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Appeal Nos: Appeal 1: CA-2025-001851
& Appeal 2:CA-2025-001686
Case Nos: Claim 1 (AC-2024-LON-004232) and Claim 3 (AC-2025-LON-000133)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
DIVISIONAL COURT
Dame Victoria Sharp, President of the King's Bench Division, Lord Justice Newey and Mr Justice Chamberlain
[2025] EWHC 1467 (Admin), [2026] 1 WLR 10

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2026

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE SINGH
and
LADY JUSTICE FALK

- -

Claim 1/Appeal 1: CA-2025-001851

BETWEEN

THE KING
on the application of
(1) BYL (by their litigation friend BAU)
(2) BAU

Claimants/Appellants

-and-

CHANCELLOR OF THE EXCHEQUER

Defendant/Respondent

-and-

(1) COMMISSIONERS OF HIS MAJESTY'S REVENUE AND CUSTOMS
(2) SPEAKER OF THE HOUSE OF COMMONS

Interested Parties

-and-

SECRETARY OF STATE FOR EDUCATION

Intervener

Claim 3/Appeal 2: CA-2025-001686

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 EDUCATION ASSOCIATION LIMITED T/A WYCLIF INDEPENDENT CHRISTIAN SCHOOL
(5) YVONNE OWUSU-ANSAH
(6) STEPHEN JOHN WHITE
(7) JOSIAH WHITE (a child, by his litigation friend STEPHEN JOHN WHITE)
(8) AHD
(9) ANF (a child, by their litigation friend AHD)
(10) AWM
(11) ASK (a child, by their litigation friend AWM)

Claimants/Appellants

-and-

CHANCELLOR OF THE EXCHEQUER

Defendant/Respondent

-and-

(1) COMMISSIONERS OF HIS MAJESTY'S REVENUE AND CUSTOMS
(2) SPEAKER OF THE HOUSE OF COMMONS

Interested Parties

-and-

SECRETARY OF STATE FOR EDUCATION

Intervener

Stephen Broach KC and Khatija Hafesji (instructed by **Rook Irwin Sweeney LLP**) for the **Claim 1 Claimants/Appellants** (Group One Claimants)

Bruno Quintavalle (instructed by **Andrew Storch Solicitors Ltd**) for the **Claim 3 Claimants/Appellants** (Group Two Claimants)

Sir James Eadie KC, Sarah Hannett KC, Jason Pobjoy KC, Tim Parker and **Katy Sheridan** (instructed by the **HM Revenue and Customs**) for **the Defendant/Respondent, the First Interested Party and the Intervener** (the Government Parties)

Hearing dates: 20 and 21 January 2026

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 27 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR GEOFFREY VOS, MASTER OF THE ROLLS, LORD JUSTICE SINGH and LADY JUSTICE FALK:

Index

Section	Paragraph
Section A: Introduction	1
Section B: The application to adduce fresh evidence	16
Section C: The essential factual background	19
Section D: The legislation under challenge	29
Section E: The judgment of the Divisional Court	34
Section F: The issues	44
Section G: The court's approach to proportionality	49
Section H: The Group One Claimants' ground of appeal on proportionality	56
Section I: Group Two Claimants' grounds of appeal	98
Section J: Conclusion	185

Section A: Introduction

1. The two claimant groups appealing to this Court contend that the Divisional Court ought to have held that the legislation applying value added tax (VAT) to private school fees was discriminatory and in violation of three essential provisions of the European Convention on Human Rights (the Convention). The claimant groups in question are: (i) children and parents of children at private schools operated by and for the disadvantaged Charedi Orthodox Jewish Community (Group One Claimants), and (ii) children and parents of children at private schools following a strictly Evangelical Christian curriculum and the schools themselves (Group Two Claimants).

2. Both claimant groups contend that the type of religious education sought by the parents for their children is not available in the state system. The imposition of VAT on their schools' fees will, they say, make the schools unaffordable, cause some children to leave, and ultimately cause some schools to collapse. The schools in question mostly charge low fees and are, in some cases, funded by community or other donations, but even so it is said that the new VAT charges will deprive many children of the specialist religious education that their parents desire for them. That state of affairs, they submit, violates article 14 of the Convention (article 14) read with article 2 of Protocol 1 to the Convention (A2P1). The Group Two Claimants also submit that it violates the terms of both article 1 of Protocol 1 to the Convention (A1P1) and A2P1, or alternatively that it breaches article 14 read with either of those articles.

3. It is important to recite these provisions of the Convention at the outset. They are among the "Convention rights" set out in Schedule 1 to the Human Rights Act 1998 (the HRA).

4. A2P1 provides for the right to education as follows:

> 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.

5. A1P1 provides for the right to property as follows:

> 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.

6. Article 14, which prohibits discrimination in the enjoyment of the other Convention rights, 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.

7. The Divisional Court, in broad terms, rejected all the claims of the Group One and Two Claimants, holding that any interference with their Convention rights was justified and proportionate.

The parties' arguments in outline

8. The Group One Claimants contend that the Divisional Court's primary error was at [156] where it gave "considerable weight" to the Government's general policy 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 (the Pluralism Policy). The Pluralism Policy was, the Group One Claimants contend, irrelevant to the correct proportionality question of whether the Government had provided an objective and reasonable justification for its failure to exempt low-cost private Charedi schools from VAT. The Divisional Court had already found at [149] that there were "almost no state schools which offer [a Charedi education], so [the Group One Claimants] do not have state alternatives which are religiously acceptable to them". Accordingly, the Pluralism Policy did not objectively justify the *Thlimmenos* discrimination against them which the imposition of VAT had caused. *Thlimmenos* discrimination is, in short, failing to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece* (2001) 31 EHRR 15 at [44]). Both claimant groups contended that imposing VAT on low-cost fees failed to treat those "significantly different people" differently. The Group One Claimants had "a strong religious and cultural preference" for a specialist education, and the Group Two Claimants were unlikely to regard state education as acceptable "because of their belief that education must be 'infused' with Christian principles" (see the Divisional Court at [149] and [174]). Allowing those children to enter the state system, where such religious education was not available, was not a justification for that discrimination, whatever the Government's Pluralism Policy might be.

9. The Group Two Claimants' grounds of appeal challenged the Divisional Court's rejection of their contention that the imposition of VAT interfered with: (a) their possessions contrary to the public interest under A1P1, and (b) the very essence of their right to education under A2P1. That right had, they argued, to be understood in the light of international conventions and the European consensus on not taxing education, as currently reflected in the EU Council Directive 2006/112/EC on the Common System of VAT (the VAT Directive). Moreover, the Group Two Claimants contended that, even if the first sentence of A2P1 had not been infringed, the second sentence (see [4] above) had. The Government had imposed a fiscal obstacle to access to Evangelical Christian education, which is not available from the state. It had thereby failed to respect the parents' religious and philosophical convictions.

10. The Government Parties argued, on the basis of *Shvidler v. Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] UKSC 30, [2025] 3 WLR 346 (*Shvidler*) at [142]-[165], that this Court should **not** undertake a fresh proportionality analysis. In oral argument, however, the Government Parties did not

strongly resist the Court's suggestion that it thought it should, on the basis of *Shvidler*, consider afresh the question of whether the Government had provided an objective and reasonable justification for its failure to exempt low-cost schools from VAT. Our reasons for doing so include the facts that these appeals: (a) involve the first consideration at appellate level of a new legislative regime of general application, (b) have considerable significance for society, and (c) have been granted permission on substantive grounds (see *Shvidler* at [160]).

Our decision in outline

11. In essence the Divisional Court was right to say that the A1P1 rights of the Group Two Claimants were not engaged. The schools' complaint is about a loss of anticipated future income, which is not a "possession" for A1P1 purposes. The parents also cannot argue that the imposition of VAT has interfered with the peaceful enjoyment of their possessions, because they are not obliged to continue sending their children to such schools.

12. In relation to the Group Two Claimants' argument that the failure to exempt them from VAT interfered with the very essence of their right to education under A2P1, the Divisional Court accurately summarised the relevant case-law at [30]-[53]. The Divisional Court was right at [54]-[58] and [60]-[65] to reject this argument. Lord Bingham summed the matter up in *A v. Head Teacher and Governors of the Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363 (*The Lord Grey School*) at [24] where he said that: "[t]here is no right to education of a particular kind or quality, other than that prevailing in the state". Even reading the second sentence of A2P1 alongside the first sentence, the same conclusion prevails.

13. Having undertaken our own proportionality analysis (see [75]-[97] below), we have concluded that the Government has provided an objective and reasonable justification for its failure to exempt low-cost schools from VAT. We have taken careful account of the guidance provided by the unanimous 7-judge decision of the UK Supreme Court in *R (SC and others) v. Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 (*SC*) at [97]-[162]. Whilst some of the language as to, for example, intensity of review and margin of appreciation can become confusing, the alleged discrimination in this case has demanded very careful scrutiny of what the Government has put forward as its objective and reasonable justification. We have given full weight to the fact that the case concerns decisions by Parliament and the Executive as to a matter of social and economic policy. We have applied the four-stage test adumbrated by Lord Reed in *Bank Mellat v. HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 (*Bank Mellat*) at [74] as follows:

> (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.

14. In summary, we have found the Government's reasons for rejecting the suggested carve-out for schools with fees set below a certain threshold to be compelling. They were encapsulated in [90] of a statement from Ms Scarlett Graham (Ms Graham), filed on behalf of HM Treasury (HMT), which can be summarised briefly as follows. A carveout for low-cost schools:

    i) would lead to significantly different treatment of schools with fees just above the threshold compared to those just below, which would not be fair to schools just above the threshold and could be open to legal challenge;

    ii) could distort the market and undermine competition by creating perverse incentives for schools to suppress fees just below the threshold;

    iii) could create incentives for schools: (a) to suppress fees legitimately (e.g. through cost-cutting), or (b) to seek to avoid VAT by (for example) notionally reducing fees but supplementing income via value shifting or via supposed donations which would not in reality be optional, and therefore not truly donations, which would be difficult and resource intensive for HMRC (His Majesty's Revenue and Customs) to police;

    iv) would increase administrative burdens for compliant, non-avoidant schools and HMRC, and make legislative implementation more complex;

    v) would reduce revenue from the measure by an estimated sum of £30 million (if the fee threshold for exempt schools was set at £7,690 per annum); and

    vi) would be inconsistent with the Government's policies that: (a) state education is suitable for children of all faiths and none, and (b) all schools are required to follow the Equality Act 2010.

The shape of our judgment

15. After addressing applications to adduce fresh evidence, we shall deal with the issues raised under the following headings: (i) the essential factual background, (ii) the legislation under challenge, (iii) the decision of the Divisional Court, (iv) the issues, (v) the court's approach to proportionality, (vi) the Group One Claimants' ground of appeal on proportionality, (vii) the Group Two Claimants' grounds of appeal, including their arguments on the engagement of A1P1, A2P1, article 14 and proportionality, and (viii) conclusions.

Section B: The applications to adduce fresh evidence

16. Shortly before the hearing of these appeals both the Government Parties and the Group Two Claimants asked for permission to adduce fresh evidence which post-dates the judgment of the Divisional Court.

17. The application on behalf of the Government Parties sought to rely on a witness statement by Michael O'Doherty, a Deputy Director at HMRC with responsibility for the Indirect Taxes Team. This gives some statistics updating the Court on the re-costing exercise that was provided of the Exchequer impact of the policy for inclusion in the Office for Budget Responsibility's (OBR) fiscal forecast at the Autumn Budget 2025.

