dirittifondamentali.it

L'educazione religiosa e il culto collettivo impartiti in una scuola dell'Irlanda del Nord violano i diritti del minore e dei suoi genitori ai sensi dell'articolo 2 del Primo Protocollo ("A2P1") alla Convenzione europea dei diritti dell'uomo ("CEDU") in combinato disposto con l'articolo 9 CEDU.

(Supreme Court of the United Kingdom, 19 Novembre 2025, 40)

Contesto del ricorso

La questione oggetto del presente ricorso è se l'educazione religiosa e il culto collettivo impartiti in una scuola dell'Irlanda del Nord siano contrari all'articolo 2 del Protocollo 1 ("A2P1") della Convenzione europea dei diritti dell'uomo ("CEDU"), in combinato disposto con l'articolo 9 della CEDU, come recepito nel diritto interno dal Human Rights Act 1998.

L'articolo 9 CEDU garantisce a tutti il diritto alla libertà di pensiero, di coscienza e di religione.

L'A2P1 prevede che

"A nessuno può essere negato il diritto all'istruzione. Nell'esercizio delle funzioni che assume in materia di istruzione e di insegnamento, lo Stato rispetta il diritto dei genitori di garantire che tale istruzione e insegnamento siano conformi alle loro convinzioni religiose e filosofiche".

In questo caso una bambina, "JR87", frequentava una scuola elementare controllata e sovvenzionata a Belfast. Nell'ambito del programma scolastico, JR87 partecipava a lezioni di religione cristiana non confessionale e al culto collettivo. I genitori di JR87 non volevano che le venisse insegnato che il cristianesimo era una verità assoluta. Suo padre, "G", contestò la legalità dell'insegnamento religioso e del culto collettivo e chiese una revisione giudiziaria contro il Ministero dell'Istruzione.

All'Alta Corte, questa contestazione ha avuto esito positivo. Il giudice Colton ha ritenuto che, poiché l'educazione religiosa e il culto collettivo nella scuola seguivano il programma didattico di base del Ministero, essi non fossero impartiti in modo obiettivo, critico e pluralistico. Sebbene i genitori avessero il diritto legale di ritirare la figlia da queste attività, tale diritto non era sufficiente a impedire una violazione dell'articolo A2P1 in combinato disposto con l'articolo 9 della CEDU. Ciò ha comportato un onere indebito per i genitori di JR87, dissuadendoli dal chiedere il ritiro e rischiando di stigmatizzare JR87. Il giudice ha dichiarato che l'insegnamento dell'educazione religiosa e le modalità di culto collettivo violavano i diritti di JR87 e G ai sensi dell'articolo A2P1 in combinato disposto con l'articolo 9 della CEDU.

Nella Corte d'appello, Treacy LJ (Keagan LCJ e Horner LJ concordi) ha confermato la conclusione del giudice Colton secondo cui l'educazione religiosa e il culto collettivo nella scuola non erano trasmessi in modo obiettivo, critico e pluralistico. Tuttavia, la Corte d'appello non ha condiviso la conclusione del giudice secondo cui il diritto statutario dei genitori di ritirare JR87 era insufficiente a impedire una violazione dell'articolo 2, paragrafo 1, in combinato disposto con

l'articolo 9 della CEDU. La Corte d'appello ha ritenuto che l'esistenza di questo diritto legale incondizionato significasse che lo Stato non perseguiva l'obiettivo proibito dell'indottrinamento. Inoltre, la Corte d'appello ha espresso forti dubbi sul fatto che i timori di stigmatizzazione o di un onere indebito per i genitori di JR87 si sarebbero concretizzati nella pratica. L'appello è stato accolto e la richiesta di revisione giudiziaria respinta.

JR87 e G ricorrono alla Corte Suprema contestando la conclusione della Corte d'Appello secondo cui il diritto legale di JR87 di ritirarsi dall'educazione religiosa e dal culto collettivo non costituiva una violazione dell'articolo 2, paragrafo 1, in combinato disposto con l'articolo 9 della CEDU. Il Dipartimento presenta un ricorso incidentale sostenendo che il giudice Colton ha commesso un errore nel non analizzare e decidere separatamente le richieste avanzate da JR87 e G.

Sentenza

La Corte Suprema accoglie all'unanimità il ricorso e respinge il ricorso incidentale. Lord Stephens emette la sentenza, con cui concordano Lord Reed, Lord Lloyd-Jones, Lord Hamblen e Lord Burrows.

Motivi della sentenza

Il giudice Colton ha ritenuto che nella scuola frequentata da JR87 l'educazione religiosa e il culto collettivo non fossero impartiti in modo obiettivo, critico e pluralistico. Tale conclusione è stata confermata dalla Corte d'appello e il Ministero non ha ottenuto l'autorizzazione a presentare ricorso contro tale conclusione. Sebbene dinanzi alla Corte suprema non siano state sollevate questioni in merito a tale conclusione, essa ha esposto alcune delle motivazioni che hanno portato i tribunali di grado inferiore a tale conclusione [84-91].

In circostanze in cui l'educazione religiosa e il culto collettivo non sono trasmessi in modo obiettivo, critico e pluralistico, un fattore da prendere in considerazione per determinare se vi sia una violazione dell'A2P1 è se esista il diritto di ritirare JR87 senza imporre un onere eccessivo ai genitori di JR87. In questo caso, il diritto legale di recesso [47] era in grado di comportare un onere eccessivo per i genitori [118-120, 129]. La Corte d'appello ha applicato in modo errato i principi consolidati della giurisprudenza della Corte europea dei diritti dell'uomo [122-127] e non si sarebbe dovuta discostare dalla conclusione del giudice secondo cui i genitori avevano valide preoccupazioni in relazione al ritiro di JR87 dall'educazione religiosa e dal culto collettivo [129].

Inoltre, la Corte d'appello ha commesso un errore nel distinguere tra indottrinamento e trasmissione di informazioni o conoscenze da parte dello Stato in modo non obiettivo, critico e pluralistico [103-106]. I concetti sono due facce della stessa medaglia: trasmettere conoscenze in modo non obiettivo, critico e pluralistico equivale a perseguire l'obiettivo dell'indottrinamento [122-3].

Concludendo le sue conclusioni sul ricorso principale al punto [129], la Corte Suprema ritiene che la Corte d'appello avrebbe dovuto ritenere che l'esercizio del diritto di ritirare JR87 fosse in grado di comportare un onere indebito per i genitori, con conseguente violazione dell'articolo 2, paragrafo 1, in combinato disposto con l'articolo 9 della CEDU.

In merito al ricorso incidentale, la Corte Suprema respinge l'argomentazione del Dipartimento secondo cui la seconda frase dell'articolo A2P1 si riferisce solo ai diritti dei genitori, per cui la

richiesta di JR87 avrebbe dovuto essere respinta. La giurisprudenza della Corte europea dei diritti dell'uomo [134-136] è chiara su diversi punti [137]. In primo luogo, sia i genitori che i figli hanno diritto alla libertà di religione ai sensi dell'articolo 9 della CEDU. In secondo luogo, i diritti garantiti dall'articolo A2P1 in combinato disposto con l'articolo 9 CEDU non sono limitati ai diritti dei genitori. In terzo luogo, la prima frase dell'articolo A2P1 deve essere letta alla luce della seconda frase e dell'articolo 9 CEDU. In quarto luogo, la prima frase dell'articolo A2P1 garantisce agli scolari il diritto all'istruzione in una forma che rispetti il loro diritto di credere o di non credere. In quinto luogo, i diritti dei genitori e degli scolari ai sensi dell'articolo 2, paragrafo 1, in combinato disposto con l'articolo 9 della CEDU devono essere analizzati separatamente. In sesto luogo, di norma l'esito di un reclamo presentato da uno scolaretto ai sensi della prima frase dell'articolo 2, paragrafo 1, sarà determinato dalle conclusioni relative ai reclami dei genitori ai sensi della seconda frase dell'articolo 2, paragrafo 1.

Per quanto riguarda i diritti di JR87, il giudice ha correttamente basato la propria decisione sulla constatazione di una violazione dei diritti di G ai sensi della seconda frase dell'articolo A2P1. Egli ha correttamente constatato una violazione dell'articolo A2P1 in combinato disposto con l'articolo 9 della CEDU sia nei confronti di JR87 che di G [138].

Di conseguenza, il ricorso di JR87 e G è accolto e il ricorso incidentale del Dipartimento è respinto. La Corte ripristina la dichiarazione resa dal giudice [139-140].

I riferimenti tra parentesi quadre rimandano ai paragrafi della sentenza.

***

THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellants who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellants or any member of their family in connection with these proceedings. Furthermore, an Order of the High Court dated 27 September 2019 is in force anonymising the Appellants.

Michaelmas Term
[2025] UKSC 40

On appeal from: [2024] NICA 34

JUDGMENT

In the matter of an application by JR87 and another for Judicial Review (Appellant)

before

Lord Reed, President Lord Lloyd-Jones Lord Hamblen

Lord Burrows Lord Stephens

JUDGMENT GIVEN ON

19 November 2025

Heard on 21 and 22 May 2025

Appellants

Ben Jaffey KC Steven
J McQuitty KC

(Instructed by Phoenix Law (Belfast))

Respondent – The Department of Education (Northen Ireland)

Tony McGleenan KC
Philip McAteer

(Instructed by Departmental Solicitor's Office (Belfast))

Respondent – The Board of Governors of the Primary School

Peter Coll KC
Roisín McCartan

(Instructed by Education Authority Solicitors (Belfast))

Intervener – Transferor Representatives' Council

Adrian Colmer KC
Denise Kiley KC

(Instructed by O'Reilly Stewart Solicitors (Belfast))

LORD STEPHENS (with whom Lord Reed, Lord Lloyd-Jones, Lord Hamblen, Lord Burrows agree):

1. Introduction

1. In these judicial review proceedings, a young girl, anonymised as JR87, and her father, anonymised as G, challenge the legality of the teaching of religious education and the practice of collective worship in the primary school ("the School") which she attended between the ages of four and seven. They contend that the Christian religious education given and collective worship provided in the School is contrary to religious freedom protections guaranteed by article 2 of protocol 1 ("A2P1") to the European Convention on Human Rights ("ECHR") read with article 9 ECHR as scheduled to the Human Rights Act 1998. The proceedings involve wide and important points of law which affect not only JR87, G, and the School, but also the teaching of religious education and the practice of collective worship more generally in Northern Ireland.

