



Neutral Citation Number: [2026] EWCA Civ 1364

Case No: CA-2025-002755

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MR JUSTICE BOURNE
[2025] EWHC 2396 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 October 2026

Before:
LORD JUSTICE BAKER
LORD JUSTICE LEWIS
and
LORD JUSTICE BUTCHER

Between:

**THE KING (on the application of CKT and DGT (by his
mother and litigation friend CKT))**

Appellants

- v -

- (1) Twyford Church of England Academies Trust**
**(2) Admissions Panel of Twyford Church of England
High School**
(3) London Diocesan Board for Schools
(4) Secretary of State for Education

Respondents

And Between

The King (on the application of CKT)

- v -

- (1) Office of the Schools Adjudicator**
(2) Secretary of State for Education

Appellant

Respondents

Raj Desai and Aidan Wills (instructed by **Gold Jennings Ltd**) for the **Appellants in the first appeal and the Appellant in the second appeal**
Peter Oldham KC (instructed by **Eversheds Sutherland**) for the **First and Second Respondents in the first appeal**
Sarah Hannett KC (instructed by **Winckworth Sherwood**) for the **Third Respondent in the first appeal**
Joanne Clement KC and Zoe Gannon (instructed by **Government Legal Department**) for the **Secretary of State for Education in both appeals**
Tom Cross KC (instructed by **Government Legal Department**) for the **First Respondent in the second appeal**

Hearing dates: 6-7 October 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 October 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. These two appeals concern a faith-based oversubscription criterion forming part of the admission arrangements for Twyford Church of England High School (“Twyford School”). In essence, there are 150 places at Twyford School which are described as foundation (Christian) places. If there are more than 150 applicants for those places, oversubscription criteria are used to allocate points to applicants. Twenty points are allocated where the child and his parent or carer are regular attenders at a Christian place of worship. One additional point is awarded to applicants where the family’s main place of worship is a Church of England church. In recent years, most successful applicants for a place at Twyford School had to have been awarded 21 points and, therefore, had to have a Church of England church as their family’s main place of worship in order to be allocated a place.
2. The principal issues on these appeals concern whether the awarding of a point where the family’s place of worship is a Church of England church gives rise to indirect discrimination contrary to sections 19 and 85 of the Equality Act 2010 (“2010 Act”) and whether the Twyford Church of England Academies Trust (“the Trust”) had complied with its duty under section 149 of the 2010 Act to have due regard to certain specified equality considerations when exercising its function of making admission arrangements.
3. The appellants are CKT and her son. CKT is originally from Eritrea. She and her son attend an Eritrean Orthodox Church in London. CKT and her son, like the great majority of members of that church, are black and of non-English ethnic origin. CKT applied for a place for her son at Twyford School.
4. Twyford School is one of four schools operated by the Trust. Three were designated as having a religious character as Church of England schools and the fourth was applying for such a designation at the material time. As there were more applicants than places at Twyford School, the oversubscription criteria were used to allocate places. CKT’s son was awarded 20 points as she and her son were regular attenders at a Christian place of worship. He was not, however, awarded an additional point as the Eritrean Orthodox Church is not in communion with the Church of England. Given the number of applicants for 2024-2025, a successful applicant needed to have 21 points, that is he needed to have to been awarded the additional point for having a Church of England church as a main place of worship in order to secure a place at Twyford School. CKT was, therefore, refused a place at Twyford School for her son.
5. CKT appealed to the admissions appeal panel but that appeal was unsuccessful. CKT also made an objection to the Office of the Schools Adjudicator (“the OSA”) about the 2025-2026 admission arrangements (which were materially the same as the 2024-2025 arrangements) alleging that they gave rise to indirect discrimination contrary to section 19 of the 2010 Act. The OSA dismissed that objection.
6. CKT and her son brought a claim for judicial review of the decision of the Trust not to offer her son a place at Twyford School (and of the admissions appeal panel refusing her appeal against that decision). They contended that the award of an additional point because the family’s main place of worship was a Church of England

church amounted to indirect discrimination within the meaning of section 19 of the 2010 Act as it involved the application of a provision, criterion or practice (referred to as a “PCP”) which put CKT and her son, and others who were black or non-English, at a disadvantage which the Trust could not demonstrate was a proportionate means of achieving a legitimate aim. They also contended that the Trust had failed to comply with its duty under section 149 of the 2010 Act. CKT also brought a claim for judicial review of the decision of the OSA dismissing the objection to the 2025-2026 arrangements advancing only one ground of claim, namely that the OSA had erred in law by concluding that the award of a point where a family’s main place of worship was a Church of England church did not give rise to indirect discrimination.

7. Bourne J (“the judge”) dismissed the claims. He held that paragraph 5 of Schedule 11 to the 2010 Act did not exempt claims that faith-based oversubscription arrangements which put persons of a particular colour or ethnicity at a particular advantage amounted to indirect discrimination contrary to section 19 of the 2010 Act and section 85 of the 1998 Act. He found that the oversubscription criterion which awarded an extra point for children whose family’s main place of worship was a Church of England church would put persons who were not white or were not English at a particular disadvantage. He held, however, that that PCP pursued a legitimate aim, namely to ensure that the Anglican character and ethos of Twyford School is preserved, and that it was a proportionate means of achieving that aim. He therefore found the refusal of a place for CKT’s son in 2024 did not involve indirect discrimination. The judge also held that the Trust had complied with its duty under section 149 of the 2010. The judge also dismissed the claim against the OSA.
8. CKT and her son appeal on four grounds namely that the judge erred in:
 - (1) his interpretation of the relevance and effect of statutory provisions permitting faith-based oversubscription criteria, in particular the religion or belief discrimination exception in paragraph 5 of Schedule 11 to the 2010 Act, when considering the justification for indirect race discrimination under section 19(2)(d) of the 2010 Act and/or on the requirements of the duty imposed by section 149 of the 2010 Act;
 - (2) his interpretation of the requirements of section 149 of the 2010 Act in the present context and in concluding that the duty was discharged on the material before him (a ground relevant only to the claim against the Trust);
 - (3) finding that the requirements of section 31(2A) of the Senior Courts Act 1981 (“the 1981 Act”) were satisfied and so would have justified the refusal of a remedy even if there had been a breach of section 149 of the 2010 Act (relevant only to the claim against the Trust); and
 - (4) his assessment of proportionality pursuant to section 19(2)(d) of the 2010 Act.
9. The Secretary of State for State for Education has filed a respondent’s notice seeking to uphold the order of the judge below on the different ground or additional ground that:

“Paragraph 5 of Schedule 11 to the Equality Act 2010 creates an exception to the prohibition in section 85(1) of the Equality

Act 2010 for an indirect race discrimination claim where that claim arises out of the application of faith-based oversubscription criteria by a designated faith school.”

10. The Trust and the admissions appeal panel have filed a respondent’s notice seeking to uphold the order on additional grounds namely that the judge should not have decided that the appellants had proved that the disputed admissions criterion put the appellants, and others of the same race, at a particular disadvantage as required by section 19(2)(b) and (c) of the 2010 Act and in particular that:
 - (1) the matters on which the judge relied to reach his conclusion were not sufficiently probative of the criterion’s discriminatory effect and, further,
 - (2) the approach adopted by the judge failed to give effect to the requirement that it was for the appellants to prove that the criterion had a discriminatory effect.

THE STATUTORY FRAMEWORK

Legislation relating to Faith-Based Schools

11. The different types of schools that exist in England are described by the judge at paragraphs 31 to 41 of his judgment. Schools may be designated as having a religious character pursuant to section 69(3) of the School Standards Act 1998 (“the 1998 Act”). Academies are a form of independent school operated by a trust but funded by the Secretary of State under a funding agreement with the relevant trust: see section 1 of the Academies Act 2010. Academies may also be designated as having a religious character (see section 124B(2) of the 1998 Act which applies section 69(3) and (5) to academies). According to the Secretary of State, there are about 7,000 schools in England designated as having a religious character, of which 4,630 are Church of England schools.
12. The admissions authority for a school must determine the admission arrangements for the school. That must include a determination of the number of pupils that it is intending to admit to the school (often referred to as the published admissions number): see section 88 and 88D of the 1998 Act. An admissions authority must enable a parent to express a preference as to the school at which the parent wishes education to be provided for his or her child. The admissions authority must comply with that preference unless that would prejudice efficient education or the efficient use of resources. No prejudice will be taken to arise if the number of pupils admitted will not exceed the published admissions number. See section 86(1), (2) and (5) of the 1998 Act. There will be cases where there are more applications than places available at a school. An admissions authority may therefore adopt criteria, referred to as oversubscription criteria, to determine how to allocate the number of places available. There has to be consultation on the proposed admission arrangements: see regulations 13 and 14 of the School (Admissions Arrangements and Co-ordination of Admission Arrangements) (England) 2012. In the case of schools designated as Church of England schools, the diocesan authority for the diocese in which the school is located must also be consulted.
13. The Secretary of State must issue a code for school admissions and certain bodies are required to act in accordance with the code. Academies are also generally required by

their funding agreement with the Secretary of State to comply with the code. The material provisions were contained in the September 2021 version of the School Admissions Code (“the Code”) and are summarised by the judge at paragraphs 51 to 56 of his judgment. Paragraph 1.7 of the Code provided that all schools must have oversubscription criteria. Paragraph 1.8 of the Code, so far as material, provided (emphasis in the original) that:

“Oversubscription criteria **must** be reasonable, clear, objective, procedurally fair, and comply with all relevant legislation, including equalities legislation. Admission authorities ensure that their arrangements will not disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group ...Admissions arrangements **must** include an effective, clear and fair-tie breaker to decide between two applications that cannot otherwise be separated.”

14. A section of the Code dealt with faith-based oversubscription criteria in schools designated as having a religious character. Paragraph 1.36 provided that schools had to offer a place to a child of the relevant religious faith, or of no faith, if places were available. It also provided that:

“Schools designated by the Secretary of State as having a religious character may use faith-based oversubscription criteria and allocate places by reference to faith where the school is oversubscribed”.

15. Paragraph 1.38 of the Code required the admissions authorities to have regard to guidance from the body representing the relevant faith (in this case the third respondent, the London Diocesan Board for Schools (“the LDBS”)). The judge identified the material part of the relevant guidance in paragraph 57 of his judgment where he noted that:

“(a) Under the heading “Our Vision for Inclusive Education”, the guidance explains that “The Church of England’s vision for education is ... for the common good of the whole community”. In keeping with this broader vision, the LDBS invites all of its schools “to make the needs of the most vulnerable and disadvantaged in their community a priority, and to be inclusive of all faiths and none”.

(b) A core obligation of an admission authority is to have an “inclusive and distinctive Christian vision which is reflected in their admission arrangements”, and the guidance explains that “Admission arrangements make an important statement about the school’s local context and distinctive Christian vision”.

(c) In the section on “Church-Related Oversubscription Criteria”: (i) “The LDBS requires admission authorities to be mindful that the original purpose of Church schools reflected in trust deeds, was to serve the children of the parish”; (ii) “The LDBS strongly recommends that all admission authorities

should ... Maintain an equal 50/50 split between foundation and open places”.