On behalf of the Group Two Claimants there was an application to rely on the witness statement of Julie Robinson, filed in response to that of Mr O'Doherty.

18. In the event the evidence was not touched upon to any great extent at the hearing but nevertheless we consider it right in principle to have all the up-to-date evidence before this Court to determine the issues before us and so we grant both applications for permission. We have taken all the evidence into account but do not consider that it materially alters the assessment of the issues which arise on these appeals. We have also noted a further application to adduce an additional witness statement, served pursuant to the Group One Claimants' duty of candour, in relation to certain discussions with local authorities about the meaning of "private schools" for the purposes of business rates. However, we take the view that the issues which arise on these appeals remain live ones and are not materially affected by this new evidence.

Section C: The essential factual background

19. The most relevant facts for the purposes of the appeal may be summarised as follows.

The VAT measure

20. The VAT charge on private school fees (the measure) was introduced further to a commitment in the 2024 Labour Party manifesto that it would "end the VAT exemption … for private schools to invest in our state schools". Details of the proposed policy were provided in a Technical Note published in July 2024, which also allowed for consultation on limited aspects (none of which is relevant to the matters in dispute). The VAT charge was initially implemented by a Budget Resolution passed by the House of Commons on 6 November 2024 and then included in what became the Finance Act 2025 (the FA 2025).

21. The Technical Note explained that, when designing the measure, the Government sought to balance four principles, namely: (1) raising revenue to support public finances and help deliver the Government's commitments relating to education and young people, (2) ensuring that high quality education was available for every child, (3) making the policy fair, with all private school users "paying their fair share", while ensuring that pupils with the most acute needs were not impacted (with the result that pupils with an education, health and care plan (EHCP) which named a private school would continue to attend that school with fees paid by the local authority), and (4) minimising administrative burdens while ensuring that the policy was not open to abuse.

22. It is worth pausing to observe that it is apparent from this that the principal aim was revenue raising, with particular reference to the spending commitments referred to (and thus principle (2)). Principles (3) and (4) relate to the design of the measure and its implementation, rather than to its overarching aim.

23. The Government considered a large number of consultation and other responses to the proposals, including arguments that small faith schools should be excluded in some way. The Government's consultation response recorded that none of the methods proposed for doing so would meet the four principles of the policy. They would reduce the revenue raised, be unfair to schools just above the threshold and create tax avoidance opportunities that would be difficult to police. Further, the Government's

position was that state schools, which are required to follow the Equality Act 2010, are suitable for all faiths and none. The possibility of carve-outs from the measure was also considered and rejected in Parliament.

24. The Government's consideration and assessment of the impact of the measure on faith schools and children attending them, and possible mitigation measures, are addressed in more detail below.

Group One Claimants: BYL and BAU

25. BYL and his father, BAU, are members of the Charedi Jewish community. As the Divisional Court found at [149], there are 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.

26. BYL attends a Charedi private secondary school for boys. BAU and his wife have low incomes and receive universal credit. 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 by the parents to be a viable option. BAU is also concerned for the safety of his child and the likelihood of antisemitic abuse against him.

Group Two Claimants: Evangelical Christians

27. The Group Two Claimants comprise four Evangelical Christian schools providing low-cost private education, four parents who wish to continue to send their children to those schools, and three children who attend them. Like the individual claimants in Group One, the individual claimants in Group Two say that they will be unable to afford the increased fees resulting from the imposition of VAT. The evidence of three of the parents was to the effect that a state school would not be religiously acceptable to them. The evidence of the fourth, AWM, focused on needs said not to be met by state schooling, in addition to religious preference.

28. Of the four schools, one is just below the VAT threshold and has blocked expansion plans because the school's governors believe that exceeding it would threaten the school's viability. The others have either registered or anticipated having to register for VAT and have each expressed concerns that the imposition of VAT on school fees will threaten its viability.

Section D: The legislation under challenge

29. The legislation with which we are concerned is contained in sections 47-49 of the FA 2025, which amended the exemption for education contained in Group 6 of Schedule 9 to the Value Added Tax Act 1994 (VATA) in relation to services provided on or after 1 January 2025. When the applications for judicial review were originally made the Finance Bill was still before Parliament, so challenges were made to the relevant

Budget Resolution. Following Royal Assent on 20 March 2025, the claims were amended by consent to refer to the FA 2025. (See further the Divisional Court's judgment at [8]-[12]).

30. By way of brief background, until the UK's exit from the European Union VAT was chargeable, or not, in accordance with EU law. (Indeed, VAT was introduced in the UK when it first joined the European Economic Community in 1973). Title IX of the VAT Directive, reflecting earlier Directives, required the provision of certain specified goods and services to be exempt from VAT. Under the heading "Exemptions for certain activities in the public interest", Chapter 2 of Title IX required Member States to exempt, among other things:

> 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. (Article 132(1)(i)).

31. The education exemption was given effect in domestic law by Group 6 of Schedule 9 to VATA. Most relevantly, this exempted the provision of education and vocational training by an "eligible body", together with certain "closely related" supplies (items 1 and 4 of Group 6, respectively). The definition of eligible body included independent schools registered under the Education Act 1996.

32. Section 47 of the FA 2025 introduced a new Part 3 of Schedule 9 containing exceptions to the exemption, as follows:

> 1. The provision of education by a private school, other than—
>
> (a) the provision of the teaching of English as a foreign language,
>
> (b) the provision of education in a nursery class, or
>
> (c) the provision of a higher education course.
>
> 2. The provision of vocational training by a private school.
>
> 3. The provision of board and lodging which is closely related to a supply of a description falling within item 1 or 2.

33. The notes to the exception provide further detail, including definitions. Section 48 captures certain prepayment arrangements, and section 49 deals with commencement.

Section E: The judgment of the Divisional Court

34. The Divisional Court considered these claims on a "rolled up" basis. In the result the Divisional Court granted permission to apply for judicial review but dismissed the claims. The Divisional Court's judgment was necessarily lengthy, as it had a larger number of claimants before it and a wider range of issues than are before this Court. The Divisional Court attached four annexes to its judgment. Annexes C and D

concerned special educational needs, which have not given rise to any of the appeals before this Court. Annex B contained a detailed consideration of article 9 of the Bill of Rights 1689 and Parliamentary privilege. Again that issue has not been a live one before this Court. Annex A gave details of the claimants, including the Charedi Jewish Claimants and the Evangelical Christian Claimants who are before this Court: see [8]-[9], [12]-[21] and [41]-[44].

35. At [5], the Divisional Court summarised its decision as follows:

> 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.

36. At [81], in considering the issue of whether the challenged provisions were a disproportionate interference with A2P1 rights, the Divisional Court set out the four-stage approach to the assessment of proportionality given by Lord Reed in *Bank Mellat*, at [74], which we have quoted at [13] above. All parties before the Divisional Court agreed that it should structure the analysis of proportionality by reference to those four questions and the Divisional Court did so. Nevertheless, when it came to article 14, the Divisional Court does not appear expressly to have posed those questions for itself. The Divisional Court considered that it should accord "a broad margin of discretion" in deciding whether the challenged measure was proportionate: see [88].

37. When considering A2P1 the Divisional Court concluded that the objective of the measure was sufficiently important to justify the limitation of the protected right and that the measure was rationally connected to that objective: see [109]-[115]. The Divisional Court considered that the lack of exemption for lower cost schools was more naturally considered at stage 3 of the *Bank Mellat* test. The Divisional Court concluded at [116]-[118] that a less intrusive measure could not have been used without unacceptably compromising the achievement of the measure's objectives. It also considered that the proportionality of the absence of exemptions was better examined under the rubric of article 14 read with A2P1: see [119].

38. The Divisional Court then addressed article 14 read with A2P1 at [122]-[227]. At [124], the Divisional Court outlined the three species of discrimination which arose in the following way:

> 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).

39. At [127], the Divisional Court noted that the present case did not involve direct discrimination on any relevant prohibited ground. It did give rise to issues of *Thlimmenos* discrimination and indirect discrimination. The Divisional Court noted at [128] that, if a claimant could establish that he or she had been subject to any kind of discrimination, the burden shifted to the state to establish justification. At [128]-[129], it said the following:

> 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].

40. The Divisional Court's essential reasoning on the article 14 issue can be found at [149]-[160]. At [160], the Divisional Court said:

> 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.

41. At [174]-[176], the Divisional Court also rejected the discrimination argument advanced on behalf of the Evangelical Christians. It considered that such discrimination would be justified for the same combination of reasons as applied in the case of Charedi Jewish people.

42. The Divisional Court considered the issue of whether the challenged provisions were 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 at [228]-[249]. It concluded that there was no breach of A1P1 or of article 14 read with A1P1. Any *Thlimmenos* or indirect discrimination would be justified for essentially the same reasons as discrimination in the enjoyment of A2P1 rights against Charedi Jewish and Evangelical Christian pupils and parents: see [249].

43. The Divisional Court addressed the issue of whether the challenged provisions were incompatible with the A2P1 rights of Evangelical Christian parents under the second sentence of A2P1 and/or Article 14 read with A2P1 at [250]-[253]. It rejected that challenge.

Section F: The issues

44. The Group One Claimants' sole ground of appeal was that the Divisional Court was wrong to find that the Government's failure to implement a "low-cost" fee exemption was justified and therefore that the impugned measures did not result in a breach of article 14 of the Convention.

45. The Group One Claimants then advanced the following sub-grounds in support of that sole ground of appeal:

> i. Sub-Ground A: the Divisional Court erred in finding that the 'Government's general policy … 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' [156] carried 'considerable weight' as justification for the lack of exemption.

ii. Sub-Ground B: the Divisional Court erred in finding [157] that the fact that 'many of the existing small private schools serving orthodox and conservative communities do not currently meet … the minimum standards applicable in the state sector' provided justification for the lack of exemption.

iii. Sub-Ground C: the Divisional Court erred in placing reliance [158] upon the fact that the creation of legislative exemptions for one group may prompt other groups to ask why an exemption is not made for them. The Divisional Court further erred in failing to then consider whether this 'possible response' was justified, or whether it amounted to a failure to protect the Convention rights of certain groups.

iv. Sub-Ground D: the Divisional Court erred in placing reliance [159] on the fact that the proposed exemption was the subject of an Opposition Day Motion in Parliament.

v. Sub-Ground E: the Divisional Court erred in failing actually to require the Government to justify the failure to treat the Charedi community schools differently than other private schools and instead affording Parliament a 'margin of discretion' in the circumstances of this case [160].

vi. Sub-Ground F: the Divisional Court erred in failing to consider the concerns of the Appellant in particular and the Charedi community in general as to the risk of antisemitism in state-funded schools in determining whether the lack of exemption was justified.

46. The focus of Mr Broach KC's submissions at the hearing was on Sub-Grounds A and E.

47. The Group Two Claimants' grounds of appeal were in summary:

Ground 1: The Divisional Court wrongly held that there was no interference with the A1P1 rights of the schools and parents.

Ground 2: The Divisional Court wrongly held the measure to be compatible with A1P1 despite being incapable of satisfying the "public interest" requirement.

Ground 3: The Divisional Court wrongly restricted the scope of A2P1 in failing to conclude that, properly construed in the light of international human rights instruments, it prohibited educational taxes on private schools.

Ground 4: The Divisional Court wrongly found that the measure did not impair the very essence of the right protected by A2P1.

Ground 5: The Divisional Court wrongly concluded that the rights of the children conferred by the first sentence of A2P1 were not breached.