2. The Department of Education ("the Department") is the respondent to the proceedings. In the lower courts the Board of Governors of the School was a notice party. In this court and in the Court of Appeal the Transferor Representatives' Council was permitted to intervene. The Transferor Representatives' Council represents the Church of Ireland, the Presbyterian Church in Ireland, and the Methodist Church in Ireland in all matters of education. In this court the Board of Governors of the School is a respondent as the Board falls within the category of respondents under rule 3.2 of the Supreme Court Rules 2024.

3. In the High Court JR87's and G's judicial review challenge was successful: [2022] NIQB 53. In a judgment delivered on 5 July 2022, Colton J ("the judge") held that as both religious education and collective worship in the School followed the core syllabus specified by the Department, they were not conveyed in an objective, critical, and pluralistic manner. The judge then considered whether the parents' statutory right to withdraw their daughter from religious education and from collective worship was sufficient to prevent a breach of A2P1 read with article 9 ECHR. He concluded that it was not, because: (a) exercising the right of withdrawal placed an undue burden on parents;
(b) parents would be deterred from seeking exclusion for their child; and (c) importantly, parents exercising the right would run the risk of stigmatisation of their children. Thereafter, the judge sought submissions from the parties as to the appropriate relief.

4. Part of the relief sought by JR87 and G was an order quashing several provisions of subordinate Northern Ireland legislation as invalid because, it was submitted, they *required* the School to breach JR87's rights and the rights of JR87's parents under A2P1 read with article 9 ECHR. In an addendum judgment delivered on 29 September 2022 the judge held that it was because of the "*outworkings*" of the various legislative provisions

that the teaching of religious education and the arrangements for collective worship in the School were in breach of A2P1 read with article 9 ECHR. The School in teaching religious education was required to *include* the core syllabus, as specified by the Department, but it could have taught additional matters so that overall, the education could have been conveyed in an objective, critical, and pluralistic manner. Accordingly, it was possible for a school lawfully to teach religious education and to provide collective worship, and the legislation did not *require* the School to breach A2P1 or article 9 ECHR. The judge declined to quash the subordinate legislation. Rather, he granted a declaration that:

> "The teaching of religious education under the core syllabus specified under article 11 of the Education (Northern Ireland) Order 2006 as implemented through article 3 of the Education (Core Syllabus for Religious Education) Order (Northern Ireland) 2007 and the arrangements for collective worship in the primary school attended by [JR87] breached her and her father's rights under [A2P1] read with article 9 of the ECHR."

JR87 and G have not appealed against the judge's refusal to quash the subordinate legislation so no issue arose before the Court of Appeal or before this court as to its validity. Rather, the issues on appeal concern the teaching of religious education and the provision of collective worship in a school (such as the School) which follows the core syllabus specified by the Department but which does not include any or any sufficient additional objective, critical, and pluralistic material.

5. On appeal to the Court of Appeal (Keegan LCJ, Treacy and Horner LJJ), it was argued on behalf of the Department, the Board of Governors of the School, and on behalf of the Transferor Representatives' Council as an intervener, that: (a) the judge erred in finding that religious education or collective worship in the School were not conveyed in an objective, critical, and pluralistic manner; (b) the judge erred in holding that there was a breach of A2P1 absent a finding that the State was pursuing an "aim" of "indoctrination"; and (c) the parents' right of withdrawing their daughter from religious education and from collective worship prevented any breach of A2P1.

6. In a judgment of the court delivered by Treacy LJ ([2024] NICA 34) with which Keegan LCJ and Horner LJ agreed, the Court of Appeal upheld the judge's finding that religious education and collective worship in the School were not conveyed in an objective, critical, and pluralistic manner. However, the Court of Appeal disagreed with the judge's conclusion that the parents' statutory right to withdraw JR87 from religious education and from collective worship was insufficient to prevent a breach of A2P1 read with article 9 ECHR. The Court of Appeal held, at para 103, that the existence of the unqualified statutory right of the parents to withdraw JR87 meant that the State was not pursuing the forbidden aim of indoctrination. Furthermore, the Court of Appeal held, at

para 101, that the fears of stigmatisation or of being under an undue burden "would [not] have been realised in practice." On that basis the appeal was allowed and the application for judicial review was dismissed.

7. JR87 and G applied to this court for permission to appeal. The Department opposed the application but if permission was granted it applied for permission to cross appeal on two grounds, namely: (a) whether the judge erred in concluding that the religious education curriculum was not conveyed in an objective, critical, and pluralistic manner; and (b) whether the judge erred in failing to separately analyse and determine the claims made by both JR87 and G.

8. On 17 October 2024 a panel of this court granted JR87's and G's application for permission to appeal. The panel refused the Department's application to cross appeal on ground (a) as to whether the judge erred in concluding that the religious education curriculum was not conveyed in an objective, critical, and pluralistic manner. The panel granted the Department's application to cross appeal on ground (b) as to whether the judge erred in failing to separately analyse and determine the claims made by both G and JR87.

9. JR87 and G now appeal to this court and the Department now cross appeals on ground (b).

10. One of the issues on this appeal is whether teaching of religious education, which is not undertaken in an objective, critical, and pluralistic manner, amounts to pursuit of the aim of "indoctrination." It is important when addressing that issue to emphasise that Christians wish to encourage others to believe that "[t]here is but one living and true God" and to encourage others to practise the Christian faith as the only path to salvation: see the first Article of Religion in the Church of Ireland, see the first Article of the Church of Ireland 2009 Declaration on the 39 Articles of Religion, and see John 14:6, and Acts 4:12. The word "indoctrination" ordinarily has negative connotations but in the context of the Christian faith it is a synonym for evangelism or proselytising. It means winning others over so that they believe in and practice the Christian faith. In that sense indoctrination is an entirely proper Christian missionary process which seeks to secure salvation for others. The word "indoctrination" is used in this judgment as a synonym for evangelism and proselytising devoid of any negative connotations.

11. At the outset of this judgment, it is important to emphasise what this case is not about.

12. First, this case is not about secularism in the education system. No one is suggesting that religious education should not be provided in schools in Northern Ireland. Rather, JR87 and G strongly support the provision of religious education provided it does not amount to indoctrination. Indeed, parents cannot object to the integration of teaching

as to a directly or indirectly religious or philosophical kind in the school curriculum: see *Folgerø v Norway* (Application No 15472/02) (2007) 46 EHRR 47 ("*Folgerø*"), at paras 84(g) and 89.

13. Secondly, this case is not about whether Christianity should be the main or primary faith that pupils learn about in schools in Northern Ireland. Historically and today, Christianity is the most important religion in Northern Ireland. It is within the Department's margin of appreciation in planning and setting the curriculum for the greater part of religious education to focus on knowledge of Christianity: see *Folgerø* at para 89.

14. Thirdly, this case does not concern indoctrination, evangelism, or proselytising outside the school environment. Parents are primarily responsible for the education and teaching of their children: see *Folgerø* at para 84(e). Parents retain in full their right "to enlighten and advise" their children and "to guide them on a path in line with [the parents'] own [religious or] philosophical convictions": see *Lautsi v Italy* (Application No 30814/06) (2011) 54 EHRR 3 ("*Lautsi*") at para 75. Parents have an undoubted right in their own homes or within their own church or religious environments to guide and encourage their children to believe in and to practise religion in line with the parents' own religious and philosophical convictions.

15. Fourthly, there is no challenge in this case to the margin of appreciation enjoyed by the Department in setting and planning of the curriculum for religious education in Northern Ireland. The Department enjoys a wide margin of appreciation as the function of setting and planning of the curriculum "mainly involves questions of expediency … whose solutions may legitimately vary according to the country and the era": *Folgerø* at paras 84(g).

16. Fifthly, there is no challenge in this case to collective worship in schools in Northern Ireland being focused on the Christian religion or that in Catholic maintained schools the focus of collective worship may be distinctive of the Catholic denomination: see para 54 below.

2. Factual background

(a) JR87 and the dates of her attendance at the school

17. JR87 is now 11 years old.

18. The School which JR87 attended between the ages of four and seven is a controlled grant-aided primary school with a nursery. Her attendance at the School commenced in 2017 and she left the School in June 2021 after completing year 3 of her Primary education (P3). In September 2021 she moved to a new controlled school commencing year 4 of Primary school (P4).

19. The Principal of the School states that JR87 "was a much-valued pupil" and throughout her time at the School she participated in all aspects of the curriculum on an equal basis with all other pupils in her class and year group, including religious education and collective worship. Both parents agree that JR87 was happy at the School. They are at pains to point out that they have no issue with the School other than the provision of religious education and collective worship. Equally, they are at pains to point out that they are not against the teaching of religion. What the parents seek is education (including religious provision) that is appropriately objective, critical, and pluralistic, having regard to JR87's age.

(b) The religious and philosophical convictions of JR87's parents

20. JR87's parents are not Christians and do not profess any other religious beliefs. They are "broadly speaking" humanist in their outlook.

21. Both parents are primarily responsible for the education and teaching of JR87: *Folgerø* at para 84(e). They do not wish her to be raised as a Christian. They object to her being taught at the School to assume that Christianity is an absolute truth. Their concerns as to religious education and collective worship at the School are heightened given that she is being taught at an age prior to the development of her critical faculties. Rather, JR87's parents wish to raise her to be caring, ethical, and respectful towards all people, whatever their religious beliefs or otherwise.

(c) The parts of the Northern Ireland curriculum taught at the school

22. The School teaches the Foundation Stage of the Northern Ireland curriculum which covers years 1 and 2 of Primary school (P1 and P2). These years correspond to the ages of four and five, and five and six respectively. The School also teaches half of Key Stage 1 of the Northern Ireland curriculum (P3) which corresponds to the ages of six and seven. The pupils leave the School after completing P3.