16. There is provision for an appeal against a decision not to admit a pupil to a school: see section 94 of the 1998 Act. There is a code issued under section 84 of the 1998 Act governing such appeals. The funding agreements with academies generally require an academy to make provisions for an appeal and provides that the code applies to such appeals. The code requires that an appeal is to be allowed where “the admission arrangements did not comply with the admissions law or had not been correctly and impartially applied and the child would have been offered a place if the arrangements had complied or been correctly applied”.
17. Finally, section 88H of the 1998 Act enables a person to refer an objection to the admission arrangements to an adjudicator. They are appointed under section 25 of the 1998 Act.

The legislation relating to discrimination

18. The 2010 Act is structured as follows. Part 2 is concerned with key concepts. Chapter 1 of Part 2 identifies what are referred to as protected characteristics. These include race, and religion and belief (see section 4). Race is defined in section 9. Religion and belief are defined in section 10. Chapter 2 of Part 2 is headed “Prohibited Conduct” and defines different types of prohibited conduct. This includes direct discrimination – broadly, defined to include a situation where one person treats another person less favourably because of a protected characteristic (section 13). It also includes indirect discrimination - defined, broadly, to include a situation where a person applies a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic (section 19). Section 25 defines how certain references in the 2010 Act are to be understood, including references to “race discrimination” and “religious or belief-related discrimination”. The remainder of that chapter deals with other prohibited conduct such as harassment (section 26) and victimisation (section 27).
19. The 2010 Act then sets out the various areas in which it is made unlawful to discriminate against a person (or to harass or victimise a person). That includes discrimination in relation to the provision of services and the discharge of public functions, employment and, in chapter 1 of part 6, education (save that the chapter does not apply to certain protected characteristics, i.e. age, and marriage or civil partnership).

Indirect discrimination and admission arrangements

20. The present case concerns alleged indirect discrimination in relation to the admission arrangements at a school. Section 85(1) and (2) of the 2010 Act provides that:

“(1) The responsible body of a school to which this section applies must not discriminate against a person—

(a) in the arrangements it makes for deciding who is offered admission as a pupil;

(b) as to the terms on which it offers to admit the person as a pupil;

(c) by not admitting the person as a pupil.

(2) The responsible body of such a school must not discriminate against a pupil—

(a) in the way it provides education for the pupil;

(b) in the way it affords the pupil access to a benefit, facility or service;

(c) by not providing education for the pupil;

(d) by not affording the pupil access to a benefit, facility or service;

(e) by excluding the pupil from the school;

(f) by subjecting the pupil to any other detriment.”

21. For present purposes, the responsible body is the Trust (see section 85(7) and section 12 of the Academies Act 2010).

22. Section 85 provides that the Trust “must not discriminate” against a person in relation to the matters set out in section 85(1). In cases involving allegations of indirect discrimination, what constitutes discrimination is defined by section 19. That provides that:

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

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

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

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

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

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

(3) The relevant protected characteristics are—

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;

sexual orientation.”

23. However, there are exceptions in relation to schools set out in Schedule 11 to the 2010 Act. Paragraph 5, which appears in Part 2 of Schedule 11 under the heading “religious or belief-related discrimination” provides, so far as material, that:

“Section 85(1) and (2)(a) to (d), so far as relating to religion or belief, does not apply in relation to—

(a) a school designated under section 69(3) of the School Standards and Framework Act 1998 (foundation or voluntary school with religious character) ...”

24. For completeness, the other exception in Part 2 of Schedule 11 concerning schools is paragraph 6 which provides:

“6 Curriculum, worship, etc.

Section 85(2)(a) to (d), so far as relating to religion or belief, does not apply in relation to anything done in connection with acts of worship or other religious observance organised by or on behalf of a school (whether or not forming part of the curriculum).”

25. Finally, section 149 of the 2010 Act imposes a duty, referred to as the public sector equality duty, to have due regard to certain specified equality considerations when exercising its functions. Section 149(1) provides, so far as material, that:

“(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act ;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

THE FACTUAL BACKGROUND

The Trust

26. The Trust is a company limited by guarantee created in 2011. It operates four secondary schools in the London Borough of Ealing of which Twyford School is one.
27. The object of the Trust is specified in its articles of association as "establishing, maintaining, carrying on and managing and developing Church of England schools designated as such".

The Trust Schools

28. Twyford School became a voluntary aided maintained school in 1981. It was designated as a school having a religious character as a Church of England school in that year. It became an academy in 2011 and retained its designation as a Church of England school. It is one of four schools operated by the Trust and the only one to have faith-based oversubscription criteria. At the material time, two of the other schools operated by the Trust (namely, the William Perkin Church of England High School and the Ada Lovelace Church of England High School) had also been designated as having a religious character as a Church of England school. Those two schools were opened in 2013 and 2018 in response to a demand for school places. Although designated as Church of England schools those two schools do not have faith-based oversubscription criteria. The fourth school, Ealing Fields High School, was opened in 2017 and became an academy operated by the Trust in 2018. At the material time, an application had been made (and has now been granted) for designation as having a religious character as a Church of England school. That school does not have faith-based oversubscription criteria.

The admission arrangements for Twyford School

29. The admission arrangements for Twyford School were the same for 2024-2025 (the year for which CKT applied for a place for her son) and 2025-2026 (the arrangements in respect of which CKT made an objection to the OSA). There were 190 places available for the relevant year at Twyford School. Of those 150 were designated as foundation (Christian) places. 21 are designated as world-faith places (which are defined as major non-Christian faiths). 19 are designated as specialist music scholarship places.
30. Put simply, when allocating the 150 foundation places, and after admitting looked after children and those with an education health and care plan, the Trust applies a points system to determine which children should be allocated places. Up to 20 points are awarded depending on the length and frequency of voluntary attendance by the child and his or her parent or carer at Church of England services (or services of churches in communion with the Church of England) or Christian churches affiliated to Churches Together or the Evangelical Alliance. The latter category includes a broad range of Christian churches including the Roman Catholic Church, the

Methodist Church and various national orthodox churches (including the Eritrean Orthodox church). The admission arrangements also award 1 point where the “family’s main place of worship is at a Church of England church” (defined to include churches in communion with the Church of England). If there are more children with 21 points than there are places, places are awarded by reference to other criteria such as having a sibling at Twyford School, or, essentially, residence and distance from home to Twyford School.

31. For convenience, it is helpful to set out the relevant provisions in the 2024 arrangements. They provide as follows (emphasis in the original):

“CRITERIA FOR FOUNDATION (CHRISTIAN) PLACES

The governors have designated 150 places each year as Foundation places for students who themselves AND their parent(s)/carers are regular worshippers Attendance should be at a public place of worship and be confirmed by a supportive reference from their parish priest or minister.

If the School is oversubscribed, after the admission of “Statemended” Children... in the event of oversubscription (ie more applicants than places available after deducting the number of places (if any) for Looked After and Previously Looked After Children... then, when deciding between applicants who ostensibly have equal entitlement, the Governos will the following criteria when deciding priority:

The total points scored will be the first deciding factor.....

Information relating to the child

- a) The **length** and **frequency** of voluntary **attendance** of the child at services of the Church of England (or Churches in communion therewith)...or, Christian Church affiliated to Churches Together in Britain and Ireland or the Evangelical Alliance. An application with a reference form a Church which is not affiliated will score zero points.

Up to 5 points are awarded for attendance over at least the last 5 years (one point for each year). In addition up to 5 points are awarded on the frequency/regularity of attendance **over the last 5 years (Weekly 5 pts, 3 times a month 4 pts, Fortnightly 3 pts, Monthly 2 pts, and Occasional 1 pt). (5+5 points)**

Information relating to the family

- b) The **length** and **frequency** of voluntary attendance of the parent/carers at services of the Church of England (or Churches in communion therewith)...or, Christian Church affiliated to Churches Together in Britain and

Ireland or the Evangelical Alliance. Up to 5 points are awarded for attendance over at least the last 5 years (one point for each year). In addition up to 5 points are awarded on the frequency/regularity of **attendance over the last 5 years (Weekly 5 pts, 3 times a month 4 pts, Fortnightly 3 pts, Monthly 2 pts, and Occasional 1 pt). (5+5 points)**

- c) The family's main place of worship at a Church of England church **(1 point)**

The Background

- 32. The background is explained in the witness statement of Dame Alice Hudson, the director and chief executive officer of the Trust. The judge accepted Dame Alice's evidence. She explains that Twyford School is the only one of the four schools operated by the Trust which uses faith-based oversubscription criteria. That was a deliberate decision by the Trust. The admission arrangements give priority to practising Anglicans which reflected its original foundation. It was regarded as important to maintain "this very distinctive Anglican character with which the school was set up". She refers to the most recent statutory inspection of Anglican and Methodist Schools report (dated November 2024) which referred to Twyford School as a "model of Anglican practice". Dame Alice then explains at paragraphs 21 to 24 of her witness statement how the distinctive Anglican character of Twyford School manifests itself. At paragraph 24, for example, she explains that Twyford School "takes responsibility for modelling the Anglican practice which is then shared with the other three Trust schools" and ensures that students from local Anglican churches have continuity of support. She says that these are practices "which could not realistically be led from the other Trust schools because it is Twyford which has the distinctively Anglican practice" and "assumes an active involvement in faith practice with a formal denominational approach".
- 33. Dame Alice goes on to explain that the oversubscription criteria were reviewed in 2013 at a time when the Trust had only two schools (Twyford School and William Perkin) and planned to open two other schools. She refers to the LDBS guidance which strongly recommends that admission authorities should maintain a 50/50 split between foundation and open places to facilitate their inclusion and to serve the common good of the community. The Trust, however, decided that Twyford School would continue to use faith-based oversubscription criteria for all its foundation place. In relation to the other three schools, however, they would have 100% open, that is not faith-based, places (not 50% as recommended) and would draw their Christian values and their Christian identity from the values and worship practices at Twyford School. That would allow the other three schools to offer "an open admissions policy to serve their local communities whilst retaining the distinctive character modelled by Twyford" School. The Trust has consulted on the admission arrangements, including consulting the LDBS and the local authority, every year but has seen no reason to alter the admission arrangements.
- 34. Dame Alice also gave evidence that the number of applicants for places was so high in 2024-2025 that no children with 20 points were awarded a Foundation place (and there were 33 children with 21 points who were not awarded a place and were placed

on the waiting list). In 2022, 3 children with 20 points obtained a Foundation place. In 2021, no children with 20 points were admitted and 23 children with 21 points were not awarded a place and were put on the waiting list. It is clear, therefore, that in most years, the foundation places (after places are allocated to looked after children and those with an education health and care plan) are allocated to those whose family's main place of worship is an Anglican church.

