable also to the supervisory jurisdiction of this court. I see nothing about the Commissioner's role or the statutory framework within which he operates so singular as to take him wholly outside the purview of judicial review."

17. In *R v Parliamentary Commissioner for Standards ex p. Al Fayed* [1998] 1 WLR 669, the applicant for judicial review relied on *Dyer* to challenge a decision of the Parliamentary Commissioner for Standards, an independent officer appointed under the Standing Orders of the House of Commons to exercise an investigative function. The claim failed. Lord Woolf MR (with whom Millett and Mummery LJJ agreed) distinguished *Dyer,* saying this at 673C:

> "Here is the really significant distinction between the role of the Parliamentary Commissioner for Standards and the Ombudsman. The Ombudsman is concerned at looking at what happens in relation to the administration by government and other relevant public bodies outwith Parliament. The Ombudsman is concerned with proper functioning of the public service outside Parliament. On the other hand, the focus of the Parliamentary Commissioner for Standards is on the propriety of the workings and the activities of those engaged within Parliament. He is one of the means by which the select committee set up by the House carries out its functions, which are accepted to be part of the proceedings of the House. This being the role of the Parliamentary Commissioner for Standards, it would be inappropriate for this court to use its supervisory powers to control what the Parliamentary Commissioner for Standards does in relation to an investigation of this sort. The responsibility for supervising the Parliamentary Commissioner for Standards is placed by Parliament, through its standing orders, on the Committee of Standards and Privileges of the House, and it is for that body to perform that role and not the courts."

18. The leading authority on the scope of the phrase "proceedings in Parliament" in Article 9 is the decision of the Supreme Court in *R v Chaytor* [2010] UKSC 52. In that case, the question was whether a prosecution for false accounting in respect of Parliamentary expenses infringed Article 9. Lord Phillips (with whom the eight other members of the Court agreed) made clear that the scope of Parliamentary privilege was a matter for the courts, although they would pay careful regard to any views expressed in Parliament on that question: see at [15]-[16]. At [47], Lord Phillips said this:

> "The jurisprudence to which I have referred is sparse and does not bear directly on the facts of these appeals. It supports the proposition, however, that the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament."

19. At [61], he continued as follows:

> "There are good reasons of policy for giving article 9 a narrow ambit that restricts it to the important purpose for which it was enacted—freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges. The protection of article

> 9 is absolute. It is capable of variation by primary legislation, but not capable of waiver, even by Parliamentary resolution. Its effect where it applies is to prevent those injured by civil wrongdoing from obtaining redress and to prevent the prosecution of members for conduct which is criminal."

20. At [101], Lord Rodger cautioned against too expansive an interpretation of Parliamentary privilege:

> "An invocation of Parliamentary privilege is apt to dazzle lawyers and judges outside Parliament. In Wellesley v Duke of Beaufort (1831) 2 Russ & M 639, 660, Lord Brougham LC warned courts of justice against acceding to claims of privilege 'the instant they hear that once magical word pronounced'."

21. The Court held that the submission of a claim for expenses was not a "proceeding in Parliament" within the meaning of Article 9, because it would not have an impact on the core or essential business of Parliament and would not inhibit debate or free speech.

22. In *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 (the prorogation case), the Supreme Court noted at [66] that *Chaytor* establishes:

> "that the principal matter to which article 9 is directed is 'freedom of speech and debate in the Houses of Parliament and in Parliamentary committees. This is where the core or essential business of Parliament takes place': para 47. In considering whether actions outside the Houses and committees are also covered, it is necessary to consider the nature of their connection to those and whether denying the actions privilege is likely to impact adversely on the core or essential business of Parliament."

23. At [67], the Court cited the first paragraph from §13.12 of Erskine May, quoted at [15] above. At [68], it went on to say this:

> "The prorogation itself takes place in the House of Lords and in the presence of Members of both Houses. But it cannot sensibly be described as a 'proceeding in Parliament'. It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen's bidding. They have no freedom of speech. This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end."

24. In *Warsama v Foreign and Commonwealth Office* [2020] EWCA Civ 142, the claimants brought proceedings against the FCO and the author of a report it had commissioned about child abuse and corruption in St Helena. The report had been published by the House of Commons pursuant to a Motion for an Unopposed Return. In its judgment, the Court of Appeal (Lord Burnett CJ, Coulson and Rose LJJ) considered whether it mattered that the publishers of papers ordered to be printed by the House of Commons enjoyed immunity from suit under the Parliamentary Papers Act 1840 ("the 1840 Act"). The answer was "No". As the Court said at [25]:

> "The effect of [the 1840 Act] for our purposes is that the publisher of any document ordered to be printed by Parliament will be protected by the 1840 Act, but that Act cannot of itself confer privilege on the document if the document is not otherwise privileged."

25. In concluding that the report did attract the protection of Article 9, the court said this at [61]:

> "The substance of what happens in an Unopposed Return is that the House as a collective body calls for the provision of information from someone outside the House on a matter about which the Members resolve they wish to be informed… One of Parliament's primary functions is to ensure the public accountability of ministers and their departments, to investigate and expose wrongdoing or abuse of power on the part of the executive and to insist on remedial action. The provision of the Report to Parliament was an essential part of that process. That accountability continued after the publication of the Report."

26. At [65], the court added:

> "Moreover, we accept the submissions of Counsel to the Speaker that from a procedural point of view the laying by the minister of the Report constitutes his compliance with the direction of Her Majesty given following the Address presented to her as resolved upon by the House. The format, content and manner of laying is prescribed by the House and the Journal Office is responsible for checking the authority by which the report is laid and for making the report available to Members. The call for the report involves a formal Parliamentary motion which has to be presented in the House and returned on a day when the House is sitting."

27. Finally, at [71], the court made clear that the Speaker had accepted that the conduct of the Inquiry prior to the publication of the Report was not covered by Parliamentary privilege "even if it was always the intention that the result of the investigation would be published using the Unopposed Return procedure". In the court's view, this was consistent with the established position that the conduct of such inquiries was subject to judicial review.