(d) Religious education at the School

23. The Principal states that the School follows and delivers the core syllabus. Therefore, the content of the core syllabus was crucial to the decision at first instance, upheld on appeal, that religious education at the School is not taught in an objective, critical, and pluralistic manner.

24. G raised an issue as to whether religious education and collective worship at the School was confined to respectively the classroom and assemblies. In response the Principal accepted that it was not, as some individual teachers may say a prayer, for example before snack-time. The Principal stated that whether and when a prayer is said is left to teacher discretion. It is neither required nor prohibited and no specific format is used. The Principal added that if teachers choose to say a prayer, it will be a very simple expression of thanks to God for the food, environment, or opportunities which are available to the child.

(e) Collective worship at the School

25. The Principal states that collective worship predominantly takes place through the School assembly programme and meets the requirements of the core syllabus. Again, the content of the core syllabus was crucial to the decision at first instance, upheld on appeal, that collective worship at the School is not conveyed in an objective, critical, and pluralist manner.

26. Another factor which led the judge to conclude that collective worship at the School was not conveyed in an objective, critical, and pluralist manner was the right of external persons to be granted access to pupils at the School for the purpose of giving religious education in addition to that contained in the core syllabus: article 21(7) of the Education and Libraries (Northern Ireland) Order 1986 (SI 1986/594 (NI 3)) ("the 1986 Order"). The only external persons who have had access to pupils at the School are either Christian religious ministers or representatives from Christian organisations. The religious ministers who have attended assemblies at the School are ministers from the Church of Ireland, the Presbyterian Church in Ireland, and the Methodist Church in Ireland. Their addresses during assemblies are based on Christian teachings, are Bible- based and linked to the core syllabus. The representatives from Christian organisations who have attended assemblies at the School were representatives from the Scripture Union and the Christian Fellowship Church, Belfast. Religious education during collective worship in assemblies at the School is Christian education based on the Holy Scriptures. The calling of Christian ministers and of representatives from Christian organisations is to proselytise.

27. On a factual basis the Principal points out that, because of the restrictions imposed, during the Covid pandemic the opportunity to have collective worship in the school in the usual way was significantly reduced.

(f) Inspection of religious education and collective worship at the School

28. In all educational areas apart from religious education and collective worship, it is the duty of inspectors appointed by the Department to promote the highest standards of education and of professional practice among teachers in schools by monitoring, inspecting, and reporting on the standard of education being provided in schools: article 102(5) of the 1986 Order.

29. The Department and the School accept that there has been no inspection of religious education or of collective worship in the School.

30. Mr Dempster, the acting Principal Officer in the Curriculum and Assessment Team in the Department, states that religious education in schools is not inspected or evaluated by the Department, and the Department has no knowledge of the practice in individual schools. Therefore, the Department does not know whether grant-aided schools do in fact provide religious education which includes the core syllabus, or whether additional religious education is given and if so whether the additional teaching amounts to further indoctrination, evangelism, or proselytising. Also, the Department has no knowledge of the constraints, if any, on teachers saying prayers of thanks to God. Mr Dempster makes no mention of inspection of collective worship. Therefore, the Department does not know whether grant-aided schools comply with the statutory requirement to include daily collective worship, or whether the collective worship amounts to indoctrination or evangelism or proselytising.

31. The Principal of the School states there has been no inspection of religious education or of collective worship in the School. Therefore, on a structured basis, the Board of Governors of the School does not know whether the School does in fact provide religious education which includes the core syllabus, or whether additional religious education is given and, if so, whether the additional teaching amounts to indoctrination, evangelism, or proselytising. Similar observations can be made about collective worship in the School and as to the exercise of discretion by individual teachers to say prayers of thanks to God outside formal teaching of religious education and outside assemblies.

(g) Parental concern as to JR87's religious education and attendance at collective worship at the School

32. By letter dated 30 May 2019 to the School, JR87's parents queried the provision of religious education and collective worship in the School. They stated that they were not comfortable in having to disclose their own personal beliefs in the context of their daughter's education but felt compelled to do so. They stated that neither of them professed any religious beliefs and they were not Christians. They were concerned that by the time JR87 had commenced P2 she had absorbed and adopted a religious (specifically Christian) worldview which was not consistent with their own views and beliefs. By way of illustration G states that, in the absence of any religious exposure at home, his daughter now believes that God made the world, and she repeats and practices a prayer/grace that she was taught at school at snack-time. His concern is that his daughter is learning Christianity and not learning "about" Christianity in a school context that effectively assumes its absolute truth and which encourages her to do the same. They stated that they were aware that it was possible to exclude JR87 from both collective worship and religious education. They did not feel this was an adequate answer to their concerns but rather exposed that the root cause of the problem was the complete lack of religious and belief diversity within the education system. The solution was an objective, critical, and pluralistic religious education rather than exclusion from religious education. In relation to exclusion they wished to know, for example: (a) what would JR87 be doing during periods of exclusion; (b) where would she go and who would be responsible for her welfare; and (c) what alternative activity/education could be provided by the School to JR87 during such periods of exclusion.

33. The School responded by letter dated 21 June 2019. The gist of the response was to say that the School would continue to provide collective worship and religious education exactly as it had done and in accordance with the School's understanding of the legislation. In its letter the School did set out the option of JR87 being excused from attendance at religious education and collective worship. However, the School stated that "prior" to the commencement of withdrawal from religious education and collective worship there would be discussions with the parents as to the alternative provisions to be put in place for JR87.

(h) Exercise of the right of withdrawal by pupils other than JR87

34. The Principal's evidence is that in her experience over the six years she has been in post only two children have been withdrawn by their parents from religious education and collective worship at the School but that on each occasion the withdrawal was short- lived. The short-lived periods of withdrawal may reflect problems experienced by those pupils and their parents. It would have been good practice for the Principal to have made enquiries of the parents as to why the withdrawals were short- lived. There is no evidence that she did.

35. If JR87's parents had withdrawn her from either religious education or from collective worship, she would have been the only child out of some 250-275 pupils at the School who did not attend.

(i) The arrangements which are required to be made if a pupil is excused from religious education or from collective worship

36. Parents have a statutory right to withdraw their child from religious education or from collective worship or from both: see article 21(5) of the 1986 order and para 60 below. There is no requirement for a parent to explain or justify a request. Rather, a pupil is wholly or partly excused upon a request being made and the pupil remains so excused until the request is withdrawn. It might be thought that withdrawing a pupil was a simple matter of a parent making a request with which the school must comply and that there was no need for any burdensome discussion or negotiations between the school and the parents. However, exercising the right of withdrawal is not that simple, either for parents or for schools, as, absent established alternative arrangements, decisions must be made as to the arrangements for the pupil. In practice those decisions involve discussion and negotiations between the school and the parents giving rise to "a potential breeding ground for conflict:" see *Folgerø* at para 98.

37. The facts of this case demonstrate that exercising the right of withdrawal was not simple either for JR87's parents or for the School. There were no pre-existing alternative arrangements which could be implemented if JR87 was withdrawn from religious education and collective worship. In practice there had to be discussions between the School and the parents "prior" to withdrawal. The parents had to know the alternative arrangements to make an informed decision as to whether to exercise the right of withdrawal and the School had to devise those arrangements and consider whether it had the resources to implement them.

38. The School sought to explore with JR87's parents options for her if she was excused attendance. A difference arose as to whether a meeting between the School and JR87's parents to discuss the options would be on a without prejudice basis or whether JR87's parents' solicitor should be present. As a result of those differences a meeting did not take place. Instead, the School provided JR87's parents with outline details of the type of educational arrangements it *might* have been able to provide for JR87. In the outline details the School acknowledged that "[a] finalised and detailed plan can only be put in place following discussion between parents and school." The School also acknowledged that consideration needed to be given to the availability of school resources to implement any plan.

39. The type of discussion between the School and JR87's parents "prior" to the commencement of withdrawal can be illustrated by the School's various proposed options

in relation to religious education lessons. The first option was for JR87 to remain in the classroom whilst the teaching of religious education took place, and she would "complete *agreed* activities in the classroom (with assistance of teacher/[classroom assistant])." (Emphasis added). This proposal would inevitably involve careful discussions with the parents and negotiation on an ongoing basis about exactly what was involved in the content of the religious lesson and which aspects JR87 would and would not participate in on a lesson-by-lesson basis. Inherent in such discussions is the risk that: (a) the parents might feel compelled to disclose to the School authorities intimate aspects of their own religious and philosophical convictions; and (b) the parents might be in conflict with the School.

(i) The parents' reasons for not exercising the right to withdraw JR87 from religious education and from collective worship at the School

40. The parents of JR87 did not exercise their right to withdraw her from attendance at religious education and collective worship at the School for several reasons.

41. First, if JR87's parents had utilised the right to withdraw her from attendance then she would have been the only child, out of some 250-275 pupils, to be withdrawn. The parents of JR87 considered that singling her out from all her peers would have given rise to risks to her. Those risks included: (a) the risk that she would be "bullied or isolated as a result"; (b) the risk that she might be confused or upset about being singled out from all her peers and might feel that she was being punished by such exclusion; and (c) the risk that she would be outed, school year by school year, as a non-Christian to the pupils at the School, the School staff, and the parents of the other pupils at the School. All these risks deterred JR87's parents from exercising their right to withdraw her from attendance at religious education and collective worship.

42. The parents of JR87 considered that the risk of stigmatisation had not only to be seen in the context that she would have been the only pupil excluded from religious education and collective worship, but also in the context that the parents' objections in a small School community may not be welcomed and/or may be misunderstood as hostility towards the majority religious tradition in Northern Ireland.

43. Secondly, the parents of JR87 considered that she should not have to be excluded from any aspect of her education simply because the Department had specified a core syllabus which is not objective, critical, and pluralistic. The parents of JR87 wanted her to receive a lawful education. They did not wish her to be excluded from religious education simply because the education provided was unlawful.