The Appellants

35. CKT is originally from Eritrea and came to the United Kingdom in about 2010. She has three children. She and her children are Christians and regularly attend an Eritrean Orthodox Church in London. The services are held in the Tigrinya language and a related language, Ge'ez. They live close to Twyford School. CKT applied for a place for her son at Twyford School for the 2024 academic year. As Twyford School was oversubscribed, it applied the oversubscription criteria. CKT's son was eligible for 20 points as he and his mother were regular attenders at a Christian place of worship. He was not eligible for an additional point (as his main place of worship was not a church in communion with the Church of England). As he did not score 21 points, he was refused a place at Twyford School. An appeal against that refusal was dismissed.
36. CKT also made an objection to the arrangements for 2025-2026 to the OSA. CKT's principal argument was that the 2025-2026 arrangements gave rise to indirect race discrimination. The OSA dismissed that objection by a determination dated 18 November 2024. The OSA found that an Eritrean who attended the Eritrean Orthodox Church was less likely to meet the criteria for the award of the additional point than a white British Christian. The OSA accepted that the aim of the oversubscription criterion was "to ensure that the Anglican ethos and character of the school is preserved". That was a legitimate aim. The OSA considered that the award of a point to those whose family's main place of worship was an Anglican church was a proportionate means of achieving that aim. The aim was sufficiently important (as recognised by legislation), the criterion was rationally connected to the aim, there were no less intrusive means that could be adopted without unacceptably compromising the achievement of the aim, and the criterion struck a fair balance between the importance of the aim and the effect on individuals.
37. CKT and her son brought a claim for judicial review against the Trust and the admissions appeal panel. The claim was of indirect discrimination contrary to section 19 of the 2010 Act. It identified the PCP as the award of one point to those whose family's main place of worship was an Anglican church (referred to in the claim form as "the CofE Extra Point as applied to a high proportion (150 of 190) of available places"). It said that put persons who were not white or not of English ethnicity at a particular disadvantage and that the Trust had not shown that the PCP pursued a legitimate aim in a proportionate way. They also contended that the Trust had failed to comply with section 149 of the 2010 Act. CKT also sought judicial review of the determination of the OSA in relation to the admission arrangements for 2025-2026. The sole ground of challenge was that the OSA erred in law by concluding that the PCP was not unlawfully discriminatory. Both claims were heard together.
38. CKT's son was, initially, provided with a place at a school which was not one of the four schools operated by the Trust and was not designated as a faith school. He subsequently transferred to one of the four designated schools operated by the Trust.

We are told that he is happy at that school and does not wish to be offered a place at Twyford School. CKT and her son have, however continued with this appeal against both the Trust's refusal to provide a place in 2024 and the OSA determination of the objection to the admission arrangements for 2025-2026. The judge recorded at paragraph 30 of his judgment that CKT wishes her other children to attend Twyford School and would have to apply for a place for the middle child by 31 October 2025 for the 2026-2027 school year.

THE JUDGMENT OF THE JUDGE

39. This appeal concerns only some of the issues before the judge. The judge's rulings on the issues that are material to the present appeal can be summarised as follows. First, he rejected the submission of the Secretary of State that, on a proper interpretation of paragraph 5 of Schedule 11 to the 2010 Act, claims of indirect discrimination were excluded where the oversubscription criteria in issue were based on religion or belief even if they gave rise to a statistical disadvantage for groups identified by race. The judge held that:

“102. In my judgment, when paragraph 5 states that “Section 85(1) ... so far as relating to religion or belief, does not apply ...”, the words “so far as” can only mean that, when the exception applies, it is not unlawful to commit direct or indirect discrimination which is so defined by reference to the protected characteristic of religion or belief.

103. It follows that even where paragraph 5 applies, it remains unlawful to commit direct or indirect discrimination which is so defined by reference to any other protected characteristic. That is the plain ordinary meaning of the words used.”

40. The judge then considered the claim of indirect discrimination under section 19 of the 2010 Act. The judge noted that it was common ground that the PCP for the purposes of section 19(2)(a) of the 2010 Act was the criterion that “the CofE Extra Point is available to some applicants for Christian places at Twyford” (see paragraph 143). He considered that it was clear that those who could not earn the CofE Extra Point were put at a disadvantage. The issue for the purposes of section 19(2)(b) and (c) was whether that put non-white persons or persons of non-English origin at a disadvantage. The judge found that it did. The essential reasoning of the judge was that the racial profile of those whose main place of worship was a Church of England church was white and that the profile of attenders of other churches was not white. That entitled him to infer that awarding an extra point where the main place of worship was a Church of England church did put persons who were not white at a particular disadvantage. That inference was supported by the statistics that showed a significantly higher proportion of white children at Twyford School (where a point for worship at an Anglican church was awarded) than in any of the other schools in the area (including the other Trust schools.) The material parts of the judgment are in the following terms:

“201. The assumption which, on balance, I am persuaded to make is that there is a sufficient degree of correlation between the racial profiles of (1) those who earn the Extra Point and (2)

attenders of CofE churches in London, and between the racial profiles of (3) those who earn only 20 points and (4) attenders of non-CofE churches in London.

202. The relevant statistics are those referred to in Mr Rosenberg's first witness statement at paras 54–59 (regarding churchgoers) and 60–83 (regarding schoolchildren). They provide a basis for concluding that a large proportion of those in group (2) are white and that a majority of those in group (4) are not. It is logical to infer that the racial profile of group (2) will significantly influence the racial profile of group (1) in a way that makes it significantly different from the racial profile of group (3), and that inference is supported by statistics showing a significantly higher proportion of white children at Twyford than in any of the other schools in the area with which it has been compared, including the Trust's other schools which do not have faith-based admission criteria and other schools which do not have a faith designation.

203. Although the available statistics persuade me that the disparate impact is significant, I cannot be confident of its exact extent or size, bearing in mind also that the Extra Point can be earned by those who attend those worldwide churches which are "in communion with" the CofE, and that the racial profile of successful applicants is also liable to be affected by the availability of "world faith" places.

204. I nevertheless conclude, on the balance of probabilities, that the criterion is indirectly discriminatory in relation to the protected characteristic of race, unless it is a proportionate means of achieving a legitimate aim."

41. The judge then turned to proportionality. He treated the aim which the Trust was pursuing as being "to ensure that the Anglican ethos and character of the school is preserved" which the claimants accepted was, in principle a legitimate aim (see paragraphs 212 to 214). He noted that all parties considered that whether the PCP was a proportionate means of achieving a legitimate aim could be measured by applying the approach to proportionality in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700. He therefore adopted that approach (paragraph 210).
42. The judge made three preliminary observations at paragraphs 206 to 208 of his judgment where he said, so far as material, that:

"206. First, I accept ... that the court should afford considerable weight to the policy rationale underpinning paragraph 5 of Schedule 11. Faith-based admissions criteria by their nature are likely to have a disparate impact on different racial or ethnic groups but Parliament permitted them, no doubt in full knowledge of that fact.

207. Second, faith-based admissions criteria, by their nature, may leave all those who cannot comply with them with a sense of injustice. It is not hard to feel for the plight of [CKT's son], who could see from his bedroom window this excellent school where he would have felt very comfortable and to which I am sure he would have been a credit, but which he could not attend because his Christian church was not the right sort of Christian church. In other years, when some places did go to applicants with 20 points, he might have been luckier. But even that would not be the case for an equally deserving applicant who also lived within sight of the school but was not a practising member of any religion. The large proportion of the population in that category, it must be remembered, do not benefit from "foundation places" at any school. Their disadvantage has no connection with the protected characteristic of race.

208. Third, it is reasonable to assume that Parliament was aware of the general potential for unfairness, as well as for a disparate racial impact, when adopting the policy permitting the use of faith-based admissions criteria. It is clearly Parliament's view that there is a public interest in allowing some state-funded schools to be designated as having a religious character and in allowing those schools to make certain choices about their admission arrangements."

43. He then considered the four questions in *Bank Mellat*. He held that the legitimate aim of preserving the character and ethos of Twyford School was a sufficiently important aim and the award of a point where the family's main place of worship was an Anglican church was rationally connected to that aim. The judge considered that the real issue on the third question posed in *Bank Mellat* was whether the degree of intrusiveness was reasonable having regard to the degree of intrusiveness and the availability of any alternatives, not whether any less intrusive measure could be devised. He considered and agreed with the analysis adopted by the OSA. He considered the submissions and case law. He concluded that:

"234. Having considered all of these factors, I am not persuaded to reject the judgment of Dame Alice Hudson and her colleagues as to the reasonable need for the oversubscription criteria, not just at Twyford but at the Trust's four schools when viewed in combination. While not using faith-based oversubscription criteria at the other three schools, they wished Twyford to be a "model of Anglican practice", as it is described in the November 2024 SIAMS report. On the one hand, it is logical and reasonable for the school's aim to be pursued by admitting practising Anglicans. On the other, there is no evidential basis for me to decide that that aim could reasonably be achieved without awarding the CofE Extra Point.

235. In those circumstances I am also not persuaded that the importance of the objective is outweighed by the racial impact,

which is (as I have said) hard to quantify but is of an incidental and nuanced nature.

236. For those reasons I find the third and fourth of the *Bank Mellat* requirements to be satisfied.”

44. For those reasons, the judge concluded the Trust had not discriminated in the way described by section 19 of the 2010 Act.

45. The judge also considered whether the Trust had complied with its duty under section 149 of the 2010 Act. He concluded it had for the following reasons:

“254. The school’s equality policy, quoted above, shows that the Trust is and was aware of the statutory requirements for equal treatment of different groups in the admission process.

255. When the Trust decided to have faith-based oversubscription criteria at Twyford, it was obvious that these would have an impact on sections of the diverse community which the school serves. The use of any faith-based criteria would disadvantage those who could not satisfy them. And, the award of the Extra Point would be to the advantage of Anglicans and to the disadvantage of all other denominations. In recent years it will have been obvious to the Trust that few if any of those with only 20 points would be offered places.

256. Moreover, I am sure that the Trust at all times was aware of the LDBS guidance referring to the original purpose of Church schools having been “to serve the children of the parish” and, for that reason, recommending an equal distribution of foundation places and open places. I am sure that the Trust knew that it was departing from that guidance at Twyford and that this would have certain obvious effects on the community.

257. In light of the evidence of the Trust deciding to take that step at Twyford and not at its other schools, I am satisfied that it has had due regard to the objectives relating to equality of opportunity and good relations so far as religion and belief are concerned. Given that Parliament permits faith schools to have faith-based oversubscription criteria, so that (for example) a school of one Christian denomination can, in principle, favour the adherents of that denomination, I doubt that “due regard” requires much if anything beyond an awareness of the impact on those of a different, or no, religion or belief. The claimants have not identified any steps which, in my judgment, should have been taken and were not taken in these respects.

258. I bear in mind also that the same standard applies to the Trust as would apply to (by way of further example) Muslim,

Jewish or Hindu schools whose oversubscription criteria favoured Muslim, Jewish or Hindu applicants.

259. Although the question of whether there was a failure to have due regard to those objectives in relation to race is slightly less straightforward, parliamentary approval of faith schools and of faith-based oversubscription criteria may be a less decisive factor but it is still an important one. That is because, as I have said, such criteria in general are likely to have (and in the cases of some faiths will certainly or almost certainly have) a disparate racial impact.

260. Moreover, in a case such as the present one, that unsurprising racial impact will be only a small part of the wider effect on the community of applying faith-based oversubscription criteria. The much larger impact will be in relation to religion or belief. Given that such criteria cannot amount to unlawful discrimination in relation to religion or belief, and given my conclusion about the limited effect of section 149 regarding the need to advance equality of opportunity and the need to foster good relations in relation to religion or belief when adopting such criteria, it would be surprising if section 149 nevertheless necessitated a much more searching inquiry into the much smaller impact relating to race.