Ground 6: The Divisional Court wrongly held that the European consensus on not taxing education could not be invoked to limit the margin of appreciation.

Ground 7: The Divisional Court erred in relation to the discriminatory nature of both A1P1 and A2P1.

Ground 8: The Divisional Court arrived at a wrong assessment of proportionality in respect of both A1P1 and A2P1.

48. There was a Respondent's Notice which raised two points in relation to the appeal of the Group Two Claimants. The first was that the Divisional Court should have held that Evangelical Christians did not make out the requisite group disadvantage for the purpose of article 14. The second related to an aspect of Ground 7.

Section G: The court's approach to proportionality

The approach of a court at first instance

49. In *Shvidler* (see [10] above), a decision which post-dates the judgment of the Divisional Court in the present case, the Supreme Court (Lord Sales and Lady Rose JJSC) gave guidance on the approach which must be taken by the court to the assessment of proportionality. At [120]-[125] the Supreme Court confirmed, in a "recapitulation" of relevant principles, that:

(1) The court itself has to make its own assessment of whether a measure is proportionate to a legitimate aim. If a measure is not proportionate, it will be incompatible with the relevant Convention right.

(2) Nevertheless, the court does not become the primary decision-maker in the full sense of that term. The court's role is to assess the compatibility of the public authority's action against the substantive legal criteria which are inherent in the Convention rights, including the criterion of proportionality. The public authority remains the primary decision-maker because it decides on the action it will take; but the court makes its own assessment whether such action is proportionate or not.

(3) Accordingly, although the court will have to have regard to and may afford a measure of respect to the balance of rights and interests struck by the public authority in assessing whether the *Bank Mellat* test at stage (iv) is satisfied, the court will not treat itself as bound by the decision of the public authority subject only to review according to the rationality standard. This reflects the features that the Convention rights are free-standing rights enacted by Parliament to be policed by the courts, that they are in the form of rights which are enforced by the European Court of Human Rights (the ECtHR) on a substantive basis rather than purely as a matter of review according to a rationality standard, and that the question whether a measure is proportionate or not involves a more searching investigation than application of the rationality test.

(4) There is room, in the context of the proportionality assessment to be carried out by the court, for appropriate respect and weight to be given to the views of the

executive or legislature as to how the balance between the interests of the individual and of the general community should be struck, depending on the nature of those respective interests.

(5) The context relevant to determining the measure of respect to the balance of rights and interests struck by a public authority will include the importance of the right, the degree of interference and the extent to which the courts are more or less well placed to adjudicate, on grounds of relative institutional expertise and democratic accountability.

(6) This approach to the assessment of proportionality can on occasion lead even experienced judges into error. A court conducting a proportionality assessment needs to take care in the language they use to explain how they have approached the task overall and also their consideration of the particular elements which are relevant to that assessment.

The approach of an appellate court

50. In *Shvidler* at [142]-[165] the Supreme Court considered the approach of an appellate court to the assessment of proportionality.

51. The Supreme Court discerned two different approaches which were identifiable in the earlier authorities. In some cases, the appellate court treated its role as confined to a review to check whether the first instance court's assessment in relation to the proportionality of a measure was arrived at on the basis of a proper self-direction as to the test to be applied and whether the result arrived at was reasonable, in the sense of being within the legitimate parameters of judgment for the judge: the Supreme Court called this the "review" approach. In other cases, the appellate court did not treat its role as so limited, but instead made its own fresh assessment of the proportionality of the measure in question: the Supreme Court called this the "fresh determination" approach.

52. The Supreme Court said that each approach was justified in the proper context. The fresh determination approach was appropriate where it was important that the appellate court should give its own opinion about the proportionality of a measure and its compatibility with Convention rights, rather than defer to the assessment of the first instance court. This was likely to be an important consideration in cases where the decision would provide guidance for other cases or where the subject matter had major social or political significance so that the public would rightly expect the senior judges in the appellate court to exercise their own judgment as to whether the measure in question was proportionate or not. Leading examples that the Supreme Court gave of this approach were the compatibility with Convention rights of the law criminalising assistance of suicide and of a law permitting internment without trial of foreign nationals suspected of involvement in terrorism.

53. The Supreme Court also explained that the question of whether a measure is proportionate is a question of law calling for assessment in the light of the facts of the case: see [145].

54. The Supreme Court accepted that there was therefore a need for flexibility in the approach to be adopted by an appellate court, depending on the circumstances but only

up to a point. The choice had to be made on a principled basis, so that the parties and the courts had a reasonable idea of the correct approach to be adopted in any given case. The Supreme Court's discussion of these issues led it to conclude at [160] that the best guidance which could be provided was that within the spectrum of cases there were:

> certain paradigm cases which are likely to require an approach involving a fresh proportionality assessment by the appellate court (but treating this as defeasible if there appear to be sufficient good reasons for departure from this approach as a general matter or in relation to particular factors relevant to the assessment) and other paradigm cases where it is likely that a review approach on appeal is appropriate. An example of the former paradigm situation would be a case involving the first consideration at appellate level of a new legislative regime of general application, especially one with considerable significance for society. An example of the latter would be a one-off decision of a judge or an official which depends entirely on the application of well-established law and principles to the facts of the individual case.

55. We are confident that the present appeals fall squarely within the first paradigm to which the Supreme Court referred in *Shvidler*. These appeals involve the first consideration at appellate level of a new legislative regime of general application. These appeals have considerable significance for society, and permission to appeal was granted in both appeals on substantive grounds. We are not persuaded by the Government Parties' suggestion that this Court should defer to the judgment of the Divisional Court, for example, because of the seniority of the judges in that Court. That is not an approach recommended by the Supreme Court nor would it be consistent with its guidance in *Shvidler*. Accordingly, we will assess the proportionality of the measure in question for ourselves.

<u>Section H: The Group One Claimants' ground of appeal on proportionality</u>

Relevant principles

56. Before we set out our analysis of the Group One Claimants' ground of appeal, it is important to set out the principles which have been laid down by the ECtHR and the Supreme Court when considering a complaint under article 14.

57. As the Divisional Court noted, the present case does not in its essence concern an allegation of direct discrimination. It does, however, concern: (i) alleged *Thlimmenos* discrimination, i.e. that persons who are in a significantly different situation are treated in the same way by the impugned measure or, to put it another way in the present context, there ought to have been an exemption for low-cost schools, and (ii) alleged indirect discrimination, i.e. that a general measure which is neutral on its face has a disproportionate impact on certain groups.

58. In *Thlimmenos* (see [8] above) the applicant was a Jehovah's Witness who had been found guilty of insubordination for refusing to enlist in the army for religious reasons. Later he wished to become a chartered accountant but was excluded on the ground that a person convicted of a felony could not become a chartered accountant. He argued

before the ECtHR that this was in violation of his article 14 rights taken in conjunction with articles 9 and 6, on the ground that the law did not distinguish between persons who had been convicted as a result of their religious beliefs and persons convicted on other grounds.

59. The ECtHR said that, although it had previously considered that the right in article 14 was violated where states treated differently persons in analogous situations without providing an objective and reasonable justification, it considered that that was not the only facet of the prohibition of discrimination in article 14: "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different": see [44].

60. It followed that the ECtHR had to examine whether the failure to treat the applicant differently from other persons convicted of a felony pursued a legitimate aim and, if it did, whether there was a reasonable relationship of proportionality by the means employed and the aims sought to be realised: see [46]. It concluded in the circumstances of that case that there had been a breach of article 14 because there was no legitimate aim. The applicant had already served a prison sentence for his refusal to wear military uniform and the ECtHR considered that imposing a further sanction on him was disproportionate. At [47], the ECtHR concluded that there was no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony.

61. As will become apparent, the ECtHR's formulation of the test for objective justification of *Thlimmenos* discrimination is not materially different from the test which applies to cases of indirect discrimination.

62. The case of *Biao v. Denmark* (2017) 64 EHRR 1 provides a good example of the concept of indirect discrimination at work in an article 14 context. The case arose out of a requirement in Danish law known as "the attachment requirement" that a family reunion could only be granted if both spouses were over the age of 24 and had stronger ties to Denmark than anywhere else. The first applicant was a naturalised citizen of Denmark and had married the second applicant, who was a national of Ghana. The attachment requirement was lifted for those who had held Danish citizenship for at least 28 years (the 28-year rule) or were born or had arrived in Denmark as small children and had resided there for 28 years.

63. The ECtHR set out the relevant principles at [91]-[94]:

> 91. A general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and there is no discriminatory intent. This is only the case, however, if such policy or measure has no 'objective and reasonable' justification.
>
> 92. As to the burden of proof in relation to art.14 of the Convention, the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that it was justified.

> 93. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background, but the final decision as to the observance of the Convention's requirements rests with the Court. A wide margin is usually allowed to the State when it comes to general measures of economic or social strategy. However, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention.
>
> 94. No difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society. Discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination.

64. At [121], the ECtHR said that it would limit its enquiry to the existence (or not) of compelling or very weighty reasons unrelated to ethnic origin for the difference in treatment.

65. At [126], the ECtHR said, by reference to its earlier judgment in *Markin v. Russia* (2013) 56 EHRR 8, at [142]-[143] (*Markin*), that "general biased assumptions or prevailing social prejudice in a particular country do not provide sufficient justification for a difference in treatment" (in that case on the ground of sex). The ECtHR found that similar reasoning should apply to discrimination against naturalised nationals. At [127], the ECtHR said that the material submitted by the Government had not shown that the difference in treatment resulting from the impugned legislation "was based on objective factors unrelated to ethnic origin".

66. At [130], the ECtHR noted that the test for proportionality which had been applied by the Supreme Court of Denmark was different from the test applied by the ECtHR, which "requires compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule". Accordingly, at [138] the ECtHR concluded that, "having regard to the very narrow margin of appreciation in the present case, the Court finds that the Government have failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule". That rule favoured Danish nationals of Danish ethnic origin and placed at a disadvantage or had a disproportionately prejudicial effect on persons who had acquired Danish nationality later in life and who were of ethnic origins other than Danish. It followed that there had been a violation of article 14 read in conjunction with article 8 in that case.

67. Although reference was made to *Biao*, in our view, that case is very different from the present appeals. First, it concerned the possible separation of married couples, a very serious interference with a core Convention value. Secondly, it concerned express discrimination on the ground of nationality. Thirdly, it concerned indirect discrimination on the ground of ethnic origins, a form of racial discrimination, which would require compelling or at least very weighty reasons, if indeed it is capable of

being justified at all. Finally, it did not concern a general measure of economic or social policy, as the present appeals do.

68. *SC* (see [13] above) is the leading authority on the assessment of proportionality under article 14. Lord Reed undertook a comprehensive analysis of the earlier ECtHR and Supreme Court case law.

69. Lord Reed set out his conclusions at [2]. In particular, he concluded that the legislation in issue in that case, amendments made to section 9 of the Tax Credits Act 2002 by section 13 of the Welfare Reform and Work Act 2016, imposing a "two-child limit" for the receipt of child tax credit, potentially constituted indirect discrimination against women as compared with men and therefore it was for the Government to establish that it had an objective and reasonable justification. In considering the question of justification, Lord Reed considered whether it was appropriate for domestic courts to determine whether the United Kingdom had violated its obligations under unincorporated international law and concluded that it was not. Lord Reed also considered the appropriate standard of review and concluded that the case law supported a "nuanced" approach which was not fully captured by a "manifestly without reasonable foundation" standard of review, and in some circumstances called for much stricter scrutiny.