44. Thirdly, JR87's parents stated that exercising the right to withdraw her from religious education and collective worship was capable of placing an undue burden on

them by: (a) the risk of exposing their philosophical but non-religious beliefs to the School and to the wider School community; (b) the potential for conflict with the School in relation to alternative arrangements for JR87 if she were to be excused from attendance; and (c) the risk of the School viewing them as "difficult or awkward parents." They considered that these matters not only placed an undue burden on them but also had a deterrent effect.

45. The parents of JR87 acknowledge that there was no legal requirement for them to reveal their philosophical but non-religious beliefs and that the School did not expressly ask them to do so. They also acknowledge that in their letter dated 30 May 2019 they chose to reveal their beliefs to the School. However, they contend that: (a) they felt compelled to do so; and (b) inevitably, in practice, they would have been required to do so in the discussions as to alternative arrangements for JR87 which the School stipulated should take place "prior" to her withdrawal from religious education and collective worship.

46. Fourthly, JR87's parents also considered that where, as here, the statutory scheme does not provide any alternative educational provision, an undue burden was placed on them in conjunction with the School to devise alternative arrangements for JR87 "prior" to her withdrawal. JR87's parents considered that devising alternative arrangements in conjunction with the School not only placed an undue burden on them but also had a deterrent effect.

3. Legislative provisions

47. At the core of this case are the legislative provisions which: (a) require religious education to include education in accordance with a core syllabus specified by the Department; and (b) confer a right for parents to withdraw their child from attendance at religious education or collective worship or both. It is not appropriate to consider those legislative provisions in isolation.

(a) Different categories of grant-aided schools in Northern Ireland

48. It is a feature of the legislative framework in Northern Ireland that there are different categories of grant-aided schools. For present purposes it is sufficient to identify and to provide a partial summary for illustration purposes of some of the different categories of schools.

49. After partition of Ireland in 1921 schools which had previously operated on a voluntary and charitable basis were offered the opportunity to transfer their capital assets to the State to secure full funding for both capital and maintenance.

50. In broad terms the Church of Ireland, the Presbyterian Church in Ireland, and the Methodist Church in Ireland ("the transferor Churches") availed of this opportunity so that their schools were transferred in the 1930s, 1940s, and 1950s to and are under the *control* of what is now the Education Authority ("the Authority"). Such a school is categorised as a "controlled school", that is a grant-aided school under the management of the Authority: article 2(2) of the 1986 Order. However, whilst a controlled school is under the management of the Authority, the Authority is required to appoint a Board of Governors for the management of each controlled school: article 10(1) of the 1986 Order. In return for transferring their schools, the transferor Churches were accorded statutory rights of representation on the Boards of Governors of existing and future controlled schools. Those statutory rights are now contained in article 10(3)(a) of and Schedule 4 to the 1986 Order. For instance, in relation to controlled primary schools where nine voting members are appointed by the Authority to the Board of Governors then, of those members, four shall be nominated by the transferors: Schedule 4 para 2(2)(a) of the 1986 Order. In this way, controlled schools are schools the management of which is influenced by the transferor Churches.

51. After partition of Ireland in 1921, the Catholic Church did not wish to avail itself of the opportunity of transferring their schools' capital assets to the State. Rather, the Catholic Church wished to retain voluntary status for their schools to enable Catholic pupils to be taught in Catholic schools under Catholic auspices. Such Catholic schools fall within the category of Catholic maintained schools: see article 2(2) of the 1986 Order and article 141(3) of the Education Reform (Northern Ireland) Order 1989 (SI 1989/2406 (NI 20)) ("the 1989 Order"). A grant-aided Catholic maintained school also falls within the category of a voluntary school: article 2(2) of the 1986 Order. The Council for Catholic Maintained Schools ("the Council") is the managing authority for all Catholic maintained schools. Such schools are "managed" for the Council by their Boards of Governors: article 11(1) of the 1986 Order. Most of the Governors are appointed by the Catholic Church and some by parents. In this way Catholic maintained schools are schools, the management of which is influenced by the Catholic Church.

52. Integrated schools in Northern Ireland are schools that intentionally foster diversity and inclusivity by bringing together students from Catholic, Protestant, and other backgrounds. They aim to create a learning environment where pupils from different religious, cultural, and socio-economic backgrounds can learn and grow together, developing respect for each other's identities and beliefs. A grant-aided Integrated school falls within the category of a voluntary school: article 2(2) of the 1986 Order.

(b) Religious education and collective worship in grant-aided schools

53. Article 21(1) of the 1986 Order provides:

> "Subject to the provisions of this article, religious education shall be given in every grant-aided school other than a nursery school and the school day in every such school shall also include collective worship whether in one or more than one assembly on the part of the registered pupils at the school."

I make the following observations about article 21(1). First, the requirement to give religious education and to include daily collective worship is mandatory. Secondly, the requirement applies to every grant-aided school and therefore applies to grant-aided controlled schools, to grant-aided Catholic maintained schools and to grant-aided Integrated schools. Thirdly, the only exception to the mandatory requirement is in relation to a nursery school.

54. Article 21(2) of the 1986 Order provides:

> "In a controlled school, other than a controlled integrated school, the religious education required by paragraph (1) shall be undenominational religious education, that is to say, education based upon the Holy Scriptures according to some authoritative version or versions thereof but excluding education as to any tenet distinctive of any particular religious denomination and the collective worship required by paragraph
> (1) in any such school shall not be distinctive of any particular religious denomination."

The following observations may be made in respect of article 21(2). First, article 21(2) only applies to controlled schools. It does not apply to, for instance, Catholic maintained schools or to Integrated schools. Secondly, in controlled schools the religious education must be based upon the Christian religion ("based upon the Holy Scriptures"). Thirdly, in controlled schools, there is a mandatory requirement that religious education and collective worship shall be undenominational, that is not distinctive of Catholic or Protestant beliefs or forms of worship. The mandatory requirement in controlled schools avoids proselytising on behalf of one particular religious denomination but means that pupils are not taught about diversity between Christian denominations. For instance, a pupil from a Church of Ireland background is not to receive religious education as to the tenets distinctive of the Presbyterian Church in Ireland. Fourthly, denominational religious education and collective worship is not prohibited in Catholic maintained schools and in Integrated schools.

55. Article 21(3) of the 1986 Order, in so far as relevant, provides:

> "Subject to paragraph (3A), in—… (c) a voluntary school, the religious education and collective worship required by paragraph (1) shall be under the control of the Board of Governors of the school and that religious education shall be subject to such arrangements for inspection and examination as the Board of Governors thinks fit."

I make the following observations about article 21(3). First, it applies to voluntary schools, which category includes Catholic maintained schools and Integrated schools. It does not apply to controlled schools. Secondly, the control of the Board of Governors is subject to paragraph 3A which makes provision for a core syllabus specified by the Department. Thirdly, it is for the Board of Governors in voluntary schools to determine what, if any, arrangements should be made for inspection and examination in relation to religious education. There is no requirement for inspection by the Department: see also article 102(7) of the 1986 Order.

56. Article 21(3A) of the 1986 Order provides:

> "In a grant-aided school the religious education required by paragraph (1) shall include religious education in accordance with any core syllabus specified under article 11 of the Education (Northern Ireland) Order 2006."

57. I make the following observations in relation to article 21(3A). First, the requirement to include religious education in accordance with any core syllabus is mandatory. Secondly, the mandatory requirement is also contained in Part 1 of Schedule 2 to the Education (Curriculum Minimum Content) Order (Northern Ireland) 2007 (NISR No 46 of 2007). Thirdly, article 21(3A) applies in relation to every grant-aided school so that it applies to both grant-aided controlled schools, to grant-aided Catholic maintained schools, and to grant-aided Integrated schools. Fourthly, the mandatory requirement to "include" religious education in accordance with any core syllabus is a minimum requirement. Provided the religious education given in a grant-aided school includes the core syllabus, the school is at liberty to give additional religious education. On the one hand the additional religious education could contain matters which are objective, critical, and pluralistic. On the other hand, the additional religious education could amount to indoctrination, evangelism, or proselytising.

58. After setting out further provisions in article 21 of the 1986 Order it will be necessary to consider how the current core syllabus was drafted. It will also be necessary to consider how the contents of the current core syllabus led the judge and the Court of Appeal to conclude that the teaching of religious education and the provision of collective worship in the School was not undertaken in an objective, critical, and pluralistic manner.

59. Article 21(4) of the 1986 Order provides:

> "Religious education and collective worship required by paragraph (1) shall be so arranged that—(a) the school shall be open to pupils of all religious denominations for education other than religious education; (b) no pupil shall be excluded directly or indirectly from the other advantages which the school affords."

A child can attend any school regardless of the child's religious denomination.

60. Article 21(5) of the 1986 Order contains the right to withdraw a child from attendance at religious education or collective worship or from both. It provides:

> "If the parent of any pupil requests that the pupil should be wholly or partly excused from attendance at religious education or collective worship or from both, then, until the request is withdrawn, the pupil shall be excused from such attendance in accordance with the request."

I observe the following in relation to article 21(5). First, a pupil is wholly or partly excused upon a request being made and the pupil remains so excused until the request is withdrawn. Secondly, for the school to be obliged to comply with the request, there is no requirement for the request to be in writing or for the parent to explain or justify the request. Thirdly, as soon as the request is made the school must immediately excuse the pupil from attendance.

61. Article 21(6) of the 1986 Order provides:

> "No payment from public funds in respect of a pupil shall be varied by reason of his attendance or non-attendance at religious education or collective worship."

By virtue of article 21(6) a parental request to excuse a pupil from attendance will not have the adverse consequence of a reduction in public funds available to the school. However, no additional funds are to be made available to the school so that it can put in place alternative arrangements for a child who is excused. Those alternative arrangements must be funded by the school out of its existing public funds. If there are no funds available, then the school is limited in what alternative arrangements can be made.

62. Article 21(7) of the 1986 Order provides:

> "Ministers of religion and other suitable persons, including teachers of the school, to whom the parents do not object shall, subject to paragraph (8), be granted reasonable access at convenient times to pupils in any grant-aided school other than a nursery school for the purpose of giving religious education, whether as to tenets distinctive of a particular religious denomination or otherwise, or of inspecting and examining the religious education given in the school and education given by virtue of this paragraph may be in addition to that provided under paragraph (1)."