261. Meanwhile, section 149 does not set a test of granularity. Authorities must have the necessary due regard in the exercise of their functions, but that obviously does not mean that that “regard” must be made manifest in respect of every detail of every policy. It is also left to each authority to decide, in each case, how to exercise the duty.

262. That being so, I am not satisfied that a breach of section 149 must be found if, when the requirements for the CofE Extra Point were defined (and thereafter), the Trust did not ask itself what if any effect those specific requirements might have on the three section 149 objectives in relation to race.

263. Instead, the question is whether due regard was had to those objectives when the Trust exercised its functions in relation to the admission arrangements, considered as a whole.

264. The evidence shows that the Trust keeps itself aware of the make-up of the diverse community which it serves and of the racial or ethnic profile of its pupils. It also shows that the Trust maintains different oversubscription criteria at Twyford and at the other three schools, with the express aim of balancing the needs of different members of the community. And, the Trust’s Equality Policy reminds it of the need for equal treatment in its admission arrangements.

265. On the basis of that evidence, and bearing in mind the inherent likelihood that faith-based oversubscription criteria permitted by Parliament will have some disparate impact on different racial groups and the difficulty of measuring what may be a relatively limited impact in this case, I conclude that the Trust did not fail to comply with section 149 in respect of its admission arrangements.”

46. The judge expressed the view that, if he were wrong in his conclusion on section 149, he would have refused relief in accordance with section 31(2A) of the 1981 Act as it was highly likely that the outcome for the appellants would not have been substantially different if the Trust had complied with section 149 as the Trust would not, in any event, have altered its oversubscription criteria.
47. The judge did not consider the claim against the OSA separately. He concluded that, for the reasons he had given, none of the grounds of claim against either the Trust or the OSA succeeded. He therefore dismissed both claims.

THE ISSUES

48. Against that background, it is sensible to deal with the issues raised by the grounds of appeal and the respondent’s notices in the following order:
 - (1) does paragraph 5 of Schedule 11 to the 2010 Act exclude claims of indirect discrimination arising out of the application of faith-based oversubscription criteria? (the issue raised in the Secretary of State’s respondent’s notice);
 - (2) was the judge entitled to conclude on the evidence before him that the appellants had proved that the PCP had put the appellants, and those who shared their race or ethnicity, at a particular disadvantage within the meaning of section 19(2)(b) and (c) of the 2010 Act? (the issue raised in the Trust’s respondent’s notice);
 - (3) is the appropriate approach to the question of proportionality for this Court to review the judge’s conclusion or does this Court have to carry out its own assessment of proportionality?
 - (4) in the light of the answer to the third issue, is the PCP a proportionate means of achieving a legitimate aim for the purposes of section 19(2)(d) of the 2010 Act? (grounds 1 and 4 of the grounds of appeal);
 - (5) was the judge entitled to find that the Trust had complied with its duty under section 149 of the 2010 Act? (ground 2 of the grounds of appeal);
 - (6) if it arises, was the judge correct to conclude that he ought not to grant a remedy by reason of section 31(2A) of the 1981 Act? (ground 3 of the grounds of appeal); and
 - (7) is the determination of the OSA unlawful? (the issue raised in the OSA’s respondent’s notice).

THE FIRST ISSUE – THE SCOPE OF PARAGRAPH 5 OF SCHEDULE 11 TO

THE 2010 ACT

Submissions

49. Ms Clement KC, with Ms Gannon, submitted that, properly interpreted, paragraph 5 of Schedule 11 to the 2010 Act precludes a claim for indirect discrimination when that claim arises out of the application of faith-based oversubscription criteria. Her principal submission was that paragraph 5 is not limited to granting an exception for religious or belief-related discrimination. Rather it relates to any form of indirect discrimination, including indirect race discrimination, arising out of the application of faith-based oversubscription criteria. That, she submitted, followed from the absence of the word “discrimination” in paragraph 5. That paragraph simply provides that the prohibition in section 85 of the 2010 Act does not apply “so far as relating to religion or belief” not “so far as relating to religious or belief-related discrimination”, the strand of discrimination defined in section 25 of the 2010 Act.
50. Ms Clement submitted that, when Parliament intended the exception to be limited to discrimination relating to a particular protected characteristic, Parliament said so expressly, as appeared, for example, from paragraph 26 of Schedule 3 (which deals with services and public functions). That paragraph provides that a person does not contravene section 29 of the 2010 Act “so far as relating to sex discrimination” by providing separate services for persons of each sex if certain conditions are met. Ms Clement submitted that Parliament must have intended to permit the use of faith-based oversubscription criteria even if they put persons of different race at a disadvantage. Admissions authorities did not have to demonstrate that the oversubscription criteria were a proportionate means of achieving a legitimate aim irrespective of the basis on which it was said that those criteria gave rise to indirect discrimination.
51. Further, Ms Clement submitted that the heading to paragraph 5, which referred to “religious and faith-related discrimination” could not be relied upon as a reason to depart from the clear wording of the paragraph. Ms Clement also relied on the decision of the Employment Appeal Tribunal in *Bakkali v Greater Manchester Buses (South) Ltd (trading as Stagecoach Manchester)* [2018] ICR 1481 as authority for the proposition that “so far as relating to” in paragraph 5 should be read as meaning “associated with” religion or belief.
52. Alternatively, Ms Clement submitted that a court should attach considerable weight to the policy rationale underlying the exception. Parliament had permitted faith-based oversubscription criteria and that was relevant to what constituted a legitimate aim, and whether the use of oversubscription criteria was a proportionate means of achieving that aim.
53. Mr Desai, with Mr Wills, for the appellants submitted that section 85 of the 2010 Act itself provides for the prohibition of discrimination. Paragraph 5 of Schedule 11 carves out an exception to that. The exception is in relation to religion or belief, i.e. direct or indirect discrimination relating to religion or belief not other forms of discrimination. In almost all of the examples cited by Ms Clement, where provisions included the word “discrimination” when providing for an exception, the wording was different and it was necessary to add the word “discrimination” after the reference to the relevant protected characteristic. Further, the predecessor legislation only

exempted discrimination relating to religion and belief not race. There was no indication that Parliament intended radically to extend the scope of the exception to preclude a claim for any form of indirect discrimination arising out of religion or belief. On the alternative submission, Mr Desai submitted that the fact that Parliament permitted the use of faith-based oversubscription criteria may be relevant to determining what amounted to a legitimate aim but it was not relevant to whether the criteria used were a proportionate means of achieving that aim. The other parties did not make submissions on the proper interpretation of paragraph 5 of Schedule 11 to the 2010 Act.

Discussion and conclusion

The proper approach to statutory interpretation

54. This issue turns on the proper interpretation of paragraph 5 of Schedule 11 to the 2010 Act. That involves considering the words of the statutory provision, read in its statutory context and having regard to the purpose underlying the statute, and bearing in mind any legitimate aids to statutory interpretation. As Lord Hodge observed in *R (O) (A child) v Secretary of State for the Home Department* [2002] UKSC 3; [2023] AC 255:

29. The courts in conducting statutory interpretation are “seeking the meaning of the words which Parliament used”: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: “Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.” (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: “Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”

30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and

advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity....”

The proper interpretation of paragraph 5 of Schedule 11 to the 2010 Act.

55. These appeals concern the proper interpretation of Paragraph 5 of Schedule 11. As that paragraph provides an exception to section 85 of the 2010 Act, it is relevant first to consider the words of section 85. That section provides that the responsible body of a school “must not discriminate against a person” in relation to admission arrangements. The section does not itself indicate in what circumstances a person will be found to have discriminated. That is defined, for present purposes, by section 13 in relation to direct discrimination (where a person treats a person less favourably because of a protected characteristic) and section 19 in relation to indirect discrimination (where a person applies a PCP which “is discriminatory in relation to a relevant protected characteristic”). Section 13 does not identify what is a protected characteristic but section 4 does list the protected characteristics. They include “race” and “religion or belief”. Section 19(3) itself identifies “the relevant protected characteristics” for the purposes of that section and they include “race” and “religion and belief”.
56. Section 85, therefore, is the provision that provides that a person must not discriminate in relation to matters concerning schools admission. Paragraph 5 provides an exception to that prohibition on discrimination. But the exception to the prohibition on discrimination only applies “so far as relating to religion or belief”. The natural interpretation of those words, read in the context of sections 4, 13 and 19, is that the reference to “religion or belief” is a reference to the protected characteristic identified in sections 4 and 19(3) as “religion or belief”. The exception excludes claims of direct discrimination - less favourable treatment - because of religion or belief and of indirect discrimination – the application of a PCP which is discriminatory in relation to a relevant protected characteristic, i.e. religion or belief.
57. I agree, therefore, with the reasoning of the judge, and his conclusion at paragraph 102 of his judgment that the words in paragraph 5 mean that, when the exception applies, “it is not unlawful to commit direct or indirect discrimination which is so defined by reference to the protected characteristic of religion and belief”.
58. That conclusion follows from an analysis of the words used in paragraph 5, read in the context of sections 4, 13, 19 and 85 of the 2010 Act. If I had any doubt about that interpretation (which I do not) it would be legitimate to have regard to the heading in Part 2 of Schedule 11. The purpose and extent to which it is appropriate to use

headings as an aid to interpretation was considered by the House of Lords in *R v Montila* [2024] UKHL 50;[2004] 1 WLR 3141. There, the House of Lords was concerned with the interpretation of words in section 93C of the Criminal Justice Act 1998 and section 49(2) of the Drug Trafficking Act 1994. They created criminal offences “if a person knowing or having reasonable grounds to suspect that any property ... is another person’s proceeds of criminal conduct” (in the case of the 1988 Act) or “drug trafficking” (in the case of the 1994 Act) and the person did one or more things in relation to that property (commonly referred to as money laundering). The issue was whether the relevant statutory provisions only created offences if it was proved that the property was in fact the proceeds of criminal conduct or drug trafficking or whether it was sufficient if the person had reasonable grounds to suspect that. The single opinion of the House, given by Lord Hope, stated that their Lordships “prefer to start by examining the words of the subsection, and they propose to do so in the context of the legislation” (see paragraph 26). Having done so, they concluded that the words, properly interpreted, mean that it had to be proved that the property was the result of criminal conduct or drug trafficking. The House of Lords then considered whether it could consider the headings to the relevant section or groups of sections. The House noted that the headings were inserted by parliamentary counsel answerable to the Cabinet Office. They were contained in the Bill presented to Parliament (and might be changed by parliamentary counsel to reflect amendments made to the Bill but the headings themselves could not be amended by Parliament). At paragraph 34, the House said this:

“34. The question then is whether headings and sidenotes, although unamendable, can be considered in construing a provision in an Act of Parliament. Account must, of course, be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in Parliament. But it is another matter to be required by a rule of law to disregard them altogether. One cannot ignore the fact that the headings and sidenotes are included on the face of the Bill throughout its passage through the legislature. They are there for guidance. They provide the context for an examination of those parts of the Bill that are open for debate. Subject, of course, to the fact that they are unamendable, they ought to be open to consideration as part of the enactment when it reaches the statute book.”