28. The only recent authority to which we were referred directly considering the question whether NAO reports are proceedings in Parliament was the decision of Lane J and C.M.G. Ockleton, then the President and Vice-President of the Upper Tribunal (Immigration and Asylum Chamber), in *DK (India) v Secretary of State for the Home Department* [2021] UKUT 00061 (IAC). In that case, one of the parties had sought to rely on the report of an All-Party Parliamentary Group, which in turn referred to an NAO report. At [18], the Tribunal said this:

> "In *Warsama & Gannon v Foreign & Commonwealth Office* [2020] EWCA Civ 142, the Court of Appeal was concerned with the application of privilege to an unopposed return; that is to say, a paper ordered by the House of Commons to be printed following a motion on the floor of the House. In a

> letter of 15 December 2020 to the respondent in regard to the present appeals, Counsel to the Speaker of the House of Commons considers the factual position in *Warsama* to be analogous with that of documents covered by the Parliamentary Papers Act 1840. In both cases, the House of Commons has an interest in the reporting in question being full and frank. Thus, as is the case with evidence provided to a Select Committee, the protection of privilege extends to a person who is not a Member of Parliament, in order to protect that person's ability to report fully and honestly to the House. That, we find, is the position with the National Audit Office report."

What constitutes "questioning" or "impeaching" proceedings in Parliament?

29. Article 9 prevents a court from attaching criminal sanction or civil liability to anything falling within the scope of "proceedings in Parliament". What else it prevents has been the subject of considerable debate.

30. In *Pepper v Hart* [1993] AC 593, 638, it was argued that any relaxation of the common law rule preventing the admission of Parliamentary materials on questions of statutory interpretation would breach Article 9. The submission was that the use of such materials, whilst it would not amount to "impeaching" proceedings in Parliament, "would involve an investigation of what the Minister meant by the words he used and would inhibit the Minister in what he says by attaching legislative effect to his words". This, it was submitted, would amount to "questioning" the freedom of speech or debate: see at 638.

31. Lord Browne-Wilkinson (with whom Lord Keith, Lord Bridge, Lord Ackner and Lord Oliver agreed) rejected that argument. He said this:

> "Article 9 is a provision of the highest constitutional importance and should not be narrowly construed. It ensures the ability of democratically elected Members of Parliament to discuss what they will (freedom of debate) and to say what they will (freedom of speech). But even given a generous approach to this construction, I find it impossible to attach the breadth of meaning to the word 'question' which the Attorney-General urges. It must be remembered that article 9 prohibits questioning not only "in any court" but also in any 'place out of Parliament.' If the Attorney-General's submission is correct, any comment in the media or elsewhere on what is said in Parliament would constitute 'questioning' since all Members of Parliament must speak and act taking into account what political commentators and other will say. Plainly article 9 cannot have effect so as to stifle the freedom of all to comment on what is said in Parliament, even though such comment may influence Members in what they say.
>
> In my judgment, the plain meaning of article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed. Relaxation of the rule will not involve the courts in criticising what is said in Parliament. The purpose of looking at Hansard will not be to

> construe the words used by the Minister but to give effect to the words used so long as they are clear. Far from questioning the independence of Parliament and its debates, the courts would be giving effect to what is said and done there."

32. Having so construed "questioning" in Article 9, the House of Lords was able to relax the exclusionary rule to allow reference to Parliamentary materials on questions of statutory interpretation, where strict conditions were met: see at 640.

33. In *Prebble* (a New Zealand case), Lord Browne-Wilkinson noted that the scope of Parliamentary privilege had been codified in s. 16(3) of the Australian Parliamentary Privileges Act 1987, which provided as follows:

> "In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of—(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament; (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament."

34. This, Lord Browne-Wilkinson said at 333E, "declares what had previously been regarded as the effect of article 9… and… contains what, in the opinion of their Lordships, is the true principle to be applied". However, later in the judgment (at 337A-B), Lord Browne-Wilkinson summarised that principle in this somewhat narrower way:

> "parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading".

It did not follow from this that courts were precluded from admitting evidence of things said in Parliament. Evidence could be admitted to prove that words had been spoken in Parliament or to prove the occurrence of events "without any accompanying allegation of impropriety or any other questioning": 337G.

35. Next, in *Hamilton v Al Fayed* [2001] UKHL 395, [2001] 1 AC 395, the question was whether a court could entertain a submission that a witness in Parliamentary proceedings had deliberately misled Parliament. The answer was "No", because misleading Parliament is a breach of the code of Parliamentary behaviour and liable to be disciplined by Parliament. For the courts to entertain a question about whether Parliament had been misled would be to trespass in an area in which Parliament had "exclusive jurisdiction": 616C (Lord Browne-Wilkinson, with whom the other members of the appellate committee agreed). However, nothing in the judgment suggests that the application of Article 9 is confined to that circumstance; and Lord Browne-Wilkinson expressly repeated his endorsement in *Prebble* of s. 16(3) of the Australian statute as containing "the true principles to be applied": 616A.

36. In *Wilson v First County Trust Ltd (No. 2)* [2003] UKHL 40, [2004] 1 AC 816, the House of Lords considered whether to permit a further relaxation of the exclusionary rule in relation to Parliamentary materials relied upon as relevant to the compatibility of legislation with Convention rights. At [60], Lord Nicholls noted that "there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way 'questioning' what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative of the will of Parliament, and without in any other way encroaching upon parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone". The use by courts interpreting legislation of statements by a Bill's promoter (subject to the conditions in *Pepper v Hart*) was one example of this. Another was the established practice of admitting statements made by Ministers in Parliament when entertaining claims for judicial review of their decisions (as, for example, in *R v Secretary of State for the Home Department ex p. Brind* [1991] 1 AC 696).

37. Lord Nicholls noted that the Human Rights Act 1998 ("the HRA") required the court to exercise a new role in respect of primary legislation, which was different from interpreting or applying it. In assessing the Convention-compatibility of a statutory provision, the court would need to examine the "underlying social purpose sought to be achieved": [61]. Equally, it may need "additional background information tending to show… the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate" and "enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed": [63]. This "additional background information" may be contained in published documents such as White Papers, but may also be contained in things said in Parliamentary debates. If so, the court must be able to take it into account: [64]. The justification for this was that:

> "The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be 'questioning' proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation."