70. Lord Reed considered the settled case law of the ECtHR on the question whether there was an "objective and reasonable" justification for a difference in treatment. This was to be judged by whether it pursued a "legitimate aim" and there was a "reasonable relationship of proportionality" between the aim and the means employed to achieve it. It was also well settled that states have "a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment". Crucially, the scope of this margin would vary "according to the circumstances, the subject matter and the background": see [98]. At [99], Lord Reed said that it was doubtful whether the nuanced nature of the approach followed by the ECtHR could be comprehensively described by any general rule. It was more useful to think of there being a range of factors which tend to heighten, or lower, the intensity of review. In any given case, a number of these factors may be present, possibly pulling in different directions, and the court has to take them all into account in order to make an overall assessment. The case law indicates, however, that some factors have greater weight than others.

71. One particularly important factor is the ground of the difference in treatment. In principle, and all other things being equal, the ECtHR usually applies a strict review to the reasons advanced in justification of a difference in treatment based on what are sometimes called "suspect" grounds of discrimination. Nevertheless, Lord Reed noted at [100] that a much less intense review may be applied even in relation to some so-called suspect grounds where other factors are present which render a strict approach inappropriate. At [109]-[110], Lord Reed observed that the ECtHR has generally adopted a strict approach to differences in treatment on the ground of religious belief but has taken a less strict approach in some cases.

72. At [115], by way of summary, Lord Reed said that the ECtHR's approach to justification was a matter of some complexity but some general points could be identified. One of those was that a wide margin was usually allowed to the state when it came to "general measures of economic or social strategy": see [115(2)]. Another

was that the width of the margin of appreciation could be affected to a considerable extent by the existence or absence of common standards among the Contracting States: see [115(3)].

73. From [143], Lord Reed addressed the question of the approach to be adopted by domestic courts. He noted that the concept of the margin of appreciation is specific to the ECtHR. Nevertheless, domestic courts have generally endeavoured to apply an analogous approach. This was for two reasons. The first was that the domestic courts generally seek to keep pace with the Strasbourg jurisprudence, neither more nor less. Accordingly, where the European Court would allow a wide margin of appreciation to the legislature's policy choice, the domestic courts allow a correspondingly wide margin or "discretionary area of judgment": see [143].

74. The second reason was that domestic courts have to respect the separation of powers between the judiciary and the elected branches of the State. They therefore have to accord appropriate respect to the choices made in the field of social and economic policy by the Government and Parliament, while at the same time providing a safeguard against unjustifiable discrimination: see [144]. At [145], Lord Reed said that at the domestic level one would expect closer scrutiny where the case concerned discrimination on a ground such as sex or race rather than a difference in treatment on less sensitive grounds, especially if it were simply a by-product of a legitimate policy. Distinctions drawn on "suspect" grounds are inherently appropriate for close judicial scrutiny, notwithstanding the respect due to the judgment of the executive or legislature.

Analysis of the article 14 issue

75. As the Supreme Court observed in *SC*, the position is complicated and nuanced. In the present case there are factors which pull in different directions. None of them can be taken too far. Here we summarise the key principles.

76. First, although the court must respect the separation of powers between the judiciary and the legislature, it is Parliament itself which has conferred on the court the power to make a declaration of incompatibility in respect of primary legislation, in section 4 of the HRA. As Lord Bingham observed in *A v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 (*A v. SSHD*), at [42], Parliament has given the courts "a very specific, wholly democratic mandate" to carry out this important function. Furthermore, Parliament has made it clear in section 4(6) of the HRA that a declaration of incompatibility: (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and (b) is not binding on the parties to the proceedings in which it is made. It is therefore a unique, and in one sense a weak form of, remedy but nevertheless it is important. It is inherent in the scheme of the HRA that a constitutional balance has already been struck by Parliament between the function of the legislature and the function of the courts. To be blunt, it is open to Parliament simply to ignore the opinion of the court which makes the declaration of incompatibility.

77. The second point to note is that deference to the judgment of the legislature cannot be taken too far in the context of equality and discrimination cases. As Lord Bingham observed in *A v. SSHD*, at [68], what needs to be justified in a discrimination case is the discrimination and not simply the underlying measure. Furthermore, it is an important function of the courts to protect minorities, in particular small and perhaps unpopular

minorities, since their interests may sometimes be overlooked or perhaps even deliberately violated by the majority. As Lady Hale observed in *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, at [132]: "democracy values everyone equally even if the majority does not". In other words, the concept of democracy which is inherent in the Convention system and the HRA is not a majoritarian view of democracy. The protection of the rights of minorities is built into the scheme of the Convention and the HRA.

78. Thirdly, the fact that Parliament has given consideration to an issue such as whether to make an exemption for low-fee schools is important although not dispositive of the issue before the court. Parliament's decision must be given weight and respect by the court. If Parliament had not considered the issue, that would not count against it, but the fact that it has considered the issue is something which must be taken into account by the court and given appropriate respect and weight: see *SC* at [182]. That is the case in the present context.

79. Fourthly, at the hearing before this Court it did not appear to us that any material distinction emerged in the submissions of the parties as to the justification required for *Thlimmenos* discrimination as distinct from indirect discrimination. In each context what needs to be justified is the absence of an exemption for low-fee schools from the measure under challenge. In both cases, the reason why there is no exemption is not because of the protected characteristic on which the challenge is brought under article 14. If it had been the case, for example, that the measure on its face discriminated against certain persons on grounds of race or religion, or the measure was deliberately designed to have that effect, in our view potentially very different considerations would have arisen when it came to the issue of justification for the measure. But that is not this case. The question in the present case is whether a measure which is neutral on its face is objectively justified, in other words whether it is reasonable and proportionate, even though it does not have an exemption for low-fee schools.

80. On that crucial issue we have reached the clear conclusion that the measure is objectively justified in the sense we have explained. That is essentially for the reasons set out in the evidence on behalf of the Government parties. We do not entirely agree with the Divisional Court, which gave priority to what it considered to be grounds of "principle" as opposed to practical considerations. In our view, those practical considerations are cogent and need to be given a great deal of weight.

81. By way of example, the net loss of £30 million may be viewed as being a "relatively modest loss", as the Divisional Court said at [154], but that is only because of the context of the expected revenue to be raised by the introduction of VAT on school fees (in the region of £1.5 billion). On any view, £30 million is a large amount of money which would otherwise be lost to the Exchequer. Although this is not a hypothecated tax, the evidence before the Court is clear that the measure was introduced with the aim of funding a number of improvements in state education. £30 million per year is equivalent to the employment of many teachers.

82. Furthermore, the administrative difficulties and risk of abuse cannot be lightly dismissed. These are significant burdens which will be imposed on public administration if the Court declares the legislation in its current form to be incompatible with Convention rights and Parliament decides to amend the legislation accordingly. Again, the analysis might have been very different if there were no option for parents

other than to have their children educated in a state school. Undesirable though it may sometimes be for many reasons, the law in this country permits parents to have their children educated at home. This again has relevance to where the balance is to be struck in assessing proportionality.

83. Finally, we should note that the Divisional Court's reasoning is not entirely clear as to what test it was actually applying in order to assess the proportionality of the measure and, in particular, the absence of an exemption for low-fee schools. For example, at [5], the Divisional Court described the issue before it as being:

> 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.

Later in the same paragraph, the Divisional Court said that it had concluded that the challenged legislation fell within that broad margin and that, even when considering the claims under article 14, where the margin of discretion was somewhat less broad, it concluded that the challenged provisions fell within it.

84. A similar point was made in the Divisional Court's conclusion on the article 14 question at [160]:

> … 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.

85. In our view, it is important not to avoid the question of objective justification which must be addressed in this case. It is a question that must be squarely addressed. We have no hesitation in doing so nor do we have any hesitation in reaching the conclusion that there is objective justification which has been demonstrated before this Court for the measure in question and for the absence of an exemption for low-fee schools. Although the authorities make numerous references to metaphors such as "margin", "area" and to varying degrees of intensity of review, ultimately it seems to us those are not legal tests to be applied by a court. They are helpful tools which may assist the court on its path as it answers the questions posed by a legal test, but they are not substitutes for a legal test. The legal test, as we have already said, is to be found in the four-stage test for proportionality in *Bank Mellat*. Before addressing those issues, we need to deal in somewhat more detail with the evidence filed on behalf of the Government Parties.

The Government's Evidence

86. Ms Susan Whitehouse (Ms Whitehouse), a Deputy Director at the Department for Education explained that "independent schools" are not exactly the same as "private schools". Independent schools, for example, include Academies, which are state funded but are not maintained by the local authority. Academies are prohibited from charging fees. Private schools are independent schools where fees can be charged. 6.5% of children in England attend private schools. Private schools are operated by their proprietor. Proprietors are required by regulations to ensure that the school meets the Independent School Standards (ISS).

87. Ms Whitehouse also explained the process by which a private school can become part of the state school system. She observed that private schools which currently operate in orthodox or conservative faith communities tend to prefer the possibility of becoming voluntary-aided schools because this enables the school to have up to 100 percent faith-based admissions if they have enough applicants from the religious community they serve. Many private schools which currently operate in orthodox or conservative faith communities would have to make significant changes before they could operate in the state-funded sector. These could include ensuring that they have appropriate governance and management capability; ensuring they can meet the educational standards required of state-funded schools; and ensuring they are viable in the long term: see her witness statement at [39].

88. In relation to faith schools, which exist in the state system as well as in the private system, Ms Whitehouse explained that faith schools are subject to the same legislation as their non-religious counterparts but benefit from some specific provisions aimed at protecting and maintaining the particular religion or denomination of the school.

89. Ms Whitehouse also pointed out that all schools are subject to the Equality Act 2010, although some schools with a religious character and/or religious ethos are subject to certain exemptions in employment, admissions and educational provision. All state-funded schools are required to provide a daily act of collective worship for all pupils except for those whose parents exercise their right of withdrawal. All state-funded schools are required to provide religious education for all pupils except for those whose parents exercise the right of withdrawal.

90. For private schools there is no requirement for religious education per se. However, the ISS require that the written policy, plans and schemes of work do not undermine mutual respect and tolerance of different faiths and beliefs.

91. At [53], Ms Whitehouse addressed the question of some private faith schools which charge lower school fees than most private non-faith schools. She addressed the question of whether some sort of exemption should have been made for faith schools or schools which charge low fees but explains that, from her department's perspective, those suggestions would be administratively unworkable and would bring the potential for abuse. In more detail she said at [53]-[55]:

> a. The Department does not regulate or monitor private school fees, other income or expenditure. Some data on minimum and maximum fee levels at each school is collected through the annual school census, but this data is not validated (unlike other data derived from the school census which is published following substantial quality assurance work to quality assure to meet the Code of Practice for Statistics). Unvalidated data on fees is therefore not published or used in any analysis. The Department does not consider it to be reliable data. For completeness, I note that unvalidated data was used to answer a Parliamentary Question on 16 January 2025. The answer to that question is appropriate in that it accurately reflects the information held by the Department, but it should be noted that the response does not actually reflect the average cost of fees in schools (which the Department does not hold data on). The

figures given are also heavily skewed by fees in special schools with very high fees and are not representative of mainstream provision. For these and other reasons, we would not advise that this answer is used in making judgements about average school fees.

b. The Department does not collect any data on schools' non-fee income, including its source. This source of income can be very significant for many schools, including those from conservative or orthodox communities who may be significantly financially supported by the communities they serve other than by way of fee payments. The Department does not collect data on reserves, trusts, or alumni income, for example.

c. The Department does not collect information on scholarships or bursaries that private schools may offer, and therefore the proportion of pupils who pay (through their parents or other family support) full fees.

d. Any work to monitor or regulate private school finances would be a new significant burden on the Department which would require resource, training, new systems and new policy.