59. The House also indicated that headings were also as much part of the contextual scene as the explanatory notes to a statute which could be used to identify the mischief, or the problem, that the statute was intended to address: see paragraphs 35 to 36. The House then indicated how the headings to the relevant sections assisted in the interpretation of the two statutes in issue in that case: see paragraph 37.
60. Chapter 1 of Part 6 to the 2010 Act deals with the circumstances in which certain conduct in relation to schools will amount to prohibited discrimination. Section 89(12) provides that “Schedule 11 (exceptions) has effect”. Schedule 11 is headed “School Exceptions”. Part 2 of Schedule 11, which includes paragraph 5, is headed

“Religious or Belief-Related Discrimination”. That indicates that paragraph 5 conferred an exception so far as that related to religious and belief-related discrimination. It was not concerned with other forms of discrimination such as race discrimination arising out of, or associated or connected in some way with, religion and belief.

61. If I had had any doubt as to the proper interpretation of paragraph 5 of schedule 11 to the 2010 Act, I would also have had regard to the legislative history. The prohibition on indirect race discrimination was initially contained in section 1 of the Race Relations Act 1976 (“the 1976 Act”). Section 49 of the Equality Act 2006 (“the 2006 Act”) introduced a prohibition on discrimination in the allocation of school places. Discrimination was defined (in section 45) as direct discrimination (i.e. less favourable treatment on the grounds of religion or belief) or indirect discrimination (i.e. by applying a PCP which put persons of the same religion as the putative victim at a particular disadvantage). Section 50 of the 2006 Act provided that the relevant parts of section 49 did not apply in relation to schools designated under section 69(3) of the 1998 Act as having a religious character. It is clear that section 50 of the 2006 Act only exempted religion or belief-related discrimination. That was all that sections 49 and 50 of the 2006 Act were concerned with. Section 50 did not affect the position in relation to race discrimination (even if arising out of faith-based discrimination) as race discrimination was dealt with in the 1976 Act and there was no corresponding exception in the 1976 Act in relation to schools admission.
62. The 2010 Act was, as the preamble indicates, an act which, as one of its objectives, intended “to reform and harmonise equality law, and restate the greater part of the enactments relating to discrimination and harassment”. If the Secretary of State were correct in her interpretation of paragraph 5 of Schedule 11 to the 2010 Act, that paragraph would have effected what might well be described as a significant, perhaps radical, change from the previous legislation in that race discrimination arising out of the application of faith-based oversubscription criteria for schools designated as having a religious character would be exempt from the scope of the 2010 Act. Admissions authorities would no longer have to demonstrate that an indirect racial impact pursued a legitimate aim and was a proportionate means of achieving such an aim. There is nothing in the words used, or the structure of the 2010 Act, to suggest that that was the intention of Parliament. We have not been shown any material to suggest that that was the mischief or the problem that the relevant provisions of the 2010 Act were intended to address. I do not accept that the explanatory notes, read fairly and as a whole, suggests that. The legislative history reinforces me in the conclusion that I have reached on the analysis of the wording of the relevant statutory provisions alone, namely that the 2010 Act continues to exempt admissions arrangements from religious or belief-related discrimination but does not exempt them from claims of race discrimination.
63. I do, however, accept Ms Clement’s alternative submission. The fact that Parliament has enacted provisions enabling schools to be designated as having a religious character, and exempting admission arrangements from the prohibition on religious or belief-related discrimination, is relevant to section 19(2)(d) of the 2010 Act. The provisions indicate that Parliament has recognised that there is a public interest in permitting faith-based schools to exist and to operate as such. That is relevant to whether faith-based oversubscription criteria pursue an aim which is legitimate. The

importance attached to maintaining-faith based schools may also be a factor relevant to the assessment of proportionality and the issues identified in *Bank Mellat*. It may, for example, be relevant when considering whether any adverse effects of the faith-based oversubscription criteria are such as to outweigh what Parliament has recognised to be an important public interest.

THE SECOND ISSUE – DID THE PCP PUT THE APPELLANTS AND PERSONS OF THEIR RACE AT A PARTICULAR DISADVANTAGE?

Submissions

64. Mr Oldham KC, for the Trust, submitted that the burden was on the appellants to prove facts from which the court could infer that the PCP put them, and persons who shared the same protected characteristic, at a particular disadvantage, relying on *Efob v Royal Mail Group Ltd* [2021] UKSC 33; [2021] 1 WLR 3863. The PCP in the present case was the award of a point where a family's main place of worship was a Church of England church. There was no statistical evidence as to the proportion of persons of a particular racial or ethnic origin who gained 20 points on the basis of their attendance at a Christian place of worship as compared with those who gained the additional point where the family's main place of worship was an Anglican church. There was no proper basis on which the judge could have drawn an inference by comparison of the ethnic composition of Twyford School as compared with the ethnic composition of other Trust schools, or schools generally. The oversubscription criteria for those other schools were different from that used at Twyford School and no legitimate inference could be drawn as to the effect of the Anglican point.
65. Mr Desai submitted that the judge was entitled to reach the conclusions he reached on the material before him. In particular, he submitted that the judge was entitled to draw the inferences that he did, in the absence of statistical evidence, as the Trust considered that it was prevented from seeking information from applicants about ethnicity. Mr Desai relied in particular on observations of Baroness Hale in *Chief Constable of West Yorkshire v Homer* [2012] UKSC 15; [2012] 3 All E.R. 1287 at paragraph 14. The other parties did not make submissions on this issue.

Discussion and Conclusion

66. I can deal with this issue relatively briefly. It is correct that a claimant has to establish facts from which it can be inferred that a particular PCP puts the claimant and others at a particular disadvantage. Statistical evidence may well be a very useful method of doing so. There will be times, however, when, as here, there may be limited relevant statistical data available. In particular, the Trust does not, for understandable reasons, consider that it can collect information about ethnicity from applicants for places because it considers that paragraph 2.4 of the Code restricts the ability of admissions authorities to obtain such information.
67. In the particular circumstances of this case, however, the PCP in issue was one which conferred an additional point where the family's main place of worship was a Church of England church. The judge did have evidence showing that non-Church of England churches had a greater proportion of members who were not white or not English than the proportion of persons attending Anglican churches. In those particular circumstances, the judge was entitled to conclude that a PCP which provided an

advantage to those whose main place of worship was an Anglican church when allocating school places did put persons who were not white or were not English at a disadvantage. That was a conclusion he could reach on the material before him, given the nature of the PCP and the evidence as to the composition of the groups attending Anglican as compared with non-Anglican churches. The judge was entitled to infer that the difference was significant although, as he accepted he could not be confident of its exact significance. For those reasons, I do not accept that the appeal should be dismissed for the additional reasons given in the Trust's respondent's notice.

THE THIRD ISSUE – THE PROPER APPROACH OF THIS COURT TO THE ISSUE OF PROPORTIONALITY.

Submissions

68. Mr Desai submitted that this was one of the cases where this Court should determine afresh whether the oversubscription criteria amounted to a proportionate means of achieving a legitimate aim. This Court was not limited to reviewing the judge's approach to determine whether he had erred. Mr Desai relied on the decision of the Supreme Court in *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] UKSC 30; [2026] AC 607.

Discussion and conclusion

69. The proper approach of an appellate court to an assessment of proportionality was considered in *Shvidler*. At paragraph 142, the Supreme Court identified two approaches:

“142...Two different approaches are identifiable in the authorities. In some cases the appellate court treats 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; if it is satisfied on these points, the appellate court will not intervene, even though it thinks that it might have reached a different view if it had been deciding the issue for itself. This approach gives particular weight to the assessment made by the judge. As explained in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079, para 64, where this approach is followed an appellate court will only intervene if the lower court has made a significant error of principle or there is “an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of [their] conclusion”. In other cases, the appellate court does not treat its role as so limited, but instead, in order to decide whether the appeal should be allowed, it makes its own fresh assessment of the proportionality of the measure in question. This approach gives

priority to the authority vested in the appellate court to decide and give guidance on legal questions.”

70. The Supreme Court noted that each approach was justified in the proper context and gave detailed guidance on which of the two approaches it was appropriate for an appellate court to adopt. It noted that the review approach "puts emphasis on the dispute-resolution effect of the first instance judgment on a determination of the facts" (see paragraph 143). The fresh determination approach was appropriate where it was important for the appellate court to give its own opinion about the proportionality of a measure and its compatibility with Convention rights. That was likely to be an important consideration where the decision would provide guidance for other cases or where the subject matter "has major social or political significance so that the public will rightly expect the senior judges in the appellate court to exercise their own judgment as to whether the measure in question is proportionate and lawful or not" (paragraph 144). At paragraph 147, the Supreme Court contrasted:

"a one-off decision which only affects persons involved in the proceedings, there is no controversy about the content and Convention compatibility of the general law which is applicable and the case turns essentially on a factual assessment of the circumstances which the lower court was particularly well placed to make. In such a case it will be appropriate for the appellate court to adopt an approach according to which it asks whether the lower court directed itself correctly, has had due regard to relevant matters and has reached a conclusion reasonably open to it, without any need to second-guess that court's proportionality assessment"

with situations where

"matters of general principle are in issue or the question concerns the Convention compatibility and proportionality of general rules set out in legislation—it is the proper function of the appellate court to determine the question of proportionality for itself without deferring to the assessment made by the lower court,"

71. At paragraph 162, the Supreme Court noted that the adoption of the more intensive role by the appellate courts in terms of making its own assessment of proportionality “requires to be justified by special factors as being constitutionally appropriate in the public interest and to uphold the rule of law”. It identified six factors likely to be relevant to justifying an appellate court making a fresh assessment of proportionality.
72. The correct approach in this appeal is the review approach. It is not a case where it is necessary or appropriate for this Court to carry out a fresh assessment of proportionality. The issue involves the question of whether the oversubscription criteria included as part of the admission arrangements of one particular school are a proportionate means of achieving a legitimate aim. The issue in relation to proportionality does not, in truth, involve establishing a point of general principle or approach. It does not involve challenges to primary or secondary legislation or issues of the sort referred to in points (ii) to (iv) of paragraph 162 of *Shvidler*. It is not a case

where there are divergent strands of authority in the lower court. The issue is important to the appellants, and at least initially, CKT wanted her son to attend Twyford School (and wants her other two children to have that opportunity in future). It is not, however an issue of “high importance for society” which requires to be “directly determined by a senior court” (paragraph 162(vi) of *Shvidler*). The list of factors referred to in *Shvidler* is not exhaustive but there are no other factors present in this case sufficient to justify a departure from the usual approach of an appellate court which is to review the decision of the court below to determine in particular whether it erred in law or reached a conclusion not open to it on the evidence before it.

73. For completeness, I note that in paragraph 163 of their judgment in *Shvidler*, Lord Sales and Lady Rose observed that there may be circumstances where it is unclear as to what the correct approach is – to conduct a review or to carry out a fresh proportionality assessment. They observed that in such circumstances it may be prudent to make an assessment of proportionality on both grounds. I have not found it necessary to do so in this case. It is clear that the correct approach is that of reviewing the decision of the judge which essentially concerns her assessment of an individual decision on the particular facts of the case. It is neither necessary, nor would it be appropriate or helpful, to carry out a fresh proportionality assessment in this case.