38. This limited additional use for Parliamentary materials was constitutionally unexceptionable, as confirmed by the unanimous view of the Joint Committee on Parliamentary Privilege (1999) (HL Paper 43-I, HC 214-I), para. 28, that "it is difficult to see how there could be any objection to the court taking account of something said in Parliament when there is no suggestion the statement was inspired by improper motives or was untrue or misleading and there is no question of legal liability": see [65]. (As Stanley Burnton J later held, references to the reports of a Parliamentary committees are permissible "in the special context of an examination of the scope and effect of parliamentary privilege, on which it is important for Parliament and the courts

to agree if possible": *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin), [2010] QB 98 *("OGC")*, [61].)

39. However, as Lord Nicholls made clear at [66]-[67], resort to Parliamentary materials for this purpose should seldom be necessary. And, beyond the use of Hansard as a source of "background information", the content of Parliamentary debates had no relevance to compatibility issues and was thus not a proper matter for investigation or consideration by the courts. Thus:

> "The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members. Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made *ex tempore* in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which 'counts against' the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute."

40. Further consideration was given to the effect of Article 9 by Bean J in *R (Bradley) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin), [2009] QB 114 and by Stanley Burnton J in *R (Federation of Tour Operators) v HM Treasury* [2007] EWHC 2062 (Admin), [2008] Env LR 22 and *OGC*.

41. In *Bradley*, at [32], Bean J returned to the question whether s. 16(3) of the Australian Act should be taken as an authoritative statement of the scope of Parliamentary privilege. At [42], he held not. Section 16(3)(a) and (b) were uncontroversial. But s. 16(3)(c), if taken literally, would rule out reliance on or challenge to a Ministerial decision contained in a statement to Parliament.

42. In *Tour Operators*, the claimants sought to rely on evidence given by Ministers to the Treasury Select Committee of the House of Commons in support of their case that the imposition of air passenger transport duty was a disproportionate interference with their rights under Article 1 of Protocol 1 to the ECHR. The purpose of this reliance was to show that Ministers had given an incomplete or inaccurate account of the effects of the tax. The Speaker objected to the admission of this evidence. Stanley Burnton J did not consider it necessary to determine the objection, but nonetheless made some observations on it. He noted that, in *Prebble*, it was said that Article 9 meant that the courts would not allow "any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges". But the key word here was "challenge". As had been made clear

in *Prebble*, the mere citation of things said in Parliament was unexceptionable if done "without any accompanying allegation of impropriety or any other questioning". At [120], he emphasised the importance of identifying the purpose for which evidence of proceedings in Parliament is relied upon.

43. In *OGC*, Stanley Burnton J returned to the topic in a case where the claimant relied on evidence given to a Parliamentary select committee, and to the report of that committee, as relevant to the question whether a document should be disclosed under the Freedom of Information Act 2000. At [39]-[40], he cited *Hamilton v Al Fayed* as authority for the proposition that Parliamentary privilege prevents a challenge to the "accuracy or veracity" of what is said in Parliament, before adding: "'Veracity' is apt to include accuracy." That being so, Stanley Burnton J concluded, "*Hamilton v Al Fayed*… is authority for the proposition that Parliamentary privilege precludes the court from considering a challenge to the accuracy of something said in Parliament". At [41], he noted that, whatever the true ratio of *Prebble* and *Hamilton v Al Fayed*, both the Privy Council and the House of Lords had endorsed s. 16(3) of the Australian Act as an accurate statement of the law. It followed that:

> "58… If a party to proceedings before a court (or the Information Tribunal) seeks to rely on an opinion expressed by a select committee, the other party, if it wishes to contend for a different result, must either contend that the opinion of the committee was wrong (and give reasons why), thereby at the very least risking a breach of parliamentary privilege, if not committing an actual breach, or, because of the risk of that breach, accept that opinion notwithstanding that it would not otherwise wish to do so. This would be unfair to that party. It indicates that a party to litigation should not seek to rely on the opinion of a parliamentary committee, since it puts the other party at an unfair disadvantage and, if the other party does dispute the correctness of the opinion of the committee, would put the tribunal in the position of committing a breach of parliamentary privilege if it were to accept that the parliamentary committee's opinion was wrong.
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> 59. If it is wrong for a party to rely on the opinion of a parliamentary committee, it must be equally wrong for the tribunal itself to seek to rely on it, since it places the party seeking to persuade the tribunal to adopt an opinion different from that of the select committee in the same unfair position as where it is raised by the opposing party. Furthermore, if the tribunal either rejects or approves the opinion of the select committee it thereby passes judgment on it. To put the same point differently, in raising the possibility of its reliance on the opinion of the select committee, the tribunal potentially made it the subject of submission as to its correctness and of inference, which would be a breach of parliamentary privilege. This is, in my judgment, the kind of submission or inference, to use the words of section 16(3) of the Parliamentary Privileges Act 1987, which is prohibited."

44. *OGC* has been referred to with approval on a number of occasions. In *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin), [2016] QB 862, at [69], Sir Brian Leveson P (with whom Cranston J agreed) cited it as authority for the proposition that "a court certainly cannot refer to parliamentary material to question its truth or accuracy". In *R (Reilly) v Secretary of State for Work and Pensions (No. 2)* [2016] EWCA Civ 413, [2017] QB 657, at [109], the Court of Appeal (Underhill and Burnett LJJ and Dame Janet Smith) cited the reasoning in *OGC* as justifying a sparing approach to the inclusion of Parliamentary materials in public law cases.