It is appropriate to make several observations in relation to article 21(7).

63. First, article 21(7) applies to any grant-aided school (other than a nursery school). Therefore, it applies to grant-aided controlled schools, to grant-aided Catholic maintained schools, and to grant-aided Integrated schools.

64. Secondly, there is a mandatory obligation on grant-aided schools to grant access to pupils to "Ministers of religion and other suitable persons, including teachers of the school." There is no statutory definition of a Minister of religion or of "suitable persons". In practice at the School the Ministers and persons were all exclusively Christian.

65. Thirdly, the purpose of granting access is: (a) to give religious education, in addition to that provided under article 21(1); or (b) to inspect or examine the religious education given in the school.

66. Fourthly, in a controlled school the only potential inspection or examination of religious education is under article 21(7) or if the Board of Governors agrees by the Department: see article 102(7).

67. Fifthly, the additional religious education given by a minister of religion or other suitable person, including a teacher of the school, can be denominational. Therefore, in a controlled school or in a Catholic maintained school, the tenets of, for instance, the Presbyterian Church in Ireland could be taught to pupils whose parents adhere to the tenets of a different Christian religion, unless the parents object.

68. Sixthly, the right of access for either purpose is subject to the qualification that "the parents do not object." However, it is unclear as to whether parental objection is by all the parents, or a proportion of the parents and if so what proportion.

69. Seventhly, the right of access is subject to the qualification that it is reasonable and at convenient times.

70. Eighthly, the qualification in article 21(8) to the right of access in article 21(7) applies to voluntary schools. The qualification does not arise on the facts of this case as the School is a controlled school.

71. Article 21(9) of the 1986 Order enables the Department to make such regulations as it considers necessary for securing that the provisions of article 21 relating to religious education are complied with in all grant-aided schools other than nursery schools.

72. The Primary Schools (General) Regulations (Northern Ireland) 1973 (NISR No 402 of 1973) ("the 1973 Regulations") were made by the Department's predecessor under earlier legislation. Regulation 21(4) of the 1973 Regulations read with article 21(1) of the 1986 Order requires schools to give religious education for half an hour every school day, or its equivalent within each week. Regulation 21(5) of the 1973 Regulations provides that a minister in charge of any church or other place of worship in the vicinity of a controlled school can require the Board, that is the relevant Education and Library Board, to communicate to him the names of pupils who are, or are stated to be, of the same religious denomination as that minister. Regulation 21(5) of the 1973 Regulations therefore envisages that the Board will have ascertained the religious denomination of pupils and will reveal their beliefs concerning spiritual matters to the relevant minister on request. The relevant minister can then require the school to grant access to that pupil for the purpose of giving additional religious education unless the parents object: see article 21(7) of the 1986 Order.

73. The religious education required by article 21(1) of the 1986 Order must include religious education in accordance with any core syllabus specified under article 11 of the Education (Northern Ireland) Order 2006 (SI 2006/1915 (NI 11)) ("the 2006 Order"). Article 11(1) provides:

> "Subject to paragraph (2), the Department may by order specify a core syllabus for the teaching of religious education in grant- aided schools, that is to say a syllabus which—
>
> (a) sets out certain core matters, skills and processes which are to be included in the teaching of religious

> education to pupils in such schools, *but does not prevent or restrict the inclusion of any other matter, skill or process in that teaching*; and
>
> (b) is such that the teaching in a controlled school (other than a controlled integrated school) of any of the matters, skills or processes set out in that syllabus would not contravene article 21(2) of the 1986 Order." (Emphasis added)

I make the following observations in relation to article 11(1). First, it is the Department which by order may specify a core syllabus in respect of religious education. Secondly, a core syllabus does not prevent or restrict the inclusion of any other matter, skill, or process in teaching religious education. The core syllabus is a mandatory minimum. It is permissible for grant-aided schools to teach matters in addition to the matters in the core syllabus but there is no requirement that the additional matters are objective, critical, and pluralistic. Rather, the additional matters might amount to indoctrination, evangelism, or proselytising. The ability to teach additional matters is to be seen in the context that there is no statutory requirement on the Department to inspect the provision of religious education. Thirdly, in respect of a controlled school (other than a controlled Integrated school) the core syllabus must not contravene the requirement that religious education shall be undenominational and based upon the Holy Scriptures.

74. The Department's power by order to specify a core syllabus in respect of religious education is qualified by article 11(2) of the 2006 Order. Article 11(2)(a) provides that the Department shall not specify a core syllabus unless a draft of that syllabus was prepared by the drafting group and submitted by it to the Department. The group responsible for drafting the current core syllabus consisted solely of representatives of the Catholic Church, the Church of Ireland, the Presbyterian Church in Ireland, and the Methodist Church in Ireland ("the four main Churches"). Article 11(2)(b) provides that the draft must be published with a notice inviting representations to be made and article 11(2)(c) provides that after considering all the representations the draft may or may not be revised by the drafting group. Thereafter, the drafting group submits the final draft to the Department, with: (i) a report by that group on the nature of representations made and on the extent to which, and the manner in which, account has been taken of those representations; and (ii) any other information which the Department may request.

4. The current core syllabus for religious education

(a) The process which led the Department to specify the current core syllabus for religious education

75. A core syllabus was first introduced in 1993 having been prepared by the four main Churches.

76. In 2002 the then Minister of Education asked the leaders of the four main Churches to review the core syllabus and specifically asked the four main Churches to consider the inclusion of other world faiths as part of the core syllabus.

77. In September 2003, a working party of the four main Churches, published "Proposals for a Revised Core Syllabus in RE in Grant-Aided Schools in Northern Ireland." In the introduction section the working party stated:

> "10. …. The decision to include the study of other world religions, at an appropriate key stage and level of study, in no way compromises the essential Christian character of the Core Syllabus, nor suggests that current provision for Religious Education should be replaced by a study of comparative religions. Indeed, *the Working Party believes that the approach it is proposing in relation to other world faiths is the outworking of our Christian duty to our fellow men and women.*
>
> 11. Some would favour going further or, indeed, in an altogether different direction, and advocate a rigorous multi- faith or comparative and phenomenological approach to the study of religions. *The Working Party is convinced that there are strong educational, as well as theological, reasons for not adopting such an approach* and concurs with Kay and Linnet Smith … who conclude … that *the study of a wide range of world faiths 'confuses pupils* and that thematic teaching produces less favourable attitudes' towards religion in general, rather than respect for religious diversity …. The Working Party maintains that the essential Christian character of Religious Education in Northern Ireland plays an important part in the *faith development* of our young people, and is overwhelmingly supported by parents and contributes significantly to the promotion of tolerance and the common good in Northern Ireland. The Working Party supports strongly, therefore, maintaining the essential Christian

> character of Religious Education for all grant aided schools in Northern Ireland as recognised in existing legislation." (Emphasis added)

78. The working party then set out its proposed core syllabus for each Stage of the Northern Ireland curriculum. It was only at Key Stage 3 that pupils were to study two World Faiths in addition to Christianity.

79. Several observations can be made in relation to paragraphs 10-11 of the introduction and in relation to the working party's proposed core syllabus. First, the working party considered that its Christian duty in drafting the core syllabus was the development of the Christian faith in young people rather than imparting knowledge about Christianity. Secondly, there was to be no reference to any other faiths in the Foundation Stage and in Key Stages 1 and 2. Therefore, between the ages of four and eleven the core syllabus was to be exclusively based on promoting *faith* in Christianity without any education *about* any other world religion. Thirdly, the first stage at which there was to be study of other world religions was to be at Key Stage 3 at which stage pupils were to study only two World Faiths in addition to Christianity, but it was "intended that study of the World Faiths will require only a modest amount of teaching time in each year of key stage 3." Fourthly, in rejecting any education as to other religions until Key Stage 3 the working party expressly took into account their own theological beliefs. Fifthly, the working party justified the failure to provide any education about other world religions until Key Stage 3 and then to provide a modest amount of teaching time devoted to other world religions on the basis that pupils would be confused.

80. In January 2005 the drafting group submitted their proposals for a revised core syllabus. There followed a full Equality Impact Assessment on these proposals together with a three-month public consultation.

81. The Northern Ireland Council for Voluntary Action and the Equality Commission for Northern Ireland made several criticisms of the proposed revised core syllabus. The judge set out those criticisms at para 66 (a)-(b) of his judgment dated 5 July 2022. The Northern Ireland Council for Ethnic Minorities expressed the view that they were extremely unhappy with the entire process by which the syllabus was reviewed, to the extent that they refused to formally take part in the consultation as they considered it fundamentally flawed (para 66(c)). The Examiner of Statutory Rules raised concerns about the content of the core syllabus which were set out by the judge at para 67 of his judgment dated 5 July 2022.

82. In October 2006, the then Minister of Education accepted the drafting group's proposals in relation to the revised core syllabus. Thereafter, the Department specified

the core syllabus in the Education (Core Syllabus for Religious Education) Order (Northern Ireland) 2007 (NISR No 309 of 2007).

83. In conclusion, the current core syllabus was drafted by the four main Churches and then, despite the criticisms, it was specified by the Department.

(b) The contents of the current core syllabus

84. The judge set out various provisions of the core syllabus at paragraphs 39-44 of his judgment dated 5 July 2022. The judge concluded, at para 74, that a fair analysis of the core syllabus "leads to the conclusion that under the curriculum religious education is not conveyed in an objective, critical and pluralist manner." His conclusion was unanimously upheld in the Court of Appeal and leave to cross appeal to this court on a ground challenging that conclusion was refused. Even though no issue arises in this court, it is appropriate to briefly set out some of the reasoning which led to the conclusion that the core syllabus did not convey religious education in an objective, critical, and pluralistic manner.

85. First, it was the inevitable consequence of leaving the drafting of the core syllabus to the four main churches. All four main churches seek to promote *faith* in Christianity as an absolute truth rather than knowledge about Christianity.

86. Secondly, there is a complete absence of plurality in relation to the teachings or practices of any other religions or non-religious traditions and philosophies in the Foundation Stage and in Key Stages 1 and 2.