THE FOURTH ISSUE – DID THE JUDGE ERR IN CONCLUDING THAT THE PCP WAS A PROPORTIONATE MEANS OF ACHIEVING A LEGITIMATE AIM?

74. It is convenient to consider grounds 1 and 4 of the grounds of appeal together as both concern the question of whether the judge erred in concluding that the Trust had shown that the PCP, namely the awarding of a point where the family’s main place of worship was a Church of England church when allocating the 150 foundation places was a proportionate means of achieving a legitimate aim for the purposes of section 19(2)(d) of the 2010 Act.

Submissions

75. Mr Desai accepted that the fact that the statutory framework permitted the use of faith-based oversubscription when allocating places was relevant to what constituted a legitimate aim. He submitted that the judge was wrong to regard the statutory provisions as evidencing a Parliamentary intention that faith-based matters played a part, indeed a significant part, in the exercise of balancing or weighing the interests of the Trust against those of the appellants as part of the assessment of proportionality. In relation to ground 4, Mr Desai made twelve criticisms in his written submissions. In his oral submissions, he focussed on two matters. He submitted that the Trust had not considered alternatives to allocating all places to those whose main place of worship was an Anglican church. He submitted that they had not considered whether the legitimate aim of maintaining an Anglican ethos could be achieved with a lesser proportion of places – say 75% - allocated to those whose main place of worship was an Anglican church. Secondly, he submitted that the Trust had not complied with its duty under section 149 to have regard to equality matters (which is the subject of ground 3) and, in those circumstances, that made it difficult for the Trust to demonstrate that its actions were proportionate. Mr Desai relied in particular on observations made in *R (E) (v Governing Body of JFS and another (United Synagogue and others intervening))* [2009] UKSC 15; [2010] 2 AC 728, *R (Ward) v*

Hillingdon London Borough Council (Equality and Human Rights Commission intervening) [2019] EWCA Civ 457; [2019] PTSR 1738, and *R (Coll) v Secretary of State for Justice (Howard League for Penal Reform intervening)* [2017] UKSC 40; [2017] 1 WLR 2093.

76. Mr Oldham submitted that the judge did not misdirect himself, reached a conclusion on the material that he was entitled to reach and addressed the criticisms made by Mr Desai.

Discussion and conclusion

Preliminary Observation

77. A PCP will not give rise to indirect discrimination if the person who applies that PCP can show that the PCP is “a proportionate means” of “achieving a legitimate aim”: see section 19(2)(d) of the 2010 Act. The courts have adopted different approaches, or used different language, at different times to test whether a PCP is a proportionate means of achieving a legitimate aim. Recently the courts have used the language, and the approach, identified in *Bank Mellat*. There, the challenge was to a direction imposing restrictions on dealings with a particular bank. The bank challenged the restriction contending, amongst other things, that it was irrational, disproportionate and discriminatory. Lord Sumption (with whom Baroness Hale, Lord Kerr and Lord Clarke agreed) expressed the appropriate approach in paragraph 20 of his judgment in the following terms:

“...the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord Reed JSC, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68–76) which I would disagree with.”

78. Lord Reed, who dissented in the result, expressed the approach as follows at the material parts of paragraphs 75 to 76 of his judgment:

“74. The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (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. The first three of these are the criteria listed by Lord Clyde in *De Freitas*, and the fourth reflects the additional observation made in *Huang*. I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

75. In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781–782 that the limitation of the protected right must be one that “it was reasonable for the legislature to impose”, and that the courts were “not called on to substitute judicial opinions for legislative ones as to the place at which to draw a precise line”. This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois State Board of Elections v Socialist Workers Party* (1979) 440 US 173, 188–189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a “least restrictive means” test would allow only one legislative response to an objective that involved limiting a protected right.

76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four)."

79. Using the approach set out in *Bank Mellat* will generally be an appropriate way of assessing proportionality for the purposes of section 19(2)(d) of the 2010 Act. In doing so, a court or tribunal should bear in mind the observations of Lord Sumption, and Lord Reed when considering the third question, namely whether less intrusive measures would unacceptably compromise the legitimate aim. Consideration of the availability of less intrusive measures does not mean that the court is looking for the one means of achieving the aim which has the least effect on others. The question is whether the measure adopted was a reasonable one for achieving the legitimate aim (and bearing in mind the balance between the importance of the aim and the effect on others). That approach reflects the wording of section 19(2)(d) of the 2010 Act which requires the person applying the PCP to demonstrate that the PCP is "a proportionate means" (not the, or the only, such means).
80. In any event, in the present case, all parties before the judge, and this Court, accepted that the judge was entitled to assess proportionality by using the approach in *Bank Mellat*. Providing the judge did so correctly, and reached conclusions he was entitled to reach on the evidence before him, he would not have erred.

The assessment of proportionality by the judge

81. Parliament has provided for a system of designation of schools as schools having a religious character: see section 69(3) of the 1998 Act. Further, Parliament permits admissions authorities to use oversubscription criteria which allocate places on the basis of religion or belief. That is why paragraph 5 of Schedule 11 to the 2010 Act provides that the prohibition on discrimination in admission arrangements does not apply to religion or belief. That reflects an acceptance by Parliament that there is a public interest in having religious, or faith-based, schools. That is relevant in assessing whether oversubscription criteria seek to achieve a legitimate aim. It is also relevant to the overall balancing exercise inherent in the assessment of proportionality. Parliament has recognised that there is an important public interest in providing for religious schools. The importance attached to maintaining faith-based schools may be a factor which is relevant to the question of proportionality and the issues identified in *Bank Mellat*.
82. Against that background, the judge was correct, therefore, in concluding that "the aim of preserving a particular Anglican ethos is legitimate" (see paragraph 219 of the judge's judgment). The appellants, I understand, accept that that is the case.
83. The judge was entitled to regard that aim as being sufficiently important to justify taking measures which might restrict the rights or freedoms of others. He was entitled

to accept the evidence of Dame Alice Hudson about the role of Twyford School in relation to the Trust's schools as a whole as a school which provided a model for Anglican worship practice which was then shared with other schools (see paragraph 218 of his judgment). The evidence of Dame Alice explained in detail how Twyford School performed that role. The judge was entitled to find that there was a rational connection between the PCP, the awarding of a point where the family's main place of worship was at a Church of England church, and the aim. As the judge noted, it is logical to promote the aim of preserving the Anglican ethos of a school "by admitting what, in all likelihood, will be a larger proportion of pupils who are better placed to form a distinctively Anglican community because they belong to Anglican congregations" (see paragraph 219 of his judgment).

84. There was no error in the way that the judge approached the third and fourth elements of the *Bank Mellat* approach in the context of judgments on how to preserve a particular religious ethos of a school (see paragraphs 222 to 223). Courts are not well placed to decide what measures are needed to ensure that the legitimate aim – preserving a particular religious ethos – is achieved. Those sorts of judgments are likely to be better carried out by those familiar with, and responsible for, the life of the religious school or community in question. But the judge recognised that he had to scrutinise the assertions that particular oversubscription criteria were needed. He accepted that the real issue on this part of the *Bank Mellat* approach was whether the limitation arising out of the application of the PCP was a reasonable one (and in so doing, he was quite properly reflecting the language of Lord Reed in *Bank Mellat* and he was not substituting a test of irrationality or unreasonable in the public law sense for the test required by section 19(2)(d) of the 2010 Act).
85. The judge did, then, apply a correct approach. He reached conclusions that he was entitled to reach on the evidence before him. He was entitled to give significant weight to the fact that Parliament had decided to permit faith-based oversubscription criteria even though in general such criteria might have a differential impact on people of different races (paragraph 228). That follows, as I have said, from the fact that Parliament has recognised that the existence, and maintenance, of religious schools is in the public interest.
86. It was in those circumstances that the judge accepted Dame Alice Hudson's judgment about the need to adopt the oversubscription criteria for Twyford School. I have summarised that evidence above. In essence the judgment was made, that, in order to preserve the strong Anglican ethos that had been established at Twyford School, giving a point for those attending Anglican churches when allocating all 150 foundation places (and not simply 50% of places as recommended by the LDBS) was, as the judge described it, a "logical and reasonable" means of preserving its Anglican ethos and character. That would mean fewer places for non-Anglicans. But the Trust considered that other children would have the opportunity of applying for places at the two (now three) schools operated by the Trust with a religious designation – and where places would not be limited to those from an Anglican or a Christian faith. The judge was entitled to find that that met the third and fourth elements of the *Bank Mellat* approach and that the objective was not outweighed by the racial impact of the oversubscription criteria (see paragraphs 234 to 236 of his judgment). In other words, using the language of section 19(2)(d), the Trust, through its evidence, had shown that the PCP (allocating a point where the family's main place of worship was a Church of

England church to all 150 foundation places) was a proportionate means of achieving a legitimate aim, namely preserving the Anglican ethos of Twyford School.

The Principal Criticisms

87. I turn then to the specific criticisms made by the appellants of the judgment to see if they are made out and if they demonstrate that, contrary to what appears from a fair reading of the judgment as a whole, there was some error on the part of the judge. I deal first with the criticisms that were the focus of oral submissions.
88. I do not consider that the judge erred because the issue of whether the Anglican ethos of Twyford School could be maintained by applying the Anglican point to fewer than 100% of the foundation (Christian) places, for example, to 75% or 80% or some other percentage, had not been addressed. The element of the *Bank Mellat* approach requiring consideration of less intrusive measures does not, in this context, call for specific assessments of whether the Anglican ethos, or particular parts of it, could be made to work, or Twyford School would be (sufficiently) Anglican, if fewer Anglicans were admitted (i.e. if the PCP was applied to less than 100% of the foundation (Christian) places). It was open to the judge to assess proportionality in a different way. The judge was entitled to consider the evidence on the very distinctive ethos of Twyford School, and the school's very strong Anglican practice. He was entitled to scrutinise the view of the Trust that allocating places to Anglicans would be more likely to assist in the aim of preserving that distinctive Anglican ethos, and its worship practices. Further, in assessing whether there were less intrusive measures available and whether the measure struck a fair balance, it was permissible to consider that places at the other Trust religious schools would not be allocated on a religious basis and non-Anglicans could seek places at those schools. That was an acceptable approach to assessing whether the PCP was a proportionate means of achieving a legitimate aim. That approach was not undermined by the fact there may be situations where some children are not able to secure a place at a Trust school (if, for example, the other Trust schools are oversubscribed and criteria, such as distance from the school, are used to allocate places meaning some children living in part of the borough may not be allocated places at a Trust school). It does not alter the fact that the judge was entitled to conclude that the PCP, i.e. the oversubscription criterion in use at Twyford School, was a proportionate means of achieving the legitimate aim of preserving the Anglican ethos of Twyford School.
89. Secondly, I do not accept the frequently repeated submission that there was no evidence the Trust had ever considered whether the distinctive ethos and character at Twyford School could be maintained with different measures. The court had evidence before it, in the form of the evidence of Dame Alice Hudson, the chief executive and director of the Trust, as to why the oversubscription criteria had been adopted and maintained. I deal below with the ground of appeal alleging that the Trust failed to comply with its section 149 duty. I note the argument that, if that were the case, it may be difficult, or more difficult, to prove to a court that the measure was proportionate. In the present case, however, the court did have evidence before it. That evidence sought to explain how the oversubscription criteria had been arrived at and why they had been maintained. The judge was entitled to have regard to, and accept, that evidence in deciding whether the Trust had satisfied the requirements of section 19(2)(d) of the 2010 Act.