45. In *Kimathi v Foreign and Commonwealth Office* [2017] EWHC 3379 (QB), [2018] 4 WLR 48, the claimants sought to rely on extracts from Hansard to prove facts about the conduct of members of UK Armed Forces in Kenya in the 1950s, which were not admitted. Relying on *OGC*, among other authority, Stewart J held at [19]-[25] that Hansard could not be admitted to prove either that the member who made the statement honestly believed it to be true or that it *was* true. At [37], he also made some observations on the meaning of the phrase "any court or place outside Parliament" in Article 9, although he noted that it was strictly unnecessary for him to rule on this issue.

46. Stewart J considered that, despite the comments of Lord Browne-Wilkinson in *Pepper v Hart* quoted at [31] above, there was support for a narrow reading of "place outside Parliament" as encompassing only tribunals exercising court-like powers. Support for this view was, he said, to be found in the Court of Appeal's decision in *Hamilton v Al Fayed* [1999] 1 WLR 1569, at 1586F-G, Erskine May (24th ed., 2011, p. 239, itself referring to para. 91 of the Report of the Joint Committee on Parliamentary Privilege of 9 April 1999) and to the opinion of Lord Mance for the Privy Council in *Toussaint v Attorney General of St Vincent and the Grenadines* [2007] UKPC 48, [2007] 1 WLR 2825, at [10].

47. Finally, in *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] EWCA Civ 213, [2020] 4 CMLR 17, the Court of Appeal did not have to rule on the application of Article 9. However, it saw force in submissions made by the Speaker, relying on *OGC* among other authority, that an answer given by a Minister in the House of Commons and evidence given to a Select Committee were both inadmissible. This was because "if the statements were held to be admissible and if there is a dispute as to their meaning, the court would be drawn into having to resolve whether what was said on behalf of the Secretary of State was accurate or not. That would bring the court into the territory which is forbidden by art. 9 of the Bill of Rights": [169].

48. In *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, Lord Reed (with whom the six other members of the Supreme Court agreed), returned to the question whether Parliamentary materials could be considered on a challenge to the compatibility of primary legislation with the ECHR. At [165], Lord Reed noted that Parliamentary privilege was not based solely on the need to avoid any risk of interference with freedom of speech in Parliament, it was also "underpinned by the principle of the separation of powers, which, so far as relating to the courts and Parliament, requires each of them to abstain from interference with the functions of the other, and to treat each other's proceedings with respect".

49. At [167]-[172], Lord Reed drew attention to the differences between the Parliamentary and judicial methods of resolving disputes. It followed from these differences that

considerable care should be taken when considering the use of Parliamentary materials in connection with the HRA. At [173]-[176], reference was made to the speech of Lord Nicholls in *Wilson* at [61]-[67]; and to the fact that submissions made in later cases by the Speaker and Clerk of the Parliaments had accepted the position set out there. At [182], it was said that the courts could consider whether it could be inferred that Parliament had formed a judgment that legislation was appropriate notwithstanding its potential impact on interests protected by Convention rights. If so, that might be a factor relevant to the compatibility of the legislation. If not, that factor would be absent.

50. However, this was subject to two caveats:

> "183… First, the courts should go no further than ascertaining whether matters relevant to compatibility were raised during the legislative process, if they are to avoid assessing the adequacy or cogency of Parliament's consideration of them… The distinction between determining whether, as a question of historical fact, an issue was before Parliament, on the one hand, and determining the cogency of Parliament's evaluation of that issue, on the other hand, is real and must be respected. Undertaking a critical assessment of Parliamentary debates would be contrary to both authority and statute. Furthermore, as I have explained at paras 167-171 above, it would mistake the nature of Parliamentary processes, and create a risk that the courts might undermine Parliament's effectiveness. Trawling through debates should not, therefore, be necessary, and is unlikely to be appropriate: a high level review of whether a topic was raised before Parliament, whether in debate or otherwise, should suffice.
>
> 184. Secondly, the courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility."

Does the NAO report fall within the scope of "proceedings in Parliament"?

Submissions for the Speaker

51. Mr Manknell for the Speaker submits that NAO Value for Money reports fall within the scope of "proceedings in Parliament". He made clear that his submissions were confined to this particular type of report. He made no submissions about reports prepared pursuant to other functions of the NAO. He made four principal submissions.

52. First, the NAO is headed by the Comptroller and Auditor General ("the C&AG"), whose appointment and functions are provided for by the National Audit Act 1983. Appointed by the King, he is an officer of the House of Commons, who cannot be dismissed unless the House agrees. His work is done on behalf of the House and to assist it: see Erskine May, §6.44.

53. Second, pursuant to Standing Order 148(1), the Public Accounts Committee ("PAC") is the key committee involved in scrutinising the supply of money to the Crown, a matter which falls within the particular responsibility of the House of Commons under

the Parliament Act 1911. There is a close relationship between the C&AG/NAO and the PAC. Section 11 of the Budget Responsibility and National Audit Act 2011 ("the 2011 Act") provides for the continuation of the office of C&AG, appointment to which is by the King through Letters Patent, the power of appointment exercisable on an address of the House of Commons, the motion for the address to be moved by the Prime Minister with the agreement of the Chair of the PAC, the appointment to last for a single 10 year term. By s. 12, the C&AG continues to be an officer of the House of Commons and is not to be regarded as a servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown. Sch. 2 to the 2011 Act provides for the Public Accounts Commission ("TPAC"), another Commons committee, to oversee the work of the NAO by appointing its Board, account officers and external auditors. Sch. 3 provides that the C&AG can review and amend the strategy for the performance of the NAO's audit function, but before the strategy and any revision must be approved by TPAC; likewise, the NAO and C&AG must prepare a code of practice, which must also be approved by TPAC.

54. Third, NAO Value for Money reports are in practice laid before Parliament and published by the House of Commons. They are therefore subject to the Parliamentary Papers Act 1840, which confers immunity on the publisher.

55. Fourth, applying the relevant case law (including *DK* and *Warsama*), NAO reports fall within the scope of proceedings in Parliament and therefore attract the protection of Article 9.

Submissions for the Government parties

56. Sarah Hannett for the Government parties adopted the submissions of the Speaker. She invited us to conclude that NAO reports are "part of or incidental to the core Parliamentary function of scrutinising public spending and are therefore proceedings in Parliament".