87. Thirdly, there is an absence of plurality in relation to the teaching of Christianity in controlled schools by virtue of the mandatory prohibition on teaching pupils about the tenets of any particular religious denomination: see para 54 above.

88. Fourthly, there is no commitment in the core syllabus to objectivity or to the development of critical thought. To teach pupils to accept a set of beliefs without critical analysis amounts to evangelism, proselytising, and indoctrination. Rather, the core syllabus encourages pupils faithfully to accept the existence of the Christian God, to accept that good things come from the Christian God, that the Christian God can help in times of adversity and that morality is based upon, and derived from, the existence of the Christian God. For instance, in the Foundation Stage the core syllabus stipulates that teachers should provide opportunities for pupils to appreciate that "praying is a way of talking to God so that we can thank him, praise him, say sorry and ask for help." Another instance is that in Key Stage 1 teachers should provide opportunities for pupils to understand that the God who loves them is forgiving towards them and that they should

be forgiving towards others. The morality of forgiveness is derived from the Christian God's example of being forgiving towards them.

89. Fifthly, at Key Stage 2 "[t]eachers should provide opportunities for pupils to[c]onsider the respect due to creation, which *is* the gift of God" (Emphasis added). This involves teaching children of the correctness of the important Christian belief that the world is created by a God who exists and that the world is his gift.

90. Sixthly, the four main Churches have developed non-statutory material for the guidance of teachers in relation to attainment of the Key Stages. It shows how the drafting group intended the core syllabus to be taught in practice and what the pupils are expected to attain through each Stage of the Northern Ireland curriculum. The guidance is unequivocally an expression of Christian faith. For instance, pupils should be able to recognise that God cares for his creation and people. Again, this teaches that the Christian God created the world and that the pupils are his people.

91. The conclusion that the core syllabus does not convey religious education in an objective, critical, and pluralistic manner has been accepted in this court by the Transferors' Representative Council, which now seeks a review of the core syllabus in which the study of other faiths would be mandatory from the Foundation Stage of the Northern Ireland curriculum.

5. Legal principles

(a) Article 9 ECHR, Article 2 of Protocol 1 ECHR

92. Article 9 ECHR, headed "Freedom of thought, conscience and religion", provides: "1.

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

93. A2P1, headed "Right to education", provides:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

(b) The threshold in relation to the parents' convictions

94. The Grand Chamber in *Lautsi* set out the threshold to be met in relation to parents' non-religious philosophical convictions for those convictions to attract protection under article 9 ECHR and to engage the respect guaranteed to a parent's "religious and philosophical convictions" under A2P1. In *Lautsi* the Court found that the threshold requirement had been met in relation to secularism. It stated, at para 58, that:

> "… the supporters of secularism are able to lay claim to views attaining the 'level of cogency, seriousness, cohesion and importance' required for them to be considered 'convictions' within the meaning of articles 9 of the Convention and 2 of Protocol No 1. More precisely, their views must be regarded as 'philosophical convictions', within the meaning of the second sentence of article 2 of Protocol No 1, given that they are worthy of 'respect' "in a democratic society"', are not incompatible with human dignity and do not conflict with the fundamental right of the child to education."

95. The parents' beliefs in this appeal are set out at paras 20-21 above. The judge held, at para 52, that "the parents' convictions in this case are embraced by both article 9 and A2P1." There has been no challenge to that finding nor could there be as they attain the requisite "level of cogency, seriousness, cohesion and importance", they are worthy of respect in a democratic society, are not incompatible with human dignity, and do not conflict with the fundamental right of JR87 to education.

(c) Authorities

96. There is extensive Strasbourg jurisprudence on the application of A2P1 to religious education. It is not necessary to examine all those cases to determine the general principles as the Grand Chamber has set them out in *Folgerø.*

97. The central aspect of this appeal is the parents' right to withdraw JR87 from religious education and collective worship. A right of withdrawal is one factor that the Strasbourg Court takes into account in assessing whether there has been a breach of A2P1. The Grand Chamber of the Strasbourg Court has considered the right of withdrawal in *Folgerø* at paras 96-100 and in *Papageorgiou v Greece* (2019) (Application Nos 4762/18 and 6140/18) 70 EHRR 36 ("*Papageorgiou*") at paras 87-89. I will now examine in some detail *Folgerø* and *Papageorgiou*.

(d) Folgerø

98. The applicants in *Folgerø*, were all members of the Norwegian Humanist Association, and were the parents of children at primary school. In 1997 the school curriculum was changed: Christianity and philosophy were replaced by a single subject called KRL in which Christianity, religion, and philosophy were taught together. Under the previous system, children of parents who were not members of the Church of Norway were entitled, upon the parents' request, to be exempted in whole or in part from lessons on the Christian faith. There was no requirement for the parents to give reasons. However, in relation to KRL it was only possible to request exemption without providing reasons in relation to activities that were clearly religious ("an automatic mandatory exemption on request"): see section 2-4 of the Education Act 1998 read with Circular F-03-98 by the Ministry of Education and Research of 12 January 1998. In relation to activities that were not clearly religious, then the parental note requesting exemption was required to contain reasons setting out what they considered amounted to practice of another religion or adherence to another philosophy of life ("partial exemption"): see section 2-4 of the Education Act 1998 read with Circular F-90-97 by the Ministry of Education and Research of 10 July 1997.

99. An example of an activity that was not clearly religious is dance classes organised as part of Physical Education: see Circular F-03-98 page 4. In relation to dancing a parent would have to give reasons such as dancing with a partner being incompatible with their convictions, while movement to music is acceptable. If a request for partial exemption was made then section 2-4 provided that "the school shall as far as possible seek to find solutions facilitating differentiated teaching within the school curriculum". A detailed outline with examples of how differentiated teaching was to be implemented is found in Circular F-03-98, from which it can be seen that the teacher was to apply, in cooperation with the parents, a flexible approach, having regard to the parents' religious or philosophical affiliation and to the kind of activity at issue. If the partial request for exemption was rejected, the parents had a right of appeal to the State Education Office in the county concerned. The appeal was sent via the school, which then had an opportunity to alter its decision.

100. The applicant parents maintained that the KRL subject was neither objective, nor critical, nor pluralistic. They contended that the partial exemption was not practical and

effective for several reasons, including exercising it was capable of placing an undue burden on them. There was no issue before the Strasbourg Court in relation to the automatic mandatory exemption on request.

101. The Strasbourg Court, at para 84, set out the following major principles as to the general interpretation of A2P1, namely:

> "(a) The two sentences of article 2 of Protocol No 1 must be interpreted not only in the light of each other but also, in particular, of Arts 8, 9 and 10 of the Convention.
>
> (b) It is on to the fundamental right to education that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between state and private teaching. The second sentence of article 2 of Protocol No 1 aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the 'democratic society' as conceived by the Convention. In view of the power of the modern State, it is above all through state teaching that this aim must be realised.
>
> (c) Article 2 of Protocol No 1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire state education programme. That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the 'functions' assumed by the State. The verb 'respect' means more than 'acknowledge' or 'take into account'. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. The term 'conviction', taken on its own, is not synonymous with the words 'opinions' and 'ideas'. It denotes views that attain a certain level of cogency, seriousness, cohesion and importance.
>
> (d) Article 2 of Protocol No 1 constitutes a whole that is dominated by its first sentence. By binding themselves not to 'deny the right to education', the contracting states guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time and the

possibility of drawing, by official recognition of the studies which he has completed, profit from the education received.

(e) It is in the discharge of a natural duty towards their children—parents being primarily responsible for the 'education and teaching' of their children—that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.

(f) Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

(g) However, the setting and planning of the curriculum fall in principle within the competence of the contracting states. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era. In particular, the second sentence of article 2 of Protocol No 1 does not prevent states from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.

(h) The second sentence of article 2 of Protocol No 1 implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded [see *Kjedsen v Denmark* (A/23) (1979–80) 1 EHRR 711 at [53]].

> (i) In order to examine the disputed legislation under article 2 of Protocol No 1, interpreted as above, one must, while avoiding any evaluation of the legislation's expediency, have regard to the material situation that it sought and still seeks to meet. Certainly, abuses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism."

102. It is appropriate at this stage to make several observations in relation to these major principles which are relevant to the appeal before this court.

103. First, in relation to the major principle at (h) above, the judge, at para 60(viii), drew no distinction between: (a) indoctrination; and (b) the State conveying information or knowledge in a manner which was not objective, critical, and pluralistic. The Court of Appeal, at para 66, disagreed. It considered that there was a distinction between the two concepts so that indoctrination was different from conveying information or knowledge in a manner which was not objective, critical, and pluralistic.

104. The decision in *Folgerø* clearly establishes that the judge was correct and that the two concepts are simply different sides of the same coin.

105. In *Folgerø*, at para 71, the Norwegian Government identified the first issue as being:

> "… whether the KRL subject in general involved the imparting of information and knowledge in a manner which objectively might be perceived as indoctrinating, that is, not objective, neutral and pluralistic."

The Norwegian Government did not consider that there was any distinction between the two concepts. The Strasbourg Court in its judgment did not state that the Government's approach was incorrect. Rather, at para 85, it expressed the concepts as alternatives. The Court stated:

> "The question to be determined is whether the respondent State, in fulfilling its functions in respect of education and teaching, had taken care that information or knowledge included in the Curriculum for the KRL subject be conveyed in an objective,

> critical and pluralistic manner *or* whether it had pursued an aim of indoctrination not respecting the applicant parents' religious and philosophical convictions and thereby had transgressed the limit implied by article 2 of Protocol No 1." (Emphasis added).

Thereafter, the Strasbourg Court made a finding, at para 102, that it "[does] not appear that the respondent State took sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner for the purposes of [A2P1]." The Court did not make a separate and distinct finding of indoctrination. It was unnecessary to do so because conveying information and knowledge in a manner which is not objective, critical, and pluralistic manner amounts to indoctrination.

106. Not only does the decision in *Folgerø* clearly establish that the judge was correct but also Mr McGleenan KC, on behalf of the Department, was unable to refer to any Strasbourg authority which established a distinction between the two concepts or identified a dividing line between them. Furthermore, quite apart from any Strasbourg authority, he was unable to articulate any test for distinguishing between the two concepts.