90. For completeness, I note the judgments in the *JFS* case. As always, it is important to consider the particular facts of a case. Identifying the facts assists in establishing what the Supreme Court decided and, importantly, provides the context in which other observations were made. The oversubscription criteria in that case awarded places to children who were Jewish according to the test applicable in Orthodox Jewish law, namely descent from a mother who was an Orthodox Jew. The majority of the Supreme Court found that that amounted to direct discrimination on grounds of ethnic origins, not indirect discrimination. The observations of the majority in relation to indirect discrimination are, therefore, at most, obiter dicta, and were not binding on the judge or this Court. Perhaps more significantly, the oversubscription criteria resulted in persons who were classed as Orthodox Jews being allocated places even though they did not follow Jewish religious practices. Other children who were not classed as Orthodox Jews (but had a Jewish father or grandfather who was an Orthodox Jew) but who did follow either Orthodox or other forms of Jewish religious practice were not allocated places. The significance of that fact was dealt with by Lord Mance who considered the question of indirect discrimination, and with whose judgment Lord Kerr, Lord Clarke, and probably Baroness Hale, agreed.
91. Lord Mance considered, obiter, that, if it had been an indirect discrimination case, the description of the legitimate aim would have to be informed by the fact that those who were classed as Orthodox Jews but were not practising Jews, would be under a duty to educate themselves and observe the tenets of Orthodox Judaism (see paragraph 95 of Lord Mance's judgment). However, there had been no attempt prior to the decision of the Court of Appeal to consider or weigh the implications or effect of its policy and no attempt to assess the extent to which children admitted to the school were or became interested in learning to observe Orthodox Judaism (see paragraph 96). It was in that context that Lord Mance considered that the school could not show that the means adopted corresponded to a real need and were appropriate and necessary to achieve that aim and struck a fair balance (paragraph 97 to 101). He did also express doubts as to whether the school had complied with its obligation under section 71 of the 1996 Act (the predecessor to section 149 of the 2010 Act). The issue was, however, whether the school could show that its policy was objectively justified. On the evidence before the courts, it had not done so. Lord Hope, with whom Lord Walker agreed, considered that the school had not shown whether putting children such as the claimant, M, who were non-Orthodox but practising Jews, at a disadvantage was objectively justifiable. Lord Hope noted the difficulty for the school in seeking to justify a policy that it had never considered (see paragraph 214). Lord Brown, with whom Lord Rodger agreed, considered that the case did not involve direct or indirect discrimination.
92. The present case is very different from the *JFS* case. The oversubscription criterion and the facts are different. Here Twyford School is one which has a distinct Anglican character and ethos, reflected in its practice of Anglican worship. The oversubscription criterion in issue is intended to preserve that ethos by giving a point to those whose family main place of worship is an Anglican Church. Put simply, it seeks to ensure that if Twyford School is oversubscribed, foundation places at this Anglican school will be given to practising Anglicans. Furthermore, there was evidence before the judge – the evidence of Dame Alice Hudson – which expressly addressed the issue. The judge was correct, therefore, to consider that the decision in *JFS* did not assist (and certainly did not bind him) to reach a different conclusion.

93. Similarly, in relation to *Coll* and *Ward*, those were cases where, on the facts, there had been a failure to comply with the duty under section 149 at the time that the relevant measure was adopted *and* the relevant decision-maker had not considered, and not put forward evidence to the first instance court to justify the measure that had been adopted (see paragraph 42 of *Coll* and paragraphs 95 to 96 of *Ward*). The present case is different. The Trust did adduce evidence before the judge. The question for the judge was whether the Trust had discharged the burden of showing that the PCP was a proportionate means of achieving a legitimate aim on the evidence before the court. He considered that. This deals with the first point of criticism in Mr Desai's written submissions (which he also made orally).

The further criticisms

94. I can deal with the remainder of Mr Desai's written criticisms relatively briefly. The second criticism is that the judge did not analyse the data available on the scale of the disparate effect and erred in referring to it as being "nuanced" and "may be relatively incidental". It is clear on any fair reading of the judgment as a whole, that the judge did analyse such data as was available (see for example, paragraphs 149 and 203) along with all the other evidence in the case. The words he used to describe the effect do not display any legal error. The third criticism is that the Trust had not placed any evidence before the court of a distinctive Anglican character at Twyford School. That submission is unsustainable given that the Trust did adduce evidence from Dame Alice Hudson addressing specially and in detail the Anglican ethos and worship practices at Twyford School.
95. The fourth criticism is that the judge did not identify or grapple with the fact that the Trust's evidence did not address measures adopted in the Trust's other designated Church of England Schools and why less discriminatory faith-based admissions criteria would compromise the legitimate aim. That, again, is simply not correct. The Trust did adduce evidence relevant to these points and the judge did address these issues (see paragraphs 218 to 236) as discussed above. The reality is that the appellants would have preferred the issues to be analysed in a different way, or for more or different evidence to be given. The judge, however, was entitled to reach the conclusions he reached on the evidence that was adduced, analysed in the way he analysed it.
96. The fifth criticism is that the judge erred in characterising the question as being whether to reject the Trust's evidence and that, in effect, operated to reverse the burden of proof and place it on the appellants. That criticism, again, is simply misplaced. At paragraph 74, the judge expressly stated that, under section 19(2)(d), the burden of establishing proportionality fell on the Trust. He concluded at paragraph 218 that it "was proper to give weight to Dame Alice's evidence" and said that, having considered all the relevant evidence, he was not persuaded to reject it. On any fair reading, that amounts to a recognition that the Trust bore the burden of proof, a testing of their evidence, and an ultimate acceptance of the evidence they adduced.
97. The sixth criticism is that the judge correctly held that the court was not well placed to apply the third element of *Bank Mellat* (essentially because it involves assessments concerning religious matters) but was wrong to treat that as militating in favour of a finding of justification. Again, there is reliance on the decisions in *JFS*, *Coll* and *Ward* and the submission that the Trust had not addressed these issues and, in essence,

a submission the judge was not in a position to assess the explanation. As explained above, that is based on a misconception. The Trust did address these issues in evidence. The judge accepted that, on the evidence, they had discharged the burden under section 19(2)(d) of the 2010 Act.

98. The seventh criticism is that the judge correctly referred to what is described as the four-stage domestic proportionality test but misdirected himself or erred in the application of the third stage, i.e. less intrusive means. Mr Desai relies on the wording of paragraph 225 of the judgment as to whether the fact that the PCP advantages one group with a particular racial profile and disadvantages another with a different racial profile “makes it unreasonable for the school to pursue its aim” by prioritisation of attendance at a Church of England school. Mr Desai submits that that “impermissibly reduces the question to one of bare rationality (“unreasonableness”)”. That is a misreading of the relevant paragraph in the judgment. The approach that the judge took reflected the observations of Lord Reed in *Bank Mellat* (cited above, and with which Lord Sumption agreed). The judge was not substituting a test of whether the Trust had acted irrationally or unreasonably in the public law sense of acting so unreasonably that no reasonable body would act in that way. He was assessing whether the Trust had established that the PCP was a proportionate means of achieving a legitimate aim and directed himself properly and applied the relevant approach correctly. The eighth criticism makes further points about the judge’s analysis of the third element of the *Bank Mellat* approach but these, too, are without foundation once the judgment is read fairly and as a whole.
99. The ninth criticism is that the judge erred in holding that it was not necessary to consider the alternative, strongly recommended by the LDBS, of reducing the proportion of foundation places at Twyford School to which the criterion was applied. The judge expressly noted the strong recommendation of the LDBS that all admission authorities should maintain an equal 50/50 split between foundation (i.e. Christian) and open places (see paragraph 57(c)). He records Mr Desai’s submission in relation to that issue (see paragraph 215). The evidence of Dame Alice explains why the Trust departed from that recommendation (as discussed above). The judge discussed the issue at paragraph 227. The criticism also refers to the fact that for geographic reasons some children may be unable to attend the other Trust schools. I have dealt with the substance of that criticism above. The judge dealt with the substance of the issue of whether the Trust had shown that the use of an oversubscription criteria at Twyford School was a proportionate means of achieving the legitimate aim of preserving that school’s Anglican ethos. Part of that involved consideration of the evidence that the decision was that children who did not meet that criterion could apply for places at other Trust schools. He was not required to deal with each of the many points that the appellants made and was not required to address, specifically, the potential that some children might not be able to obtain a place at another Trust school because of that school’s oversubscription criteria.
100. The tenth criticism is that the absence of a proper assessment of less restrictive means (including the LDBS recommendation) meant there could not be and was not any proper assessment of the fair balance. The judge did consider the third element of the *Bank Mellat* approach as already explained. The judge did carry out the balancing exercise required.

101. The eleventh criticism is that the judge failed to identify and give any weight to what is described as the important, core purpose of indirect discrimination law, namely levelling the playing field. The obligation of the judge was to apply the relevant law laid down by Parliament in relation to indirect discrimination, here, in particular, section 19 of the 2010 Act as it applied to school admission arrangements and he did so. In doing so, as he said at paragraph 237, he had regard “to the corrosive effect on society of race discrimination and the importance of rooting it out”. As the judge noted, however, a PCP will in some cases be a disguised means of imposing a prejudice. In others a PCP may be well intentioned but nevertheless perpetuate discrimination and may need to be corrected. In others, a PCP may be legitimate and its impact unavoidable and acceptable. This case, he considered, fell into the latter category. The eleventh criticism is, therefore, unfounded and untenable on the facts of this case.
102. The twelfth criticism is that the judge did not identify or grapple with the significance of the close connection between favouring Church of England church attendance over non-Church of England attendance and ethnic origin. The judge did. It is difficult, reading the judgment fairly and as a whole, to see the basis on which this criticism could be made out.

Conclusion

103. Standing back from the details therefore, the judgment, read fairly, and as a whole, does not demonstrate any error of law. The judge properly directed himself as to how he could assess the proportionality of the PCP. He considered, and accepted, the evidence of the Trust. He came to conclusions that he could reach on the evidence before him. He was entitled to regard the statutory framework providing for the designation of schools as having a particular religious character, and permitting faith-based oversubscription criteria, as reflecting a recognition by Parliament that there was a high public interest in preserving faith schools. That was relevant to the assessment of whether the preservation of an Anglican ethos for such a school was a legitimate aim. The public interest in preserving faith-based schools was also a relevant factor to which the judge could give significant weight when assessing whether the PCP in this case was a proportionate means of achieving a legitimate aim. I would dismiss grounds 1 and 4 of the grounds of appeal.

THE FIFTH ISSUE – WAS THE JUDGE ENTITLED TO FIND THAT THE TRUST HAD COMPLIED WITH ITS DUTY UNDER SECTION 149 OF THE 2010 ACT?