Submissions for the claimants

57. Lord Pannick for the Claim 1 claimants submitted that NAO reports are not "proceedings in Parliament". The 2011 Act establishes no formal process by which the NAO is to provide information to the House of Commons. There is no statutory requirement to lay Value for Money reports before Parliament. The situation is therefore not akin to that in *Warsama*, where the House had called for the report and its contents were inextricably bound up with the activities of Parliament. NAO reports are frequently relied upon by the courts. Examples in the last 12 months include *Unipart Group Ltd v Supply Chain Coordination Ltd* [2025] EWHC 354 (TCC) at [58], *R v Qasim* [2024] EWCA Crim 1655 at [30], *R (Transport Action Network Ltd) v SST* [2025] Env LR 2 (Admin) at [16] and *R (FH) v SSHD* [2024] EWHC 1327 at [71].

58. Mr Hyam for the Claim 2 claimants adopted Lord Pannick's submissions and added that NAO reports are not analogous to unopposed returns; and that *DK* is not binding on this Court and should not be followed. Mr Quintavalle for the Claim 3 claimants also adopted Lord Pannick's submissions on this point.

Discussion: general principles

59. The authorities contain five general principles relevant to the present issue.

60. First, the scope or ambit of Article 9 of the Bill of Rights (and of Parliamentary privilege more generally) is a matter for the courts. Where a question arises in legal proceedings about whether a particular activity falls within that scope, the courts will pay careful regard to any views expressed by the Parliamentary authorities. Those views are not, however, determinative. This starting point was common ground between the parties, including the Speaker. It also has the imprimatur of the Supreme Court: see *Chaytor*, at [15]-[16] and *Miller*, at [66].

61. Second, in its primary or core meaning, "proceedings in Parliament" are the actions and decisions of the two Houses of Parliament and the formal conduct of their members which informs and triggers those actions and decisions: principally, speaking in debates, but also other formal conduct such as voting, giving notice of a motion, or presenting a petition or report from a committee: Erskine May, §13.12. Thus, the main object to which Article 9 is directed is "freedom of speech and debate in the Houses of Parliament and in parliamentary committees" or "freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges": *Chaytor*, [47] and [61].

62. Third, Parliamentary privilege is also underpinned by the principle of the separation of powers, which requires the courts and Parliament to "abstain from interference with the functions of the other, and to treat each other's proceedings with respect": *SC*, [165]. As the Supreme Court has emphasised, respect is owed in both directions. Parliament manifests respect for courts and tribunals by adhering to other rules and conventions which impose limits on comment regarding matters that are *sub judice* and constrain criticism of individual judges. The scope and application of these rules and conventions is a matter for the Parliamentary authorities, just as the scope of Parliamentary privilege is for the courts to determine.

63. Fourth, this wider rationale, which goes beyond protecting freedom of speech and action in Parliament, explains why Parliamentary privilege extends to the words and actions not only of members of the Houses of Parliament but also of those who give evidence before the committees established under their standing orders (see Erskine May §13.12 and *OGC*). It would be inappropriate for the evidence of a witness before a select committee to be questioned or impeached in a court or tribunal because it might affect the witness's willingness to give frank evidence, and because it would risk cutting across the functions of the select committee, thereby failing to treat its proceedings with respect. Likewise, as the Supreme Court made clear in *Wilson* and *SC*, the courts do not express a view on the quality or cogency of debate in Parliament. To do so would be incompatible with the maintenance of mutual respect between Parliament and the courts, even if in practice it would be unlikely to affect the willingness of members to participate in debate.

64. Fifth, it was established in *Warsama* that Parliamentary privilege extends to reports presented in compliance with the direction of His Majesty given following an Address presented to him as resolved upon by the House of Commons. But [71] of the judgment in that case makes clear that there was no suggestion that privilege extended to the

report in issue there, or the investigations or inquiries which had given rise to it, prior to the stage at which it was produced to Parliament pursuant to this procedure, even though it was contemplated in advance that the procedure would be invoked.

Discussion: the status of NAO reports

65. It is against this constitutional background that we consider whether NAO Value for Money reports fall within the scope of "proceedings in Parliament". We conclude that they do.

66. The fact that he was an officer of the House of Commons, appointed by the Sovereign and removable only with the agreement of the House, was not enough to bring the Parliamentary Ombudsman's reports within the scope of Parliamentary privilege, in the view of the Divisional Court in *Dyer*. Nor was the fact that his reports were required to be laid before Parliament and were in fact considered by a House of Commons Select Committee. Equally, Woolf LJ's judgment in *R v Parliamentary Commissioner for Standards ex p. Al Fayed* might be thought to suggest that what matters is the object of the inquiry: reports on the conduct of Parliamentarians were caught, whereas reports on the performance of government departments or agencies were not. NAO reports concern the performance and conduct of the administration, rather than the conduct of members of the Houses of Parliament. The reasoning in *Dyer* and *Al Fayed* might therefore be thought to suggest that Article 9 does not apply to NAO reports.

67. In our view, however, *Chaytor* requires us to apply a different test. The question posed by [47] of Lord Phillips's judgment in that case is not whether the activity in question is inward or outward looking. The focus is, rather, on the nature of connection between the activity in question and the "core or essential business" of Parliament, and on whether, if the activity does not enjoy privilege, this is likely to impact adversely on that business. To answer this question, it is necessary to consider both law and practice. In that connection, there are in our judgment four salient points.

68. First, since the revolutionary settlement of 1689, Parliament has controlled the supply of funds to the Crown. Since the Parliament Act 1911, the House of Commons has asserted dominance in this field. In the modern era, the effective control of supply requires the ability to subject public expenditure to more detailed scrutiny than would be possible through debates on the floor of the House. The PAC provides the forum for such scrutiny. It occupies a key constitutional position among the Parliamentary checks and balances on government action. This position is reflected in the fact that, in accordance with Standing Order No 122B (1)(e) of the House of Commons, its chair is always an opposition MP. We accept the Speaker's submission that its role is at the core of Parliament's function of ensuring the public accountability of Ministers and their departments: cf. *Warsama*, at [61].