54. A tax exemption based on faith alone would allow many large mainstream schools with wide appeal to be exempt from the relevant tax. By way of example, Eton College, Harrow School, Westminster School, Cheltenham Ladies College, Winchester College, Wellington School, Wykeham Abbey and St Paul's School all have a religious ethos and are accordingly 'faith schools'. Such an exemption would also discriminate against non-faith schools who may also cater to parental demand for a particular preference – i.e. secular or non-religious education. The same problems would abound if an exemption was made on the basis of a combination of being low-cost and faith designated.

55. A tax exemption on the basis of low-cost fees only could be open to abuse, to which I refer to the evidence provided on behalf of HMRC (as well as the significant problems with monitoring such an exemption which would require significant and brand-new resource to collect and analyse data which the Department does not currently collect or have access to). One option for a school to abuse such a system would be create an expectation of 'voluntary donations' alongside fees from parents (and potentially not admit children whose parents did not agree to make such donations in advance). Such behaviour would be hard to identify as the Department does not monitor (or substantially regulate) private school admissions.

92. There was next a witness statement from Ms Katharine Peters (Ms Peters), a Deputy Director at HMRC, with responsibility for Knowledge Analysis and Intelligence (KAI),

which is the HMRC Directorate that provides analysis, research and statistics to inform policy and operational development. KAI works closely with HMRC Policy and HMT as well as the OBR.

93. At [48], Ms Peters explained the consideration which was given in the modelling by KAI to having an exemption for faith schools and low-cost schools. KAI considered the implications of a carve-out for schools below a set fee threshold (including but not limited to low-cost faith schools). Adopting an annual fee threshold of £7,690, KAI estimated that some 250 schools would be carved-out of the VAT policy, with an estimated 50,000 pupils, and at an annual exchequer cost of £30 million. This was an indicative costing based on a sample of schools. It was estimated by modelling the fee income of schools with fees under the threshold, by multiplying the estimate of their average fees (£4,300) by their number of pupils (50,000), making £212 million. Applying the ratio of net yield to fees in the main costing of 12.4 percent to that figure of £212 million gave a yield of £26 million. There was then a small upward adjustment made to allow for a behavioural response of schools with fees slightly above the threshold of £7,690 reducing their fees (possibly by seeking further donations) in order to benefit from the relief, and a growth adjustment as the fee data was for 2024-2025. This led to the rounded figure of £30 million.

94. Most importantly, in our view, was the witness statement from Ms Graham, who is, as we have said, a Deputy Director at HMT. She has responsibility for VAT and Excise Policy, including private schools VAT.

95. In her evidence Ms Graham considered the impact of VAT on faith schools. She pointed out that "faith schools" comprise a very broad group and include a significant proportion of the private school sector: in January 2024, 444 out of 2,421 schools stated that they had a religious affiliation or ethos. However, officials considered specifically the possibility of particular impacts on certain subsets of school within that broad cohort, in particular smaller faith schools which tend to have fewer pupils, charge lower fees, cater for lower-income families, and be more reliant on charitable donations to supplement what fees are charged. It was not apparent that small faith schools as a cohort would be affected more by the VAT policy than other schools. Nonetheless, it was acknowledged that there might be some displacement of children from private faith schools. It was acknowledged that, contrary to the Government's position, some parents believed that state schools were incompatible with their religious beliefs. It was recognised that displacement might lead to higher incidents of home schooling.

96. At [90], Ms Graham explained that the proposals for potential carve outs were considered, the most common being to carve out schools with fees below a set threshold, but this was rejected as not meeting the principles of the Government's policy (see the summary of this section at [14] above). In particular:

> a) **Unfairness**. This approach would lead to significantly different treatment of schools with fees just above the threshold compared to those just below. This would not be fair to those schools just above the threshold and could potentially be open to legal challenge, including about where the threshold fee was set and how it was justified.

b) It could also **distort the market** and undermine competition by creating perverse incentives for schools to suppress fees just below the threshold.

c) **Risk of tax avoidance**. In addition to creating an incentive for schools to suppress fees legitimately (e.g. through cost-cutting), a threshold would also create an incentive for schools to seek to avoid VAT by (for example) notionally reducing fees but supplementing income via supposed 'donations' which would not in reality be optional, and therefore not truly donations, or through 'value shifting'. These practices would be difficult and resource intensive for HMRC to police.

d) **Implementation challenges**. A threshold would also increase administrative burdens for compliant, non-avoidant schools and HMRC. Schools would need to demonstrate eligibility for the threshold and have this verified by HMRC, and this could not be done on a one-off basis. Finally, this approach would make legislative implementation more complex.

e) **Cost**. In addition to implementation costs, this approach would reduce revenue from the measure, reducing the amount of money raised to help support the Government's education priorities. HMRC estimated the annual loss of revenue to be £30mn, were a fee threshold of £7,690 to be used.

f) Finally, the Government took the position that **state education is suitable for children of all faiths**, and all schools are required to follow the Equality Act 2010. A faith school carve out would therefore be inconsistent with wider education policy.

97. On the basis of the above evidence, we are satisfied, as we have said, that the Government Parties have discharged the burden of proving that the measure under challenge has an objective justification. In particular, having an exemption for low-cost schools would have serious detrimental consequences and was not required in order to render the measure compatible with article 14. Expressed in terms of the *Bank Mellat* tests (as to which, see [13] above): (1) the measure without such an exemption has a sufficiently important objective, (2) the measure is rationally connected to its objective, (3) there is no less intrusive alternative, since having the exemption would not have been as effective in achieving the objectives of the measure and would lead to other burdens being imposed on public authorities, and (4) the importance of the measure's objectives without the exemption outweighs the severity of the impact on those in the claimants' position, so that a fair balance has been struck between the rights of the individual and the general interests of the community. We acknowledge that the measure may have a serious impact on the Group One Claimants if they are unable to afford private education which accords with their religious convictions, but it is important to bear in mind that they have the option of home schooling if free education in the state sector is not acceptable to them.

Section I: Group Two Claimants' grounds of appeal

Ground 1: interference with A1P1

98. Ground 1 of the Group Two Claimants' grounds of appeal is that the Divisional Court wrongly held that there was no interference with the A1P1 rights of the schools or the parents. They maintain that legislation which threatens the viability of the schools is an interference with the schools' possessions, in the form of goodwill. As far as the parents are concerned, the Group Two Claimants say that the correct approach is that tax charges fall within A1P1: see for example *Burden v. United Kingdom* (2008) 47 EHRR 38 at [59]. The VAT charge was intended to raise revenue, and it should be considered on that basis rather than as intended to drive parents away from private schools.

99. As the Divisional Court observed at [239], the case law of the ECtHR draws a distinction between the goodwill of a business, which may constitute a possession for A1P1 purposes, and an expectation of future income, which does not. The Divisional Court concluded at [245]-[247] that the schools fell into the latter category, relying on an absence of any evidence that the measure had caused a diminution in the present-day marketable value of the schools' goodwill. Further and in any event, any interference was justified.

100. The distinction between goodwill and future income has been considered in a number of domestic authorities, including *R (Countryside Alliance) v. Attorney General* [2007] UKHL 52, [2008] AC 719 (*Countryside Alliance*) at [21], where Lord Bingham approved the approach of the Court of Appeal in *R (Malik) v. Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, [2007] 1 WLR 2092 (*Malik*), based on what Lord Bingham described as the "very convincing analysis" of Mr Kenneth Parker QC, sitting as a deputy High Court judge, in *R (Nicholds) v. Security Industry Authority* [2007] 1 WLR 2067 (*Nicholds*) at [70]-[76].

101. More recently, the topic was returned to in some detail in *Breyer Group v. Department for Energy and Climate Change* [2015] EWCA Civ 408, [2015] 1 WLR 4559 (*Breyer*), which related to a proposal to bring an early end to a scheme incentivising certain types of low-carbon generation of electricity through fixed tariffs for the energy produced. Although the proposal was never implemented, the claimants alleged they had suffered losses through the abandonment of proposed solar installations. The Court of Appeal held that Coulson J had been correct to distinguish between existing enforceable contracts that had been secured (which formed part of marketable goodwill) and possible future contracts that the claimants had hoped to secure (which did not).

102. Lord Dyson MR considered in *Breyer* the ECtHR and domestic case law, including *Malik* and *Nicholds*, at [28]-[39]. He observed at [42] that, while there was force in the claimants' argument that the present value of future cash flows from anticipated but unsigned contracts would have been reflected in what a purchaser would have paid for a claimant's business and thus formed part of goodwill, the term "possessions" was an autonomous Convention concept. He then said this:

> 43. The well-established distinction between goodwill and future income is fundamental to the Strasbourg jurisprudence. The consistent line taken by the European court is that the goodwill of a business, at any rate if it has a marketable value, may count as a possession within the meaning of A1P1, but the right to a future income stream does not…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…

(It is clear from the context that the reference to a "right to a future income stream" in the second sentence should be read as being an expectation of one, rather than to a legally enforceable right.)

103. Lord Dyson observed at [44] in *Breyer* that goodwill is not susceptible to precise definition, but derived assistance from Lord Macnaghten's description of it in *Inland Revenue Comrs v. Muller & Co's Margarine Ltd* [1901] AC 217, 223-224, as follows:

> … the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom … It is the one thing which distinguishes an old-established business from a new business at its first start …

104. Goodwill was "the present value of what has been built up", which was to be distinguished from the value of a future income stream, even though, to an accountant, the distinction might make little sense ([45] of *Breyer*). On the facts, installation contracts that had been secured might be said to be part of the goodwill of the business because they were a product of past work, but contracts the business hoped to secure in future were "no more than that" ([49]).

105. While the dividing line between goodwill and future income is far from straightforward, we agree with the Divisional Court that the schools' complaint falls on the "future income" side of the line. The analogy with *Breyer* is instructive. The concern of the schools is that parents will be forced to withdraw their children, and that prospective pupils will not join. But the schools do not rely on any breach of contract. Parents are not obliged to continue sending their children to the schools. The schools' concern is that they have reduced expectations of being able to generate income in future from parents who might otherwise keep their children at, or send them to, the schools.

106. The exclusion from the concept of "possessions" of future income for which there is no enforceable claim reflects the case law of the ECtHR: see *Breyer* at [30] and [31], referring to *Ian Edgar (Liverpool) Ltd v. United Kingdom* Reports of Judgments and Decisions 2000-I at page 465 and *Denimark Ltd v. United Kingdom* (2000) 30 EHRR CD 144. It is reflected also in Lord Bingham's summary in *Countryside Alliance* at [21], where he referred to the distinction between goodwill and "future income, not yet earned and to which no enforceable claim exists". For present purposes at least, it seems to us that this is a clearer test than attempting to identify and distinguish "marketable" goodwill from future income. As Rix LJ observed in *Malik* at [65], the present-day value of a business will inevitably reflect its future earning capacity, and the ECtHR case law has also placed emphasis on goodwill in the form of professionals' clientèle that may not be readily marketable (see for example *Van Marle v. The Netherlands* (1986) 8 EHRR 483 at [41]).