107. Secondly, in relation to the major principle at (h) above, Mr McGleenan, on behalf of the Department, submitted that, even if the State had failed to fulfil the functions assumed by it so that indoctrination had occurred, there would be no breach of A2P1 unless there was a finding that the State was pursuing an *aim* of indoctrination. I reject that submission. In circumstances where indoctrination has occurred, making a breach of A2P1 dependent on a finding that the State had pursued the aim of indoctrination would make the rights of parents and pupils theoretical and illusory, by depriving them of a remedy where they had suffered a wrong: see the Chamber decision in *Öcalan v Turkey* (Application No 46221/99) (2003) 37 EHRR 10 at para 153, the Grand Chamber decision in the same case (2005) 41 EHRR 45 at para 135 and *Artico v Italy* (1980) 3 EHRR 1, at para 33. Furthermore, the submission ignores the positive duty, under the major principle at (i) above, on the competent authorities to inspect schools "to see to it" that indoctrination does not occur and the concomitant duty on the competent authority to take action if on inspection it is found that it is occurring. In circumstances where indoctrination is occurring, the competent authority would also be in breach of its positive duties under major principle (i). Finally, the Strasbourg Court in *Folgerø* found that there was a breach of A2P1 and did so without making a finding that the State was pursuing the "aim" of indoctrination.

108. Thirdly, as I have indicated, the major principle at (i) above places positive duties on the competent authority to inspect and to take action if on inspection it is found that indoctrination is occurring. In this case one of the reasons advanced by JR87's parents for not withdrawing her from religious education and collective worship at the School is that they wished her to receive religious education, provided it did not amount to

indoctrination. If the Department had inspected and had taken positive action to prevent indoctrination, then there would be no substance in this reason advanced by JR87's parents. However, the Department, as the competent authority, has conspicuously failed to comply with its duties to inspect and to take action so there is considerable substance in this reason as one of the factors to be taken into account in determining whether there has been a breach of A2P1.

109. Fourthly, there is another feature of the duty to take the utmost care identified in major principle (i) above. Utmost care requires the Department to provide some assistance to individual schools in relation to the difficult practical questions as to: (a) the alternative arrangements to be made for pupils who are withdrawn from religious education and/or collective worship; and (b) the procedures to be followed by the schools in conjunction with the parents when seeking to identify appropriate alternative arrangements.

110. Returning to the judgment in *Folgerø* and after detailed consideration of the KRL curriculum the Strasbourg Court held, at para 95, that there were not only quantitative but even qualitative differences applied to the teaching of Christianity as compared to that of other religions and philosophies. Thereafter, it addressed the issue as to whether this imbalance could be said to have been brought to a level acceptable under A2P1 by the possibility for pupils to request exemption from the KRL. The Court, between paras 97 and 99, found that there were several difficulties with the exercise of the exemption. It is sufficient, for present purposes, to set out para 98:

> "Secondly, pursuant to Circular F-03-98, save in instances where the exemption request concerned clearly religious activities—where no grounds had to be given, it was a condition for obtaining partial exemption that the parents give reasonable grounds for their request. The Court observes that *information about personal religious and philosophical conviction concerns some of the most intimate aspects of private life*. It agrees with the Supreme Court that imposing an obligation on parents to disclose detailed information to the school authorities about their religions and philosophical convictions may constitute a violation of article 8 of the Convention and, possibly also, of article 9. *In the present instance, it is important to note that there was no obligation as such for parents to disclose their own conviction.* Moreover, Circular F-03-98 drew the school authorities' attention to the need to take duly into account the parents' right to respect for private life. *The Court finds, nonetheless, that inherent in the condition to give reasonable grounds was a risk that the parents might feel compelled to disclose to the school authorities intimate aspects of their own religious and philosophical convictions*. The risk of such compulsion was all

> the more present in view of the difficulties highlighted above for parents in identifying the parts of the teaching that they considered as amounting to the practice of another religion or adherence to another philosophy of life. *In addition, the question whether a request for exemption was reasonable was apparently a potential breeding ground for conflict, a situation that parents might prefer simply to avoid by not expressing a wish for exemption.*" (Emphasis added).

A comment to be made in relation to this paragraph is that the capacity for placing an undue burden on parents by disclosing intimate aspects of their own religious and philosophical convictions was not dependent on whether there was an obligation "as such" on them to do so. It was sufficient if the parents reasonably felt compelled to do so.

111. In light of those difficulties the Court found, at para 100, that:

> " … the system of partial exemption was *capable* of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life and that the potential for conflict was likely to deter them from making such requests. In certain instances, notably with regard to activities of a religious character, the scope of a partial exemption might even be substantially reduced by differentiated teaching. This could hardly be considered consonant with the parents' right to respect for their convictions for the purposes of article 2 of Protocol No 1, as interpreted in the light of Arts 8 and 9 of the Convention. In this respect, it must be remembered that the Convention is designed to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective'." (Emphasis added).

112. The Court, at para 102, found a violation of A2P1. In so far as relevant to this appeal it stated:

> "Against this background … it does not appear that the respondent State took sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner for the purposes of article 2 of Protocol No 1.

> Accordingly, the Court finds that the refusal to grant the applicant parents full exemption from the KRL subject for their children gave rise to a violation of article 2 of Protocol No 1."

(d) Papageorgiou

113. There were two joined applications to the Strasbourg Court. In the first application the first two applicants were parents of the third applicant, a student who attended the General High School on the small island of Milos. In the second application the first applicant was the mother of the second applicant, a student attending the only primary school on the small island of Sifnos. The focus of the compulsory religious education in both schools was on the Christian Orthodox faith. Parents could seek exemption from religious education courses by submitting a "solemn declaration" in writing to the school Principal stating that "the student is not an Orthodox Christian and therefore relies on grounds of religious conscience". The submission of a false solemn declaration was a criminal offence. The applicant parents never submitted an application for exemption from the religious education course. Their case was that the exemption procedure was incompatible with their Convention rights as it was capable of placing an undue burden on them. The Court considered that the exemption procedure was capable of placing an undue burden on parents. It stated, at para 87, that:

> "… the current system of exemption of children from the religious education course is capable of placing an undue burden on parents with a risk of exposure of sensitive aspects of their private life and that the potential for conflict is likely to deter them from making such a request, especially if they live in a small and religiously compact society, as is the case with the islands of Sifnos and Milos, where the risk of stigmatisation is much higher than in big cities. The applicant parents asserted that they were actually deterred from making such a request not only for fear of revealing that they were not Orthodox Christians in an environment in which the great majority of the population owe allegiance to one particular religion, but also because, as they pointed out, there was no other course offered to exempted students and they were made to lose school hours just for their declared beliefs."

114. The Court, at para 90, found that there was a breach of the rights of all the applicants, both parents and students, under the second sentence of A2P1, as interpreted in the light of article 9 ECHR. The Court explained, at para 39, that the second sentence of A2P1:

> "… should be read in the light not only of the first sentence of the same article, but also, in particular, of article 9 of the Convention, which guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion, and which imposes on Contracting States a 'duty of neutrality and impartiality'. When read as it should be in the light of article 9 of the Convention and the second sentence of article 2 of Protocol No 1, the first sentence of that provision guarantees schoolchildren the right to education in a form which respects their right to believe or not to believe."

On this basis the Court found that there was a breach of the rights of all the applicants, both parents and students. The Court awarded jointly to the parents and to the student in the first application the sum of €8,000 and jointly to the mother and the student in the second the sum of €8,000.

6. Application of the legal principles to the facts of this case

115. In respect of grant-aided schools the Department has assumed the function of specifying a core syllabus for religious education and has enacted requirements for collective worship ("the assumed functions"). In fulfilling the assumed functions, the Department must take care that information or knowledge included in the core syllabus is conveyed in an objective, critical, and pluralistic manner. Teaching at the School in accordance with the core syllabus did not convey information or knowledge in an objective, critical, and pluralistic manner, and amounted to indoctrination. The Department breached the obligation to take care. The breach affected not only the teaching of religious education but also the conduct of collective worship which is based on the core syllabus.

116. A factor to be taken into account in determining whether there is a breach of A2P1 is whether there is a right to withdraw JR87 from religious education and collective worship without placing an undue burden on her parents. If the right of withdrawal is *capable* of placing an undue burden on them, then their rights and the rights of JR87 under A2P1 read with article 9 ECHR would be theoretical and illusory rather than practical and effective.

117. The judge considered and rejected the argument that the parents' statutory right, which the judge described as an unfettered right, to withdraw JR87 from religious education and collective worship was sufficient to prevent a breach of A2P1 read with article 9 ECHR. In arriving at that conclusion the judge set out, at para 107, the concerns of the parents if they exercised the statutory right. I have summarised those concerns at paras 40-46 above. The judge considered, at para 122, that:

> "… *the concerns raised by the parents in relation to exclusion are valid*. Whilst an unfettered right to exclusion is available it is not a sufficient answer to the lack of pluralism identified by the court. It runs the risk of placing undue burdens on parents. There is a danger that parents will be deterred from seeking exclusion for a child. Importantly, it also runs the risk of stigmatisation of their children." (Emphasis added).

The judge, relying on the judgment of Warby J in *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 (Admin); [2016] PTSR 405 at para 79, added a further reason as being that "the need to withdraw [JR87] would be a manifestation of the lack of pluralism in question."

118. The finding that *the concerns raised by the parents in relation to exclusion are valid* was a factual finding made by the judge. There was ample evidence to support it. For instance in relation to the parents' concerns as to the risk of stigmatisation of JR87:
(a) there was the parents' evidence; (b) there was no evidence from the School that JR87 would not be stigmatised; (c) the evidence of stigmatisation is consistent with peer pressure and classroom norms to which children are inevitably exposed and to which they are sensitive; (d) JR87 would have been the only child withdrawn from religious education and collective worship; (e) the evidence that the two previous withdrawals at the School had been short lived: see para 34 above; and (f) this was a small school environment. I consider that there was not only ample evidence to support the judge's factual finding as to the risk of stigmatisation of JR87, but it was also the only available finding open to him on the evidence.