69. Second, just as the performance of this function requires a specialist forum, so it requires the assistance of expert investigators and auditors. The NAO affords that assistance through the production of Value for Money reports. Without such reports, the volume and complexity of the activities of the modern administrative state would make it impossible for the PAC effectively to perform its function of scrutinising public expenditure. The legal provisions to which Mr Manknell has referred—in particular, ss. 11, 12 and 14 of and Schs 2 and 3 to the 2011 Act—show the strength and depth of

the connections between the NAO and the PAC (and TPAC). At least when producing Value for Money reports, it is fair to say that the NAO's principal function is, as it says on its website, to "support Parliament in holding government to account".

70. Third, although there is no statutory requirement for Value for Money reports to be laid before Parliament, they are invariably laid before Parliament and often form the evidential starting point for the work of the PAC. The laying of such reports before Parliament serves a purpose equivalent to the giving of evidence to a Parliamentary select committee. If anything, such reports occupy a role that is more integral to the business of the PAC than the evidence of most witnesses is to the business of the select committee before whom they give evidence.

71. Fourth, NAO reports often contain uncompromising criticisms of Ministerial or departmental conduct, which may well have an impact on the reputation of individuals. The usefulness of the NAO's Value for Money Reports would be substantially diminished if the authors were concerned that their reports might give rise to legal liability on their part. It is true that the authors would be able to rely on qualified privilege as a defence to a claim in defamation. But qualified privilege is defeasible if the claimant can show malice. Malice for these purposes is not the same as bad faith: recklessness or indifference as to truth is enough. In any event, as *Warsama* shows, a defamation claim is not the only one that could be brought. We consider that the NAO's function in issuing Value for Money reports, and its centrality to the work of the PAC and of Parliament in holding government to account, demands that the protection of privilege should extend to those reports.

72. We are aware, of course, that the claimants are not seeking to impose any legal liability on the authors of the NAO report. But the effect of a finding that such reports fall outside the scope of "proceedings in Parliament" would be to deny them the protection of Article 9 altogether, including in claims seeking to establish legal liability on the part of their authors. In our view that would be "likely to impact adversely on the core or essential business of Parliament": *Chaytor*, [47]. If and to the extent that there is a legally significant difference between seeking to attach legal liability to "proceedings in Parliament" and merely seeking to criticise them, that must be because of the limited scope of the concepts of "questioning or impeaching". We turn to that next.

73. At this stage, however, we conclude for all the reasons we have given that each of the NAO reports on which the Claim 2 claimants placed reliance was a "proceeding in Parliament" for the purposes of Article 9 of the Bill of Rights. We note that our conclusion in this respect accords with that of the Upper Tribunal in *DK (India)*.

Is reliance on the reports permissible?

<u>The objections to the admissibility of the reports</u>

74. Mr Manknell for the Speaker submitted that the claimants cannot properly rely on the select committee or NAO reports to establish factual matters, save where the facts are agreed by parties. In any other case, reliance would place the Government parties in the invidious position of having to accept the contested facts, since questioning them would be prohibited by Article 9: see *OGC*, *Kimathi*, *Reilly* and *Collins*. Nothing in *Wilson* (as further explained in *SC*) suggests the contrary. The exception there is a

limited one and relates only to Parliamentary consideration of the Bill which became the Act whose interpretation is in issue. Ms Hannett for the Chancellor adopted these submissions and made plain that the Government parties did not accept all the factual conclusions contained in the reports whose admissibility was disputed.

The claimants' response

75. Lord Pannick for the Claim 1 claimants submitted that *Wilson* shows that the task of assessing the proportionality of legislation is different from that of interpreting or applying it. The former involves comparing the effect of the legislation with its policy objectives and making a value judgment made by reference to the prevailing circumstances. *Wilson* shows that this requires the court to look "outside the statute … to see the complete picture": [61]. To assess proportionality, the court needs "background information" and "enlightenment on the nature and extent of the social problem… at which the legislation is aimed": [63]. Such information may be contained in Parliamentary material: [64]. Mr Hyam for the Claim 2 claimants adopted these submissions.

Discussion: first principles

76. The test at [47] of Lord Phillips' judgment in *Chaytor* was directed to the question whether a particular activity falls within the scope of "proceedings in Parliament". However, in stating the test, Lord Phillips identified what he regarded as the primary purpose of Article 9: maintaining "freedom of speech and debate in the Houses of Parliament and in parliamentary committees". To that may be added the equally important purpose of ensuring that Parliament has available to it the information it requires to perform its function of holding the government to account. This is why it is not only parliamentarians, but also those who give evidence to parliamentary committees and those (such as the NAO) who gather the information necessary for the performance of their functions, whose activities fall within the term "proceedings in Parliament".

77. It is easy to see that, if a court were to attach criminal or civil liability to evidence given to select committees or to NAO reports, it would undermine these purposes. Witnesses and authors of reports would feel inhibited in what they could say. This would be likely in practice to limit the information available to Parliamentary committees, and to Parliament itself, in performing its functions. There would be a real danger that evidence and reports would cease to be forthright and hard-hitting, as they often are now, and would end up being "lawyered".

78. As Lord Reed made clear at [165] of *SC*, the separation of powers supplies a separate and additional doctrinal rationale for Article 9: the separation of powers, which requires the courts and Parliament each "to abstain from interference with the functions of the other, and to treat each other's proceedings with respect". Some things a court or tribunal might do, short of attaching criminal or civil liability to proceedings in Parliament, would contravene this requirement. To take a paradigm example, if a court or tribunal were to impugn the good faith or motives of a witness or report author, it would have interfered with the functions of the committee just as surely as Parliament would if it impugned the good faith of a witness in court proceedings.