107. Sir James Eadie KC accepted that the schools' argument that there was an interference with their possessions would be stronger if the existence of the business was in jeopardy. That must be right. If the facts demonstrated that the effect of the measure was to cause a school to shut, with the loss of all existing (as well as prospective) custom, that might involve an interference with A1P1 rights, just as in *Breyer* there was an interference because, on the assumed facts, it was no longer economically viable to install solar systems (*Breyer* at [71]). In this case, however, the evidence referred to **concerns** about viability but it did not go further than that. In essence, the complaint is about a loss of future income.

108. The Divisional Court correctly observed that none of the parents is obliged to continue sending their children to private schools. We accept that, for a number of parents, state schooling would not be an acceptable alternative, but home schooling remains an alternative. The parents are not legally obliged to pay private school fees. In those circumstances, we agree with the Divisional Court's observation at [248] that it is doubtful that the measure interferes with the parents' possessions, any more than the imposition of VAT (or VAT at a higher rate) on any other services or goods that the parents might choose to buy would do so.

109. Further and in any event, even if there were an interference with the A1P1 rights of the schools or parents, it would be justified for the reasons discussed below under Ground 8 ([170]-[184] below).

Ground 2: A1P1 and "public interest"

110. Ground 2 is: the Divisional Court wrongly found the measure to be compatible with A1P1 despite it being a tax contrary to the public interest and therefore incapable of satisfying the threshold "public interest" requirement of A1P1.

111. This issue only arises if (contrary to what we have already held) there is any interference with A1P1 rights in the present cases.

112. In any event, we reject this ground. The phrase "public interest" in A1P1 simply requires there to be a legitimate aim for the measure. Further, A1P1 requires the principle of proportionality to be complied with. We reject the submission based on article 132 of the VAT Directive that the imposition of VAT on the provision of education is inherently contrary to the public interest.

113. Mr Quintavalle submits that A1P1 contains a threshold requirement that no-one shall be deprived of his possessions "except in the public interest". He submits that a tax contrary to the public interest will be contrary to A1P1 and will not therefore fall to be justified under a proportionality analysis since it would be illegitimate from the outset.

114. Mr Quintavalle relies in this context on the provisions of article 132(1)(i) of the VAT Directive, in Chapter 2 of Title IX of the Directive, which is headed 'Exemptions for certain activities in the public interest'. As we have said at [30] above, this makes it mandatory for Member States of the European Union to exempt from VAT "the provision of children's or young people's education, school or university education, … 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 submits

that, although the UK has now left the EU, the scope of A1P1's public interest requirement is still to be informed by the common EU position, which is reflected across the rest of the Council of Europe.

115. We have no hesitation in rejecting that submission. The fact that the EU operates a harmonised policy on VAT does not in any sense mandate that a non-EU State (as the UK now is) cannot consider it to be in the public interest to impose VAT on school fees. Reference to other members of the Council of Europe is irrelevant in this context, since they are not subject to the VAT Directive, which is an instrument of EU law (the Council of Europe is a much larger body, comprising 46 States, including the UK). Furthermore, in our view, it is obvious that a revenue-raising measure such as the one challenged in this case is capable of being in the public interest. Whether it is compatible with A1P1 will depend on other factors, in particular the principle of proportionality, but there can be no doubt that the measure was enacted to serve the public interest. It has, in the Convention parlance, a "legitimate aim".

116. Mr Quintavalle relied in his skeleton argument on the fact that the Divisional Court itself had recognised, at [95], that private education serves the public interest. In oral submissions he also reminded us that the provision of education has long been regarded as serving a public interest purpose for the purpose of domestic charity law. But these submissions do not take the argument anywhere. No-one doubts that the provision of education, including by private schools, serves the public interest. The question under A1P1 is whether a tax measure like the one under challenge in these appeals was enacted in the public interest. The two propositions are not inconsistent with each other.

117. In this context Mr Quintavalle also relied on the ECtHR's decision in *NKM v. Hungary* (2016) 62 EHRR 33 (*NKM*). That case was decided in a very different context. It concerned a civil servant who had worked for 30 years in the civil service. She received severance pay on her dismissal. That severance pay was taxed at an effective tax rate of 52 percent as opposed to the general personal income tax rate of 16 percent. The ECtHR held that this was a violation of her rights under A1P1. Mr Quintavalle relied on [55]-[59] in the ECtHR's judgment but we can see nothing there which supports his submissions. To the contrary, we note that, in the result, the ECtHR concluded that the measure under challenge in that case did serve the public interest, in particular the interest in protection of the public purse and the "sense of social justice of the population": see [59].

118. Mr Quintavalle also relied on what the ECtHR said at [71]-[72] in *NKM*, but that was in the context of a different argument, that is the proportionality analysis, having already held that the measure under challenge did serve the public interest. On the facts of that case, the ECtHR decided that the applicant had been made to bear an excessive and disproportionate burden while other civil servants with comparable benefits were apparently not required to contribute to a comparable extent to the public purse. Further, the ECtHR observed that the measure did not afford the applicant a transitional period within which to adjust herself to the new scheme. Those were particular features of the measure under challenge in that case and do not support Mr Quintavalle's submissions about the public interest in the present cases.

Ground 3: A2P1 and international human rights instruments

119. Ground 3 is: the Divisional Court wrongly restricted the scope of A2P1 so as not to require a Member State to facilitate pluralism in education and wrongly found that the international human rights instruments relied on by the Appellants did not reduce the State's margin of appreciation nor broaden the scope of A2P1 so as to prohibit the imposition of educational taxes on private schools.

120. We do not accept the submission that the international human rights instruments relied upon by the Appellants add anything to their submissions and, in particular, expand the scope that would otherwise be given to A2P1.

121. Mr Quintavalle criticises what the Divisional Court said at [253]: that the substantive rights guaranteed by A2P1 go no further than the right of access to whatever educational system the state chooses to provide and the right to establish a private school. In particular, the Divisional Court said, that the rights guaranteed by A2P1 did not include any right to require the state to facilitate one's child's access to a private school. Mr Quintavalle submits that this fails correctly to consider the effect of international human rights instruments which inform the correct interpretation of A2P1. He submits that these demonstrate that the state has positive obligations to support parents in the educational choices which they make and to support a flourishing of educational choices, including in the private sector, which taxing education does nothing to further.

122. Mr Quintavalle relies on the ECtHR Grand Chamber decision in *Catan v. Moldova and Russia* (2013) 57 EHRR 4, at [136], where the ECtHR said that, in interpreting and applying A2P1, account must be taken of any relevant rules and principles of international law applicable in relations between the contracting parties, and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part. In particular, the ECtHR mentioned the right to education set out in the Universal Declaration of Human Rights, the Convention against Discrimination in Education, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child as being of relevance.

123. When stated at that high level of abstraction, that principle is well-established and familiar in the case law of the ECtHR. But there is nothing there which supports the specific submission which Mr Quintavalle makes in the present context.

124. Mr Quintavalle relied on four particular instruments. First, he relied on article 26(2) of the 1948 Universal Declaration of Human Rights (strictly speaking not an international treaty but a resolution of the General Assembly of the United Nations), which recognises that parents have a prior right to choose the kind of education that should be given to their children. Secondly, he relied on the Convention Against Discrimination in Education 1960, and in particular article 1, which defines "discrimination" to include any distinction based on, for example, religion or economic condition. It talks of a provision which has the purpose or effect of depriving any person of access to education of any type or at any level or of limiting any person or group of persons to education of an inferior standard. We can see nothing in the measure under challenge which has that purpose or effect. Further, and in any event, care must be taken not to take this argument to its logical conclusion. If it were right, for example, that a state could not impose a tax charge on school fees which has the effect of preventing some parents from sending their children to a private school: in one sense that could be said to be on the basis of

their "economic condition" but there is nothing in principle or in the case law which Mr Quintavalle has shown us which would prevent a state from so acting.

125. Next Mr Quintavalle relied on the International Covenant on Economic, Social and Cultural Rights 1966, in particular article 13, which makes provision for education at different levels, including by stating that secondary education in its different forms shall be made generally available and accessible to all by every appropriate means. The state parties undertake to have respect for the liberty of parents to choose for their children schools other than those established by the public authorities to ensure the religious and moral education of their children in conformity with their own convictions. We do not understand this to say anything in substance different from what A2P1 says in any event. More importantly, there is nothing in these provisions of the 1966 Covenant which would prevent the state from imposing VAT on school fees.

126. Fourthly, Mr Quintavalle relied on the Convention on the Right of the Child 1989, in particular article 28, which requires states parties to encourage the development of different forms of secondary education. Again, we can see nothing in that Convention which would prevent the imposition of VAT on school fees.

127. Finally in this context, Mr Quintavalle relied on the judgment of the ECtHR in *Şahin v. Turkey* (2007) 44 EHRR 5 (*Şahin*), at [137]. There the ECtHR said that, although A2P1 does not impose a duty to set up institutions of higher education, any state doing so will be under an obligation to afford an effective right of access to them. Again, we can see no analogy with the present context.

128. Before we leave this ground of appeal, it is important to recall what the Supreme Court said in *SC* at [74]-[96] about the use of unincorporated international instruments in domestic law. First, although treaties are agreements intended to be binding upon the state parties to them, they are not agreements which domestic Courts can enforce: see [76]. Secondly, it is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the UK: see [77]. Further, the HRA has not given domestic effect to unincorporated treaties: see [79].

129. As Lord Reed explained at [80] in *SC*, a misunderstanding appears to have arisen from the fact that the ECtHR itself does frequently have regard to international law. Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties requires that, in the interpretation of treaties, any relevant rules of international law applicable in the relations between the parties shall be taken into account. But, as Lord Reed pointed out at [83] in *SC*, the ECtHR has not treated provisions of international treaties as if they were incorporated into the Convention itself so as to impose specific obligations on the contracting state via the Convention. Nor does it refer to international materials for the purpose of determining whether contracting states have complied with their obligations under unincorporated treaties, recognising that it possesses no jurisdiction to make such a determination. Accordingly, as Lord Reed concluded at [84] in *SC*, there is no basis in the case law of the ECtHR for any departure from the rule that our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties.

130. We have had regard to the judgment of the Supreme Court in *Christian Institute v. Lord Advocate* [2016] UKSC 51; [2016] HRLR 19, at [72]-[73] (Lady Hale DPSC, Lord Reed and Lord Hodge JJSC) (*Christian Institute*), where the Supreme Court did look at

the UN Convention on the Rights of the Child as an aid to the interpretation of the Convention but, as we have said, the position has been authoritatively explained by the Supreme Court in *SC* and *Christian Institute* does not take matters any further.

131. Nor do we find any assistance in the present context in the passage cited by Mr Quintavalle, and quoted at [73] of *Christian Institute*, from *Pierce v. Society of Sisters* 268 US 510 (1925), at 534-535, where Justice McReynolds, in delivering the opinion of the US Supreme Court, said:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

132. As we have already said in this judgment, nothing in the measure under challenge requires parents to accept instruction from public teachers only. Importantly, they retain the option of home schooling their children if that is their wish.

133. We have given effect to the scope of A2P1 in this judgment as interpreted by the ECtHR. There is nothing in the unincorporated international instruments to which Mr Quintavalle has drawn attention which requires any other result.

Grounds 4 and 5: the "essence" of the A2P1 right and the first sentence

134. It is convenient to consider Grounds 4 and 5 together, both of which focus on the first sentence of A2P1: "No person shall be denied the right to education". Ground 4 is that the Divisional Court erred in concluding that the measure did not impair the "essence" of the right protected by A2P1. Ground 5 is that the Divisional Court failed to address part of the Group Two Claimants' claim and wrongly held that the rights of the children to education contained in the first sentence of A2P1 were not breached.