Submissions

104. The next issue concerns the question of whether the Trust had complied with its duty under section 149 of the 2010 Act to have due regard to certain specified equality matters. Mr Desai submitted that the purpose of section 149 was to require public bodies to give advance consideration to issues of race discrimination before making any policy decision. That required a conscious consideration of the statutory criteria (not a general regard to issues of equality). In the present case, the matters relied on by the judge, it was submitted, were not sufficient to demonstrate that due regard had been given as required to the matters in section 149(1)(a), so far as race was concerned and 149(1)(b) and (c) so far as religion and belief and race were concerned.

Further, Mr Desai submitted that if the material were not available to enable a proper appreciation of the potential impact, then there would be a duty to acquire it.

105. Mr Oldham submitted that section 149 required that due regard be had to the matters specified in sections 149(1)(a) to (3). Due regard was the regard that was appropriate in the circumstances. It was not a requirement that in every case a particular thing must be done in order for there to be compliance with section 149. He submitted that what would be required would vary with the facts, including the characteristics of the body subject to the duty.

Discussion and conclusion

106. It is important to consider the wording of section 149 in order to determine the scope or content of that duty. It imposes an obligation on a public authority (1) "to have due regard" (2) "in the exercise of its functions" (3) to the need to eliminate discrimination, harassment, victimisation and any other prohibited conduct, and to advance equality of opportunity, and to foster good relations, between persons who share a protected characteristic and those who do not.
107. The starting point, therefore, is to identify the particular functions that the public body is exercising. In the present case, the Trust was exercising the function of making admission arrangements for Twyford School. The section 149 duty applied to the exercise of those functions. The admissions appeal panel was exercising the function of hearing and determining appeals against a refusal of a place but it applied the admission arrangements, including the oversubscription criteria, and, provided that the Trust had discharged its duty under section 149 when making the admission arrangements, it is not suggested that the admissions appeal panel need do more.
108. The next step is to assess whether, on the evidence, the authority did have due regard to the specified equality considerations when exercising those functions. In doing so, it is often sensible to focus on the statutory provisions themselves and to ask whether the relevant body has had due regard to the matters identified in sections 149(1)(a) to (c) (see the observations of this Court in *R (Sheakh) v Lambeth London Borough Council* [2022] EWCA Civ 457; [2022] PTSR 1315 at paragraph 15). The body needs to be clear what the equality implications are but it is for the relevant body to determine what weight they should be given in the light of all the relevant factors. Section 149 may not require an elaborate structure of secondary decision-making and the decision-maker is concerned with the obvious impacts on equality not every detail of every conceivable impact (see *Sheakh* at paragraph 15).
109. It is well-established that the duty is one of substance, not form, and the real issue is whether the relevant body has, in substance, had due regard to the matters identified in section 149, taking into account all the relevant factors including the nature of the decision and the body's reasoning (see, eg, *Baker v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2009] PTSR 809, at paras 36–37, and *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] Eq LR 60, at para 26). As Lord Neuberger of Abbotsbury PSC observed at para 74 of his judgment in *Hotak v Southwark London Borough Council* [2015] UKSC 301; [2015] PTSR 1189, "the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment". Potentially relevant principles are set out at para 26 of the judgment of McCombe LJ in *Bracking*. As the Court of

Appeal has subsequently observed, that decision has to be read in context and the application of the duty will differ from case to case depending upon the function being exercised and the facts of the case. Furthermore, courts should be careful not to read the judgment in *Bracking* as though it were a statute: see *Powell v Dacorum Borough Council* [2021] EWCA Civ 23; [2019] HLR 21, at para 51 and *R (End Violence against Women Coalition) v Director of Public Prosecutions* [2021] EWCA Civ 350; [2021] 1 WLR 5829 at paragraph 85.

110. I turn then to the facts of this case and the assessment of the judge. It is helpful first to consider the context in which the function of making admissions arrangements was being exercised. First, it is right to note, as the judge did, that the Twyford School's equality policy shows that the Trust was aware of the statutory requirements governing its duty under section 149 (see paragraph 254 of the judgment). We were taken to that document. It makes it clear that the directors of the Trust, who made the admission arrangements, were reminded of the 2010 Act and were told that the admissions policy was among the key policies with an equality and diversity impact. The policy set out a summary of the obligations imposed by section 149 of the 2010 Act. It is reasonable to infer, therefore, that the persons making the admission arrangements were aware of their obligations and the fact that admissions arrangements had potential equality impacts. Furthermore, although the judge does not refer to it, the School Admissions Code in force at the material time set out the legislation relevant to admissions decisions and summarised the obligations imposed at different times by the various statutes dealing with equality. This factor is not, of course, conclusive evidence that the relevant body complied with its duties under section of the 2010 Act. But it is a relevant factor and the starting point is that this body knew what its obligations were and knew that admissions arrangements would involve equality impacts.
111. Secondly, it is right to note, as the judge did, that it was obvious that once the Trust decided to have faith-based subscription criteria at Twyford School, that would have an impact on sections of the diverse community that that school served. The oversubscription criteria provided an advantage to Anglicans as compared with other denominations (or faiths). In particular, in recent years, it was obvious to the Trust from the figures that few if any places at Twyford School would go to those whose main place of worship was not an Anglican church. The criteria would, therefore, disadvantage those who were not Anglicans.
112. Thirdly, the judge was satisfied on the facts, that the relevant body was at all times aware of the LDBS guidance referring to the purpose of serving the children of the parish and, therefore, that it strongly recommended that places be divided 50/50 between foundation (Christian) places and open (non-faith based) places.
113. It was in that context that the judge considered first whether the Trust had had due regard to the need to advance equality of opportunity between those who were Anglicans and those who were not (section 149(1)(b)) and to foster good relations between those who were Anglicans and those who were not (section 149(1)(c)).
114. Given the nature of the decision taken, in the context described above, it is clear that the Trust did have due regard to those matters. The judgment could have been reasoned more fully. It is, however, obvious from the evidence of Dame Alice Hudson (which the judge accepted) that the Trust consciously considered maintaining

a 50/50 allocation of places on a religious and non-faith basis, that it considered that allocating all foundation (Christian) places to Anglicans would preserve the Anglican ethos of Twyford School, and it considered that the impact on those of other faiths would be mitigated by the opportunity to have a place at one of the other Trust schools, which were designated as schools having a religious, that is Church of England, character but where the Trust would not apply faith-based criteria to the allocation of (any) of the places. The judge was entitled to conclude from the nature of the decision and the context, that the Trust had had due regard to the matters referred to in section 149(1)(b) and (c) so far as religion was concerned.

115. I turn then to the impact in terms of race and whether the Trust had due regard to the need to eliminate discrimination prohibited by the 2010 Act, and to advance equality of opportunity and to foster good relations between persons of different race (i.e., broadly, for present purposes, persons who were white or of English ethnic origin, as a larger proportion of such persons attended Anglican churches, as compared with persons of different colour or ethnicity). Again, in assessing whether the Trust had due regard to those matters, it is right to bear in mind the context. The Trust knew that admissions policies had potential racial impacts and they knew they had duties under the 2010 Act in that regard. More significantly, perhaps, they knew that the LDBS recommendation was to have a 50/50 allocation between faith and non-faith based places in order to promote inclusion of different ethnic groups within schools. Importantly, the judge found that faith-based criteria such as that used for Twyford School were inherently likely to have a disparate racial impact (although it was not possible to calculate that numerically).
116. The evidence then was that the Trust decided that it would depart from the recommendation of the LDBS, and have faith-based criteria which included the point being awarded where a family's main place of worship was an Anglican church, for all the foundation places at Twyford School. It must, on the judge's findings, have been aware that that would have a greater impact on certain races. It is also clear from Dame Alice Hudson's evidence that the Trust considered how to address that impact and decided that children would have the opportunity to apply for places at one of the other Trust schools (which were also designated as Church of England schools but where no faith-based oversubscription would be applied).
117. It is inherent in my judgment, given the context and the nature of the decision, that the Trust knew of the potential impact of its decision to make, and maintain, these admission arrangements on persons of other races. It is clear that it paid due regard to that. It wished to achieve what Parliament recognises is a legitimate aim, namely the preservation of religious or faith-based schools. It sought to achieve that by the arrangements it adopted for Twyford School, and considered that the impact on people of other races would be addressed by places at other Trust schools. That, to my mind, does demonstrate that it was paying due regard to the racial impact of the admission arrangements for Twyford School, and the matters set out in section 149(1)(a) to (c). For those reasons, while the judge's reasons could have been more fully expressed, I consider that the judge's conclusion at paragraph 265 of his judgment, that there was no breach of section 149, was one that he was entitled to reach. I would dismiss ground 2.

THE SIXTH AND SEVENTH ISSUES – SECTION 31(2A) OF THE 1981 ACT AND THE POSITION OF THE OSA

118. In the light of those conclusions, I can deal with the sixth and seventh issues very briefly. As there was no breach of section 149, there is no need to consider whether the court was required to refuse a remedy by reason of section 31(2A) of the 1981 Act. That section applies where it is highly likely that the outcome for the claimants in a case would not be substantially different. It is not necessary to consider whether the judge was correct in his approach to that section as it does not arise. The proper approach to section 31(2A) had been the subject of detailed consideration by this Court in *R (Bradbury) v Brecon Beacons National Park Authority* [2025] EWCA Civ 489; [2025] 4 WLR 58. If there is any difference between the approach of the judge in this case, and the approach of the Court in *Bradbury*, other courts will follow the decision of this Court in *Bradbury*. It is not necessary, therefore to consider ground 3 of the grounds of appeal.
119. The appellants have only appealed against the determination of the OSA dismissing the objection to the 2025-2026 arrangements on grounds 1 and 4. I would dismiss those grounds and, it would follow, there is no basis for considering that the OSA determination is unlawful. Nothing has been put forward orally, or in written submissions, to suggest that there was some other error allegedly made by the OSA. It follows that the appeal against the OSA would be dismissed. In those circumstances, it is not necessary to explore the issue raised in the OSA's respondent's notice, namely whatever the outcome in relation to the decision of the Trust to refuse CKT a place for her son in 2024, there is no basis on which the court could find that its determination about the 2025-2026 admission arrangements were unlawful.

CONCLUSION

120. I would dismiss these appeals. The appellants were not precluded by paragraph 5 of Schedule 11 to the 2010 Act from bringing a claim that the PCP in the present case (i.e. that part of the oversubscription criteria which allocated one point to those whose family's main place of worship was a Church of England church when allocating the 150 foundation places at Twyford School) was discriminatory in relation to race. The judge was entitled to find that the PCP put the appellants, and persons of the appellants' race and ethnic origin at a particular disadvantage (within the meaning of section 19(2)(b) and (c) of the 2010 Act). The judge was entitled to find, however, that the PCP was a proportionate means of achieving a legitimate aim, namely the preservation of the Anglican character and ethos of Twyford School, and so was justified under section 19(2)(d) of the 2010 Act. The judge was entitled to find that the relevant bodies had complied with their duties under section 149 of the 2010 Act.

LORD JUSTICE BUTCHER

121. I agree.

LORD JUSTICE BAKER

122. I also agree.