79. If the matter were unconstrained by authority, we would question whether any of the doctrinal rationales for Article 9 justify reading the prohibition on "questioning or impeaching" so broadly as to prohibit any factual disagreement with the evidence given to, or indeed the conclusions reached by, a select committee. In principle, we find it hard to imagine that a witness or report author would be deterred from giving full and frank evidence by the prospect that a court, while not attaching criminal or civil liability or questioning the good faith of the witness or report author, might disagree with a factual conclusion. This is particularly so in the case of a professional witness or report author, such as those responsible for the preparation of NAO Value for Money reports, who must be assumed to encounter reasoned disagreement with their views routinely and be robust enough to tolerate it. The suggestion that the content of a select committee's own factual conclusions might be affected if the courts were able to consider them alongside other evidence and (if appropriate) reject them seems to us even more far-fetched.

80. Looking at the matter through the lens of the separation of powers, we find it difficult to see why a reasoned disagreement with the factual evidence given by a witness or report author, or indeed by a committee itself, should be regarded as interfering with the functions of the committee or as failing to accord respect to it, or to Parliament as a whole. Indeed, it might be argued that a rule requiring a court to adopt an attitude of studied ignorance towards the evidence given to or conclusions reached by a select committee itself manifests a certain lack of respect for the important work performed in the public interest by those committees and by those who give evidence and report to them.

81. However, this point is now covered by authority. In *OGC*, Stanley Burnton J expressly considered whether the prohibition on challenging the "veracity" of proceedings in Parliament included any challenge to the "accuracy" of things said as part of such proceedings. We agree with him that the Privy Council in *Prebble* and the House of Lords in *Hamilton v Al Fayed* made clear, by endorsing the Australian Act as reflective of the scope of Article 9, that the answer was "yes". We agree with Stanley Burnton J that, given the clarity of the views expressed in these authorities, it does not matter whether the point was part of the ratio of either decision. In any event, the position set out by Stanley Burnton J in *OGC* has now been endorsed by the Divisional Court in *Collins* and by the Court of Appeal in *Reilly* and (obiter) in *Heathrow Hub*. On the present state of the authorities, we consider that it is too late for a change of course other than by the Supreme Court.

82. This means that, unless some exception applies, it is not open to the claimants to rely on either the conclusions of the select committees or the reports of the NAO to establish any contested issue of fact.

Discussion: Does *Wilson* create an exception?

83. The question in *Wilson* was whether it was permissible for a court considering the Convention compatibility of an Act of Parliament to consider statements made during the passage of the Bill about its aims and objectives. It was in that context that Lord Nicholls said that it may be necessary to look outside the statute "in order to see the complete picture", including "the nature and extent of the social problem (the 'mischief') at which the legislation is aimed"; and that, if information relevant to these

matters had been provided by a minister or other member "in the course of a debate on a Bill", the courts must be able to take it into account, subject to strict caveats: see [61]-[64] and [66]-[67]. In our judgment, these passages apply only to statements made during the passage of the Bill which became the Act whose compatibility is in issue, and not to other parliamentary statements relied upon by one side or other in support of a submission on a contested factual issue.

84. Furthermore, Lord Nicholls was not saying that the HRA had licensed an exception to Article 9. On the contrary, the new approach in compatibility cases was "constitutionally unexceptionable", given that it did not involve any suggestion that the parliamentary statements being admitted were inspired by improper motives or were untrue or misleading and given that there was no question of any legal liability: [65]. When Lord Nicholls' opinion is read as a whole, the changed approach is framed as an extension of *Pepper v Hart*, which itself was described as effecting a relaxation of the previous rule imposed by the courts themselves—and one which was entirely consistent with Article 9, rather than an exception to it: see [57]-[58].

Discussion: What use can be made of materials subject to Parliamentary privilege in the present proceedings?

85. The authorities make clear that Article 9 prohibits the admission of materials falling within the term "proceedings in Parliament" in court or tribunal proceedings *for certain purposes*. Such materials cannot be used to establish criminal or civil liability. They cannot be deployed to suggest that a witness or report author, or a member of either House, has acted in bad faith. They cannot be deployed as part of a submission that attacks the cogency or quality of parliamentary debate, or (in the context of proceedings before a parliamentary committee) impugns the veracity or accuracy of evidence given to the committee or conclusions reached by it. That being so, it would be unfair to allow them to be deployed for the opposite purpose (i.e. to show the cogency or quality of parliamentary debate on a particular issue or to establish contested facts). These prohibitions are all explained because the use in question directly involves, or indirectly invites, the questioning or impeaching of proceedings in Parliament by one or more parties to litigation, or by the court or tribunal itself.

86. But uses of parliamentary materials which do *not* involve questioning or impeaching proceedings in Parliament are *not* prohibited: see *Prebble*, 337G; *Wilson*, [65] (citing the Joint Committee on Parliamentary Privilege (1999) at para. 28); *Toussaint*, [19] and [23]; *OGC*, [49] (the reasoning in which was approved in *Collins* and *Reilly*).

87. In many cases, materials falling within the term "proceedings in Parliament" will be a very useful resource for claimants in judicial review proceedings. This is particularly likely to be true of NAO reports, which are typically rigorously researched and carefully drafted. It may also be true of other evidence given to parliamentary committees and of the reports of those committees themselves. This makes it important to take care in distinguishing uses which involve or invite questioning or impeaching from uses which do not.

88. Despite what we have said at [79]-[80] above, it is now well-established that courts and tribunals cannot admit parliamentary materials attracting the protection of Article 9 for the purpose of establishing a contested fact. This is because doing so invites the other

party or the court to question or impeach things said in parliamentary proceedings. We would respectfully question whether it follows, as held in *Kimathi*, that statements made in Parliament cannot be admitted (whether for the truth of their contents or for the fact that the statement was made) in circumstances where the other party has identified no independent evidential basis for contesting them.

89. In any event, however, we are confident that there is nothing objectionable in a party extracting the key factual conclusions upon which he seeks to rely with a view to putting those conclusions to his opponent to see if they are accepted. That is what happened here, following a suggestion made by the court at the hearing on 8 April 2025. If and to the extent that the conclusions are accepted, admitting them involves no infringement of Article 9 or any wider principle of Parliamentary privilege, because it neither involves nor invites any questioning or impeaching of proceedings in Parliament.