135. The Group Two Claimants argue, in summary, that the Divisional Court failed to consider that there was a distinction between a direct tax targeting private education and (legitimate) indirect taxes which applied neutrally, and to recognise the practical effect of the tax. A2P1 prohibits measures such as a measure which impedes or hinders access to education. Under Ground 5, the Group Two Claimants further argue, by analogy with the position of Jeffrey Cosans in *Campbell and Cosans v. United Kingdom* (1982) 4 EHRR 293 (*Campbell and Cosans*), that there was a breach of the first sentence of A2P1 because the appellant children risked being denied an education.

136. The scope of the right established by the first sentence of A2P1 was first established in *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (1968) 1 EHRR 252 (*Belgian Linguistic*). At page 281, the ECtHR confirmed 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". At the time the Protocol was signed, all member states of the Council of Europe had a general education system. There was no question of requiring such a system to be established, but "merely of guaranteeing to persons subject to the

jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time".

137. Thus, the first sentence of A2P1 guarantees "a right of access to educational institutions existing at a given time", and (in order for that right to be effective) the right to formal recognition of studies completed. The state's regulation of the right would vary according to circumstances but "such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention" (*Belgian Linguistics* at pages 281-282).

138. Mr Quintavalle also relied in this connection on *Şahin*, which concerned a ban on the wearing of headscarves in higher education. Commenting on *Belgian Linguistic*, the ECtHR observed 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". Although there was no duty to set up higher education institutions, a state that did so was obliged to afford "an effective right of access to them" ([137]). While states had a margin of appreciation in relation to regulation: "[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". Further, any 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 ([154]).

139. Mr Quintavalle seeks to read into *Belgian Linguistic* and *Şahin* more than they say. The Divisional Court accurately summarised the relevant case law at [30]-[53], and we agree with its analysis at [54]-[65]. In particular, it is worth restating Lord Bingham's summary of the case law of the ECtHR in *The Lord Grey School* at [24], to which we refer at [12] above:

> The underlying premise of [A2P1] 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?

140. In short, the state is obliged to permit effective access to such education institutions as exist at the relevant time, but it is not obliged to do more than that. In particular, it is not obliged to establish educational institutions or to subsidise either them or those attending them. We would add that, provided a right to education is not denied, the state is not obliged to keep a particular institution or institutions open.

141. Further, a state may impose restrictions which "curtail" the right to education (*Şahin* at [154]), so it is not correct that no impediment or hindrance is permissible. Rather, the reference in *Şahin* to the "very essence" of the right being impaired is a statement of the permissible limit of any restrictions which curtail the right, namely that any restrictions may not "impair its very essence and deprive it of its effectiveness", and that in order to ensure this they must be foreseeable and pursue a legitimate aim. The ECtHR's approach reflects the essentially negative nature of the first sentence of A2P1 and (in the context of that case, which concerned religious observance) its close link to the second sentence, which the ECtHR has described as an "adjunct" of the first.

142. For example, therefore, the second sentence has the effect that a system of education which involved an aim of indoctrination would not comply with A2P1. As the ECtHR put it in *Lautsi v. Italy* (2012) 54 EHRR 3 (*Lautsi*) at [78], the first sentence "guarantees schoolchildren the right to education in a form which respects their right to believe or not to believe". But in this case there is no dispute that the education available in the state system would comply with that requirement.

143. The Divisional Court was correct to recognise at [59] that the Government Parties' submission below that A2P1 would not preclude a prohibition on private schools was wrong. The rights conferred include freedom to establish private schools and, where such schools exist, a right of access to them (see for example *Şahin* at [153]). Lord Bingham's reference to "such educational facilities as the state provides" in *The Lord Grey School* at [24] (a case which did not concern private schools) should not be read as indicating otherwise. But it does not go further than that. In particular, and in the context of the availability of both a state system of education that does comply with the second sentence of A2P1 and the alternative of home schooling for those for whom state education is unacceptable, action by the state that has the effect of making attendance at private schools more expensive but which does not go so far as to render it impossible or practically impossible to operate them, cannot be said to be a restriction that impairs the very essence of the right to education. As the Divisional Court found, although a not immaterial number of pupils were expected to be displaced from private schools as a result of the tax change, the data available to the decision-makers was that 94% of those attending private school would continue to do so (see the Divisional Court at [120]).

144. We do not accept the distinction sought to be drawn by the Group Two Claimants between a tax targeting private education and other taxes which apply neutrally. That distinction has no basis in the authorities. Either may make private schooling unaffordable in practice for certain parents. As the Divisional Court correctly recognised at [62], the impact of (say) a 20% increase in fees is the same whatever tax or other measure may have prompted it.

145. Sir James Eadie KC relied on *Konrad v. Germany* (2007) 44 EHRR SE8 (*Konrad*), which concerned German legislation requiring children to be educated at primary school. The applicant parents wished to be exempted on the ground that only home

schooling would be consistent with their Christian beliefs. Their complaint was rejected on the basis that the matter fell within the state's margin of appreciation, having regard to the stress placed by the German authorities on the importance of societal integration, and noting both that there was no consensus among Contracting States about compulsory school attendance and that the parents were free to educate their children outside school hours, such that the parents' rights were not restricted in a disproportionate manner (page 143).

146. *Konrad* was obviously decided in the context of the relevant German system and has no direct application to the UK education system, where home schooling remains an available option for parents. As already indicated, we prefer to rely on both the availability of a state system of education that complies with the second sentence of A2P1 and the alternative of home schooling.

147. *Campbell and Cosans* does not assist the Group Two Claimants. It concerned parents of two children who disagreed with the use of corporal punishment in Scottish state schools. Mrs Campbell had been refused a guarantee that her son Gordon would not be subject to corporal punishment. Mrs Cosans' son Jeffrey had been suspended from his school following a refusal to accept corporal punishment, and was not readmitted when the school was not prepared to accept a condition that he should not receive corporal punishment for any other incident while he remained a pupil. In the event Jeffrey never returned to school.

148. Both Mrs Campbell and Mrs Cosans relied on the second sentence of A2P1. The ECtHR held that their views amounted to philosophical convictions which had not been accorded "respect" by the Government's policy of gradually eliminating corporal chastisement, such that there was a breach of the second sentence of A2P1 ([37]-[38]). Mrs Cosans also relied on the first sentence of A2P1. As the ECtHR observed at [40]: "Article 2 constitutes a whole that is dominated by its first sentence, the right set out in the second sentence being an adjunct of the fundamental right to education". Further, in contrast to the claim under the second sentence, this claim concerned the rights of a child rather than their parent.

149. The ECtHR concluded that there was a breach of the first sentence, saying this at [41]:

> 41. The right to education guaranteed by the first sentence of Article 2 by its very nature calls for regulation by the State, but such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols…
>
> The suspension of Jeffrey Cosans – which remained in force for nearly a whole school year – was motivated by his and his parents' refusal to accept that he receive or be liable to corporal chastisement ... His return to school could have been secured only if his parents had acted contrary to their convictions, convictions which the United Kingdom is obliged to respect under the second sentence of Article 2 ... A condition of access to an educational establishment that conflicts in this way with another right enshrined in Protocol No. 1 cannot be described as

> reasonable and in any event falls outside the State's power of regulation under Article 2.
>
> There has accordingly also been, as regards Jeffrey Cosans, breach of the first sentence of that Article.

150. The critical point, therefore, was that because the condition of access imposed by Jeffrey's school conflicted with the second sentence of A2P1, the first sentence was also breached. In contrast, in this case a state school would be obliged to respect the parents' (and children's) religious convictions. What would prevent state school attendance would not be a lack of respect within the second sentence of A2P1 but a personal conviction that a state school was incapable of providing an acceptable environment or education. Put another way, nothing done by the state or school in question would breach Convention rights. *Campbell and Cosans* therefore does not assist.

Ground 6: the European consensus

151. Ground 6 is as follows: the Divisional Court wrongly held that the European consensus on not taxing education, as reflected in the VAT Directive, was not a matter indicating a common "moral" consensus and therefore wrongly held that this consensus could not be invoked to limit the state's margin of appreciation in relation to the imposition of taxes on education.

152. Mr Quintavalle criticises the reasoning of the Divisional Court at [91]-[93]. He submits that the Divisional Court found that, while the margin of appreciation could be restricted as a result of convergence in state practice, "attributable to a common moral position", there would be no such constraint where there is no common moral view. In doing so, he submits, the Divisional Court improperly restricted the applicability of international consensus only to questions of "morality", alternatively it wrongly restricted the concept of "morality" to exclude a consensus not to impose taxation on education.

153. Mr Quintavalle relies on the ECtHR decision in *Hirst v. United Kingdom (No 2)* (2006) 42 EHRR 41, which concerned the prohibition on voting of all convicted prisoners while they were in prison. Even though 13 other European states had similar laws to the UK, the ECtHR considered that the margin of appreciation was relatively narrow and found that the total ban on voting by convicted prisoners violated article 3 of the First Protocol. Mr Quintavalle submits that, even though whether prisoners should be able to vote or not is not a "moral" question, the existence or not of consensus among contracting states was still relevant, if not "determinative" as to the breadth of a state's margin of appreciation. Here, he points out, no other state in the Council of Europe imposes VAT on school fees. Conversely, Mr Quintavalle points out, in other cases the ECtHR has afforded a wide margin of appreciation to states because there was no common European standard concerned.

154. Here again, Mr Quintavalle relies on the provisions of the VAT Directive, which he submits shows a strong consensus in the context of those European states which are members of the European Union against having VAT imposed on school fees.

155. In our view, what matters is not so much whether a consensus is said to be based on "moral" considerations but crucially whether it is relevant to the human rights standards to be achieved: see e.g. *Markin*, at [126], where the ECtHR said:

> Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in contracting states and respond, for example, to any emerging consensus as to the standards to be achieved …

As the Government Parties submit, that passage makes it clear that it is not just any consensus but only one going to the standards to be applied under the Convention that matters: that is the correct approach as a matter of principle.

156. In the present context, we accept the Government Parties' submission that to the extent that there is a consensus currently in the Council of Europe or in the EU, which is a subset of the Council of Europe, the VAT Directive is at least to a significant extent a harmonisation measure. The common VAT position created by the VAT Directive has what is primarily an economic rationale, directed to create frictionless internal markets. This says nothing about whether state practice in this area is concerned with human rights standards.

157. We also accept the Government Parties' submission that there is no evidential basis for the contention, insofar as it is made by Mr Quintavalle, that private schools do not compete with one another across European borders.

158. Accordingly, we reject Ground 6.

Ground 7: the discriminatory nature of the tax

159. Ground 7 is that the Divisional Court failed properly to address the Group Two Claimants' arguments as to the discriminatory nature of the VAT charge in respect of both A1P1 and A2P1, failing to consider or properly apply the relevant ECtHR authorities.

160. This ground relies on article 14 in conjunction with A1P1 or A2P1. The Group Two Claimants maintain that the effect of the measure is to create a regime which directly discriminates between state-funded academy and free schools on the one hand and private schools on the other. The former remain exempt from VAT, placing private schools at a disadvantage.

161. We can deal with this shortly. Even if being a private school amounts to a "status" for the purposes of article 14, such schools are not in a relevantly similar position to state-funded schools, most obviously because private schools may charge fees whereas state-funded schools may not.

162. Further, and in any event, the difference in treatment is readily justified. The imposition of VAT on private school fees has the principal aim of raising revenue (see [22] above). Even if an equivalent charge could somehow be added to the funding of state-funded academies and free schools, it would not raise revenue since the cost would be borne by the Government.