119. Another instance is that there was ample evidence to support the factual finding of a risk of placing undue burdens on the parents. In practice it was reasonable for the parents to have felt compelled to disclose to the School their non-religious and philosophical convictions even though there was no obligation "as such" to do so. Furthermore, in practice the discussions and negotiations to be entered into with the School "prior" to withdrawal of JR87 would have led to a real risk that the parents would feel compelled to disclose their convictions to the School.

120. A yet further instance is that there was ample evidence to support the factual finding of a danger of being deterred from seeking withdrawal. The risk of stigmatisation of JR87 alone would give rise to that risk.

121. The judge concluded that the right to withdraw JR87 was insufficient to prevent a breach of A2P1 read with article 9 ECHR. The Court of Appeal disagreed. However, I consider that in applying the legal principles to the facts of this case the Court of Appeal fell into several errors.

122. First, the Court of Appeal fell into error by drawing a distinction between conveying knowledge in a manner which was not objective, critical, and pluralistic on the one hand and indoctrination on the other: see paras 104-106 above. The two concepts are merely different sides of the same coin.

123. Secondly, the Court of Appeal fell into error in making a breach of A2P1 dependent on a finding that the Department had pursued the aim of indoctrination. The Court of Appeal held, at para 69, that to establish that there has been a breach of A2P1 it must be shown that the State has crossed the line of pursuing the forbidden aim of "indoctrination that might be considered as not respecting parents' religious or philosophical convictions." Conveying knowledge in a manner which is not objective, critical, and pluralistic on the one hand and indoctrination on the other are, as I have just said, different sides of the same coin. Conveying knowledge in that manner amounts to pursuing the aim of indoctrination. The Strasbourg Court does not make a separate and distinct finding that the State was pursuing the aim of indoctrination before it finds a breach of A2P1: see paras 107 and 112 above.

124. Thirdly, the Court of Appeal fell into error by failing to recognise that established principles of Convention law apply to both automatic and partial exemptions and therefore fell into error in relation to the application of the *Ullah* principle (*R(Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323). The Court of Appeal stated: (a) that the exemption cases before the Strasbourg Court "concerned only partial rights of withdrawal" (see para 84); (b) that "an overview of the European caselaw shows that only qualified exemptions have been found to be in breach of the Convention" (see para 98); and (c) applying the *Ullah* principle, that the domestic courts should not go further than the Strasbourg Court by finding a breach of A2P1 where there is an automatic exemption (see para 108).

125. I disagree with the Court of Appeal that the exemption cases before the Strasbourg Court "concerned only partial rights of withdrawal." In *Folgerø* the exemptions were both an automatic mandatory exemption on request in relation to activities of a clearly religious nature and a partial exemption in relation to other matters. I agree with the Court of Appeal that there is no Strasbourg authority which has found that an automatic exemption was insufficient to bring an imbalance to an acceptable level under A2P1. However, that was because there has been no Strasbourg case, including *Folgerø*, in which the issue was raised. The issue in *Folgerø* was whether the partial exemption was sufficient to bring the imbalance to a level acceptable under A2P1. In determining that issue, the Strasbourg Court applied the core principle that the right of exemption must not be *capable* of placing an undue burden on parents. If the exemption is capable of placing an undue burden on parents, then the rights under A2P1 would be theoretical and illusory rather than practical and effective. Mr McGleenan, on behalf of the Department, accepted, in my view correctly, that the established principle of Convention law as to the practicality and effectiveness of Convention rights must apply to automatic as well as to partial

exemptions. There is no reason why all the established principles of Convention law in relation to partial exemptions should not also apply to automatic exemptions.

126. The Court of Appeal's error in failing to recognise that the same principles apply to automatic and partial exemptions caused the Court of Appeal to fall into error in relation to the application of the *Ullah* principle. As Lord Reed stated *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] AC 487, at para 59, "it is not the function of our domestic courts to establish new principles of Convention law." However, this case does not involve our domestic courts establishing any new principles of Convention law. Mr McGleenan, on behalf of the Department, was unable to identify any new principle as opposed to the application of established principles of Convention law as to the exemption being capable of placing an undue burden on the parents. This appeal does not establish any new principles of Convention law. The *Ullah* principle is not infringed.

127. Fourthly, the Court of Appeal fell into error by incorrectly imposing, at para 93, a requirement on the parents of JR87 to establish that their apprehensions were "objectively made out" so that, at para 101, they "would have been realised in practice." In considering whether there is *capacity* for an undue burden *reasonable* apprehensions on the part of parents are sufficient. Such apprehensions can include the risks of: (a) stigmatisation of them and/or their child; (b) conflict with the school authorities; and (c) exposure of sensitive areas of their private lives, even in circumstances where there is no requirement "as such" to disclose their religious or philosophical views. The Court of Appeal incorrectly imposed a higher and different standard to the parents' apprehensions requiring those apprehensions to be objectively justified so that they would have been realised in practice.

128. Fifthly, the Court of Appeal fell into error in departing from the factual finding made by the judge. The judge made a factual finding that "the concerns raised by the parents in relation to exclusion are valid." It is only in exceptional circumstances that an appellate court should reverse a finding by a trial judge on a question of fact. The Court of Appeal was not justified in departing from the judge's factual findings by holding, at para 100, that it was not satisfied "that the filing of an exemption" would "result in stigmatisation."

129. In conclusion, the judge decided that the right to withdraw JR87 from religious education and collective worship was insufficient to prevent a breach of A2P1 read with article 9 ECHR. The Court of Appeal disagreed and allowed the appeal. In arriving at that conclusion, the Court of Appeal fell into several errors. It was bound by the judge's factual finding that "the concerns raised by the parents in relation to exclusion are valid." The Court of Appeal ought to have found that exercising the right to withdraw JR87 was capable of placing an undue burden on the parents so that there was a breach of A2P1 read with article 9 ECHR. I would allow G's appeal and, subject only to the Department's cross appeal, I would also allow JR87's appeal.

130. For the purposes of this appeal and absent full argument on these points it is not necessary to decide whether: (a) the Department was also in breach of A2P1 by failing to monitor, inspect and report on the standard of religious education being provided in schools (see paras 28-30 and 108 above); (b) regulation 21(5) of the 1973 Regulations breaches article 9 ECHR by requiring the Board to reveal pupils' beliefs concerning spiritual matters to the relevant minister on request (see para 72 above); (c) the safeguards in relation to the qualification to the right of access to pupils under article 21(7) of the 1986 Order that "the parents do not object" is sufficient to protect the rights of parents and their children (see para 68 above).

7. The Department's cross-appeal

131. The Department submits that the judge erred in failing to separately analyse and determine the claims made by both JR87 and G.

132. The judge granted a declaration that the teaching of religious education under the core syllabus and the arrangements for collective worship in the School breached not only G's rights but also the rights of JR87. As the Court of Appeal allowed the appeal on other grounds it was unnecessary for it to determine whether the judge was correct to consider the claims of JR87 and G together. However, the Court of Appeal, at para 109, stated that it did not consider that the trial judge erred by considering the applicants' claims together.

133. The second sentence of A2P1 places an obligation on the State to "respect the right of parents." Mr McGleenan, on behalf of the Department submitted that the claim of JR87 ought to have been dismissed as "the right in the second sentence of A2P1 relates only to parents' rights as is evident from the text of the article and the relevant jurisprudence."

134. This issue was addressed in *Papageorgiou* (see para 114 above) and in *Lautsi* at para 78. It was addressed in most detail in *Perovy v Russia* (Application No 47429/09) [2021] ELR 298 ("*Perovy*").

135. In *Perovy* the first two applicants were the parents of the third applicant, their son, who was a seven-year-old first year pupil at the time of the relevant events. All three applicants alleged a violation of their right under article 9 ECHR to freedom of religion. The first and second applicants also complained that their right under A2P1 to ensure their son's education in conformity with their own religious convictions had not been respected. The Court observed that whilst the third applicant had made a complaint under article 9 ECHR in his own name, he had made no complaint under the first sentence of A2P1. The Court stated that:

> "49. … The Court has previously accepted complaints under [the first sentence of A2P1], without reservations *ratione personae*, from persons who experienced an alleged violation of article 9 of the Convention before reaching the age of majority, thus acknowledging the position of children as holders of the right to freedom of religion.
>
> 50. In this connection it must be highlighted that the first sentence of article 2 of Protocol No 1, read in the light of the second sentence of that provision and article 9 of the Convention, guarantees schoolchildren the right to education in a form which respects their right to believe or not to believe ..."

136. The Court continued by stating that as the third applicant had made no complaint under the first sentence of A2P1 it would:

> "examine the third applicant's complaint under article 9 of the Convention. However, any such examination will be guided by the findings in respect of the first and second applicants' complaints under the second sentence of article 2 of Protocol No 1."

137. I consider that the jurisprudence is clear: (a) both parents and children are holders of the right to freedom of religion under article 9 ECHR; (b) the rights guaranteed by A2P1 when read with article 9 ECHR are not limited to parental rights; (c) the first sentence of A2P1 must be read in the light of the second sentence of that provision and article 9 ECHR; (d) when read in that way, the first sentence of A2P1 guarantees schoolchildren the right to education in a form which respects their right to believe or not to believe (the child in *Perovy* did not need to restrict his complaint to article 9 ECHR);
(e) the rights of parents and schoolchildren under A2P1 read with article 9 ECHR must be separately analysed; and (f) ordinarily the outcome in respect of a complaint by a schoolchild under the first sentence of A2P1 will be guided by the findings in respect of the parents' complaints under the second sentence of A2P1.

138. In relation to JR87's rights, the judge was correct to be guided by the finding of a breach of G's rights under the second sentence of A2P1 and was correct to find a breach of A2P1 read with article 9 ECHR in relation to both JR87 and G.

139. I would dismiss the Department's cross-appeal.

8. Conclusion

140. I would allow JR87's and G's appeal. I would dismiss the Department's cross appeal. I would reinstate the declaration made by the judge.