90. In our judgment, we can therefore proceed to consider the claims on the basis of the agreed factual matters set out in the schedule prepared by the Government parties and filed on 23 April 2025, as set out in Annex D.

ANNEX C: The key statutory provisions relating to special educational needs

1. Section 7 of the Education Act 1996 ("EA 1996") requires that all parents "shall cause… every child of compulsory school age" to receive education that is "suitable" to "any special educational needs… he may have". A parent which does not do so may be subject to fines, criminal prosecution and conviction: sections 444-444B of the Education Act 1993; *Isle of Wight Council v Platt* [2017] UKSC 28, [2017] 1 WLR 1441, [21]-[22], [47]-[49].

2. Section 19 EA 1996 imposes a duty on local authorities to arrange for "the provision of suitable…education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them."

3. Under section 20(1) of the Children and Families Act 2014 ("CFA 2014"), "[a] child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her". Section 20(2)(a) CFA provides that a child has a "learning difficulty" if he or she "has a significantly greater difficulty in learning than the majority of others of the same age". Section 20(2)(b) provides that a child has a disability if he or she "has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions".

4. Section 21(1) CFA 2014 defines "special educational provision" to mean "educational or training provision that is additional to, or different from, that made generally for others of the same age" in mainstream schools.

5. All local authorities and state schools are required by §§1.14-1.19, 6.14-6.27 of the statutory SEN Code of Practice to identify those of their children who have SEN. All schools (including private schools) are required to make reasonable adjustments for disabled children pursuant to ss. 20-21 of the Equality Act 2010.

6. The CFA 2014 imposes the following duties on schools in respect of children with SEN but without an EHCP:

   (a) mainstream state schools must use their "best endeavours" to make the special educational provision necessary to meet a child or young person's SEN (s. 66);

   (b) mainstream state schools must appoint a suitably qualified or experienced Special Educational Needs Co-ordinator (SENCO) to oversee the school's strategic approach to meeting SEN (section 67);

   (c) state schools must publish a SEN Information Report, with prescribed minimum content. Elements include setting out how the school will implement its SEN policy and its approach to the identification and assessment of SEN (s. 69 CFA 2014 and Sch. 1 to the Special Educational Needs and Disability Regulations 2014 (SI 2014/1530));

(d) save in prescribed circumstances, mainstream state schools must secure that a child with SEN engages in the activities of the school together with children who do not have SEN (s. 35); and

(e) state schools must inform the child and his or her parent if special educational provision is being made for the child (where the child does not have an EHCP) (s. 68).

ANNEX D: Agreed facts about special educational needs provision in the UK at the time of publication of the National Audit Office Report in October 2024

1. In 2021/22, 69 per cent of those with SEN at key stage 4 were in sustained education, apprenticeship or employment after leaving 16 to 18 study, compared to 85 per cent for those without. This reflects similar proportions to 2018/19.

2. 31 per cent of 35 local authority special educational needs inspections by Ofsted and the Care Quality Commission between January 2023 and March 2024 found "widespread and/or systemic failings".

3. Department for Education ("DfE") and Department for Health and Social Care ("DHSC") jointly published review findings in a March 2022 green paper which found the system created "vicious cycles" of worsening performance with needs being identified late, insufficient capacity and a lack of confidence in the system.

4. Between 2015 and 2024 there was an overall 14 per cent increase in state school pupils with SEN support, to 1.14 million children.

5. For pupils at state schools with SEN support, there were increases across certain identified primary needs: (i) social, emotional and mental health needs (40 per cent increase to 254,000 pupils); (ii) speech, language and communication needs (28 per cent increase to 292,000 pupils); and (iii) autistic spectrum disorders (74 per cent increase to 104,000 pupils). Some primary needs fell in number, including moderate learning difficulties (18 per cent decrease to 180,000).

6. The number of children with an EHCP or equivalent statement of special educational needs increased significantly from 240,000 in January 2015 to 576,000 in January 2024. This was an increase of 140 per cent.

7. 50 per cent of children in 2023 were waiting for an EHCP for longer than 20 weeks (the statutory expectation). This was a reduction from around 60 per cent from 2018 to 2021. From 2023, the data collection process changed from aggregate figures at local authority level, to a person level collection. This was a major change in approach and as such care should be taken with comparisons across this period.

8. In 2023, local authorities issued between 1 per cent and 100 per cent of EHCPs within 20 weeks, with 24 of 148 issuing less than 20 per cent.

9. The DfE's central estimate was that, without policy interventions, the number of EHCPs would nearly double to just over one million by 2032/33.

10. The proportion of EHCP decisions challenged in the First-tier Tribunal increased from 1.6 per cent in 2018 to 2.5 per cent in 2022/23. There was a 159 per cent increase in the number of decisions appealed, from 6,000 in 2018 to 15,600 in 2022/23.

11. In 2023/24, the proportion of appeals decided by the First-tier Tribunal where the appellant was successful in the majority of the sections of the EHCP appealed against was 99%. The proportion was 98 per cent in 2022/23.

12. Each year since 2016-17 most local authorities have overspent their annual high needs budget. In 2022/23, 101 local authorities (66 per cent of the 152 submitting returns) had overspent on their high needs budget.

13. The DfE forecasted a cumulative deficit for 2024-25 that was slightly higher than that predicted by local authorities, with a central estimate for 2024/25 of £3.2 billion.

14. DfE's central estimate as at October 2024 of the cumulative deficit in the dedicated schools grant at the end of 2025-26 was £4.6 billion, although these figures are uncertain.

15. The DfE estimated that around 43 per cent of all local authorities will have cumulative deficits exceeding or close to larger than their reserves by the end of 2025/26.

16. The central estimate of the gap between DfE's forecast high-needs costs and the current level of high-needs funding, adjusted for forecast inflation, in 2027/28 was £3.4 bn.

17. The DfE's aggregation of 105 local authorities' forecast cumulative dedicated schools grant deficits between 2022-23 and 2028-29, as at August 2024, by intervention approach, forecasted a cumulative deficit by 2028-29 of 9.4 billion.