163. Mr Quintavalle sought to argue that the discrimination claimed to exist could not be justified on proportionality grounds. This argument was based on a comment in *Guberina v. Croatia* (2018) 66 EHRR 11 at [73] (*Guberina*) (set out at [181] below) that measures must be implemented in a non-discriminatory manner "and" be proportionate. The argument is clearly wrong. For example, in *Carson and Others v. United Kingdom* (2010) 51 EHRR 13 (*Carson*) at [61], adopted by Lord Reed in *SC* at [37(3)], the test for discrimination was formulated as follows: "… a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised". Indeed, in *Guberina* itself the ECtHR made the same point at [71] and went on both to identify discrimination and to consider proportionality.

164. In his oral submissions, Mr Quintavalle sought to develop a further argument by reference to differences between the treatment of boarding fees and ancillary or extra-curricular supplies at state-funded and private schools. Leaving to one side whether these points are properly within the scope of the claim brought by the Group Two Claimants, we were in any event unpersuaded by them.

165. It is correct that the measure has the effect of imposing VAT on private boarding school fees, whereas boarding fees charged by state-funded schools remain exempt, even if paid for by parents rather than by the state. However, other supplies that are "closely related" to the education provided by private schools, such as school meals, transport and books and stationery, are not caught by the measure and remain exempt under Group 6 of Schedule 9 to VATA. The evidence indicates that the Government considered there to be a low risk of abuse in the form of "value-shifting" between tuition fees and non-boarding ancillary services, whereas the risk was perceived to be higher for boarding fees.

166. None of the claimant schools has boarding facilities, nor was it suggested that they planned to do so. We cannot see how they could make out a discrimination-based claim by reference to a provision that has no impact on them. We would reject the argument on that ground.

The Respondents' Notice: group disadvantage

167. It is convenient to refer to the Respondents' Notice at this point. The Respondents' Notice maintains that the Divisional Court should have held that the Evangelical Christians did not make out the requisite group disadvantage necessary for an article 14 claim. Instead, the Divisional Court expressed doubt on the point but was prepared to proceed on the footing that there was a relevant sub-group into which the Group Two Claimants fell, such that they were both in a relevantly different position from others for the purposes of *Thlimmenos* discrimination and that they were disproportionately prejudiced so as to found a claim of indirect discrimination ([174]-[175]).

168. It is unnecessary to decide this point because, like the Divisional Court, we have concluded that any discrimination would be justified. We will therefore not do so, but we will briefly address Mr Quintaville's submission that there was no need to identify "group" disadvantage in any event.

169. We do not accept that argument. It relies on an observation in *Lautsi* at [59] that A2P1 is the *lex specialis* in relation to article 9 of the Convention (freedom of thought, conscience and religion), together with the fact that – reflecting the fact that it can protect idiosyncratic beliefs – article 9 does not require group disadvantage (see *Mba v. Merton London Borough Council* [2013] EWCA Civ 1562, [2014] 1 WLR 1501 at [21], [34] and [41], and more generally on article 9: *R (Williamson) v. Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 at [22]). The observation in *Lautsi* obviously focused on the second sentence of A2P1 rather than the right to education generally. But the key point is that this is not an article 9 case. The Group Two Claimants' discrimination claim relies on article 14 read with A1P1 or A2P1, **not** article 9. In order to invoke article 14 some form of "status", or identifiable characteristic, needs to be established which is said to be the ground (i.e. basis) on which a person is discriminated against (*SC* at [37(1)], reflecting *Carson* at [61]). By definition, a status will be held by a group of persons, such as those of a particular race or religion. So, for example, in the context of indirect discrimination Lord Reed explained in *SC* at [53] that a claimant needed to show that "that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination".

Ground 8: proportionality

170. We will address each of Mr Quintavalle's six sub-grounds under Ground 8 in turn. Before we do so we should point out that it is not an error for a court not to deal expressly with every specific argument which has been advanced before it. The Divisional Court judgment was on any view lengthy and thorough. The fact that a court does not refer to a particular argument does not mean that it has not had regard to it.

171. The first criticism that Mr Quintavalle made was that the Divisional Court failed to address the authorities on court fees, which, as a specific charge levied in order to access a protected right, provide a very close analogy: see e.g. *Julin v. Estonia* (judgment of 29 August 2012), at [161]. We do not accept that the authorities on court fees provide an analogy to the VAT charge in this context. As the Government Parties point out, a person who cannot afford a court fee has nowhere else to go and may be denied justice altogether. A person who cannot afford a private school can send their children to state schools free of charge or can educate their children at home if they prefer.

172. The second sub-ground advanced by Mr Quintavalle is that the Divisional Court failed to recognise a rational bright line distinction for exemption of VAT for schools which charge less than the per-pupil state cost of education. As we have mentioned, the evidence is that the Government carefully considered various options for the design of the measure under challenge. In particular, consideration was given to whether a low-cost exemption could be made. For all the reasons set out in that evidence, which we have summarised at [86]-[97] above, this would not have been as effective in achieving the aims of the measure and would have led to additional administrative and cost burdens and the possibility of abuse.

173. Thirdly, Mr Quintavalle submitted that the Divisional Court failed to give effect to the Convention obligation to provide "very weighty reasons" for measures which detrimentally impact groups historically subject to discrimination.

174. As we have explained earlier, the exercise which needs to be carried out in assessing proportionality under article 14 is a nuanced one, as explained by the Supreme Court in *SC*. One cannot simply take phrases like "very weighty reasons" from particular judgments of the ECtHR and apply them out of context. In the present context, as we have explained, the measure in question, and in particular the decision not to have a low-cost exemption, does meet the Convention requirement of proportionality and does provide an objective justification for any difference of treatment. It is relevant in this context, as we have said, to recall that this is not a case of direct discrimination. Further, unlike *Biao* which was an indirect discrimination case, this is not a case of discrimination on grounds of ethnic origin, which is very difficult to justify, if indeed it is capable of being justified at all under the Convention. Everything depends on context.

175. The fourth submission that Mr Quintavalle advanced was that the Divisional Court failed to acknowledge that the regulatory regime for schools clearly provides for a different regulatory environment for small religious schools which cannot be replicated if they accept state funding. This is no doubt an important matter of detail, if the only way in which small religious schools can continue to operate is indeed to seek a place in the state sector. We are satisfied that if that step is taken by some schools in response to the change in VAT rules, the Government would be perfectly entitled to require such schools to comply with standards which apply to other state-funded schools. This does not, however, persuade us that there is any breach of the Convention rights on the ground that there has been a lack of proportionality.

176. The fifth argument advanced by Mr Quintavalle was that the Divisional Court wrongly found it neither excessive nor disproportionately burdensome that the only people subject to the new tax were the very people who were not availing themselves of state education for their children and therefore do not burden the state with respect to their educational choices. In our view, this was the sort of point going to the merits or otherwise of the measure under challenge which people were entitled to make in the democratic debate which preceded the enactment of the measure. It does not, however, persuade us that the decision which Parliament eventually made is one that is incompatible with the Convention rights.

177. Finally, under Ground 8, Mr Quintavalle submitted that the Divisional Court wrongly found it neither excessive nor disproportionately burdensome to impose an educational tax regardless of the wealth of the people being taxed and in the absence of any transitional period for those people to make adjustments. There are two specific criticisms made here and we will address each in turn.

178. First, again Parliament had well in mind that some parents would not be sufficiently well off to be able to afford the new charge being imposed on school fees. It factored that into account in its calculation of how much revenue would be raised and whether to make exemptions. The conclusion which was eventually arrived at was that the benefits of the new measure outweighed the disadvantages. In particular, as we have said, those parents who are no longer able to afford a private school education for their children do have access to the state-funded school system free of charge and, if that is not appropriate according to their religious or other beliefs, they do have the option of home schooling.

179. So far as the question of a transitional period is concerned, consideration was given to this. The new measure was introduced in January 2025. Ms Peters said at [44]-[45] that the estimated provisional costings for options which would have delayed the implementation of the change until April or September 2025 showed that this would result in a corresponding loss in Exchequer yield. Not starting the policy until September 2025 would have lost over £500 million, in other words, one-third of the projected income for 2025-2026. We are unable to say that it was a disproportionate response on the part of the Government Parties to take the view that the change in VAT regime needed to be implemented in January 2025, albeit it is recognised by everyone that it was going to cause difficulties to at least some parents to introduce the change in the middle of an academic year.

180. Before we leave Ground 8, we should note that Mr Quintavalle relied on the judgment of the ECtHR in *Guberina* (referred to at [163] above). That was a case in a very different context and concerned an individual with disabilities. The applicant owned a flat on the third-floor of a residential building where he lived with his wife and two children. The applicant's third child was born with multiple physical and mental disabilities and was declared by the competent social care services to be 100% disabled. The applicant bought a house and sold his flat. He stated that he bought the house because the building in which the flat was situated did not meet the needs of his disabled child: it had no lift. He submitted a tax exemption request under relevant legislation which provided for an exemption to be made from the Real Property Transfer Tax for a person buying a property in order to meet his or her housing needs if he or she, or members of their immediate family, did not have another flat or house that met their needs. The request was refused and legal proceedings in the domestic legal system failed.

181. Mr Quintavalle relies on this judgment principally for what the ECtHR said at [73]:

> On the one hand, a wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy, for example. This also includes measures in the area of taxation. However, any such measures must be implemented in a non-discriminatory manner and comply with the requirements of proportionality. On the other hand, if a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the state's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs. The Court has already identified a number of such vulnerable groups that suffered different treatment on account of their characteristic or status, including disability. Moreover, with regard to all actions concerning children with disabilities the best interest of the child must be a primary consideration. In any case, however,

> irrespective of the scope of the state's margin of appreciation the final decision as to the observance of the Convention's requirements rests with the Court.

182. It is important, however, not to view that passage, which sets out well-established principles of Convention law at a high level of abstraction, out of context. When the ECtHR came to apply those principles to the specific facts before it, it engaged in a close analysis of the particular circumstances of the applicant and his child with disabilities. As is apparent in particular from [88]- [89], the Government virtually conceded that the relevant domestic authorities were not empowered to seek a reasonable relationship of proportionality between the means employed and the aims sought to be realised in the applicant's particular case. Therefore, contrary to the requirements of article 14, they were unable to provide objective and reasonable justification for their failure to correct the factual inequality inherent in the applicant's case. That is very far from the circumstances of the present case.

183. Further, at [93] in *Guberina*, the ECtHR said that the issue in that case was the manner in which the legislation was applied in practice and that this failed to sufficiently accommodate the requirements of the specific aspect of the applicant's case related to the disability of his child and, in particular, the interpretation of the term "basic infrastructure requirements" for the housing of a disabled person. The reason for excluding the applicant from the scope of the tax exemption was the fact that his flat was considered to meet the basic infrastructure requirements for the housing needs of his family and plainly it did not do so: see [96].

184. In the present context, there is a challenge not to the application of a national rule to the specific circumstances of an individual applicant but rather a challenge to a general measure in legislation. The specific challenge is then made that Parliament ought to have carved out an exemption for low-cost schools, particularly religious schools. For all the reasons we have already given, we are satisfied that the Government has provided an objective and reasonable justification for declining to make that exemption. We do not consider that individual decisions like *Guberina* assist the Group Two Claimants in advancing their challenge to the measure in this case.

Section J: Conclusion

185. For the reasons we have given, these appeals are dismissed.