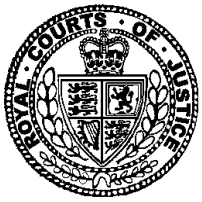

Neutral Citation Number: [2025] EWHC 306 (Admin)

Case No: AC-2022-LON-002669

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2025

Before :

MR JUSTICE LAVENDER

- -

Between :

REX
on the application of
CWJ **Claimant**

- and -

(1) DIRECTOR OF LEGAL AID CASEWORK
(2) LORD CHANCELLOR **Defendants**

- and -

MIND **Intervener**

- -
- -

Stephanie Harrison KC and **Ollie Persey** (instructed by **Coram Children's Legal Centre**) for the **Claimant**
Malcolm Birdling and **Joshua Pemberton** (instructed by the **Government Legal Department**) for the **First Defendant**
Shane Sibbel (instructed by the **Government Legal Department**) for the **Second Defendant**
Grace Brown and **Nadia O'Mara** (instructed by **MIND**) for the **Intervener**

Hearing dates: 21 and 22 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 10:30am on Friday 14 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Lavender:

(1) Introduction

1. The Claimant applies for judicial review of the decision of the First Defendant ("the Director") of 28 June 2022 not to make an "exceptional case determination" (as defined in sub-paragraph 10(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO")) in relation to proceedings before a review panel ("the review panel") in respect of the exclusion of her son ("XWJ") from his school ("the school").

2. The Claimant also applies for permission to amend her claim form and statement of grounds and, if permission to amend is granted, applies for judicial review of paragraph 8.2 of the Lord Chancellor's Exceptional Case Funding Guidance (Non-Inquests) ("the 2023 ECF Guidance"), which was issued by the Second Defendant, the Lord Chancellor, in July 2023.

3. The question whether, and, if so, in what circumstances, exceptional case funding is available for representation before review panels in cases of permanent exclusion is a potentially significant one, given the issues to which I will refer and the wider context, which includes the following factors:

   (1) The number of permanent exclusions. For instance, 7,894 pupils were permanently excluded in 2018-19 and 6,495 in 2021-22.

   (2) The evidence that a significantly larger proportion of children with certain characteristics (including children with special educational needs, children of certain ethnicities (including Black Caribbean ethnicity) and children in receipt of free school meals) are subject to permanent exclusion than children without those characteristics.

   (3) The significant adverse effects of permanent exclusion, which were acknowledged by Lord Bingham in paragraph 21 of his speech in *A v Headteacher and Governors of Lord Grey School* [2006] 2 A.C. 363 ("*Lord Grey School*") and which were set out extensively in the evidence relied on by the Claimant and by the Intervener, MIND, in the present case.

(2) Background

4. XWJ is of Black Caribbean heritage, he has special educational needs and disabilities, including poor mental health and dyslexia, and he was in receipt of free school meals.

(2)(a) The Permanent Exclusion and the Challenges to it

(2)(a)(i) The Exclusion Decision

5. By a letter dated 13 May 2021 ("the exclusion letter") the head teacher of the school gave notice of her decision ("the exclusion decision") to exclude XWJ permanently from the school because of what were alleged to be two separate acts of physical violence towards members of the school community on 6 May

2021. The exclusion letter also referred to XWJ's disciplinary record, which included three fixed term exclusions from the school, most recently in March 2021. XWJ's permanent exclusion took place shortly before he was due to sit his GSCE exams. Arrangements were made for him to sit his exams at a different institution.

(2)(a)(ii) The GDC Decision

6. On 8 June 2021 a governors' disciplinary committee ("the GDC") held a hearing to review the exclusion decision. The Claimant and XWJ attended the hearing, accompanied by a friend of the Claimant, LKM, who is a local authority planning lawyer. The Claimant and LKM addressed the GDC. In a letter dated 8 June 2021 ("the GDC letter") the GDC announced its decision ("the GDC decision") to uphold XWJ's permanent exclusion.

7. Minutes of the GDC's meeting ("the GDC minutes") were subsequently produced, although their accuracy was disputed. The GDC minutes contained summaries of the family's case and of the family's summing up, in which no reference was made to any Convention right. Paragraph 10.10 of the GDC minutes stated as follows:

> "It was further agreed that the requirements of the Equality Act had been considered and [*XWJ*] had not been treated any less favourably because of his SEN needs."

(2)(a)(iii) The Review Panel Proceedings

8. On 15 July 2021 the Claimant requested that the GDC decision be reviewed by a review panel.

9. I was told that LKM filed submissions dated 20 September 2021 on behalf of the Claimant with the review panel, although I note that these submissions were not referred to in the Claimant's witness statements, statement of facts and grounds or skeleton argument. In these submissions:

   (1) It was alleged that the GDC's decision was unlawful on a number of grounds, including discrimination. In particular, it was alleged that the GDC had, by the GDC letter, agreed that the decision to permanently exclude XWJ amounted to direct discrimination, indirect discrimination and victimisation.

   (2) It was also alleged that it was unlawful for the GDC to uphold the exclusion decision without considering Article 8 ECHR.

10. On 18 November 2021 Sabrina Simpson of the charity Just for Kids Law (since replaced by Coram Children's Legal Centre) filed a further submission on behalf of the Claimant, setting out why the Claimant contended that the governing body's decision was unlawful. This submission did so under three headings: "Failure to consider relevant information"; "Unreasonableness and Failures to follow the statutory guidance"; and "Failure to conduct a fair

hearing". The submission, which was 10 pages long, did not expressly refer to any Convention right, although it did refer to the public sector equality duty.

11. The hearing before the review panel took place over two days, the first of which was 25 January 2022. The Claimant and XWJ attended the first day of the hearing, together with counsel (Mr Persey), Ms Simpson and LKM. The Claimant and XWJ were asked questions by the school's representative. This resulted in their becoming distressed and leaving the hearing, a matter which was addressed by Ms Simpson in a letter dated 28 January 2022.

12. The second day of the hearing before the review panel was on 11 March 2022. The Claimant and XWJ did not attend, but they were represented by Mr Persey and Ms Simpson, with LKM also attending. The review panel issued its decision on 23 March 2022. The review panel decided not to quash the GDC decision, but recommended that the governing body reconsider its decision.

13. The review panel's decision is 14 pages long. Amongst other things, it summarises the Claimant's case and the closing submissions made on behalf of the Claimant. The decision records that it was submitted on behalf of the Claimant that the school had acted in breach of the public sector equality duty, a submission which the review panel described as "at the heart of the [*Claimant's*] case". However, the decision does not record any submission that XWJ's exclusion was an act of direct or indirect discrimination or victimisation or was a violation of Article 8 or of Article 2 of Protocol 1 to the ECHR.

(2)(a)(iv) The Application for Judicial Review

14. The Claimant applied for judicial review of the review panel's decision. The GDC met on 11 July 2022 and decided to uphold XWJ's permanent exclusion ("the GDC reconsideration decision"). The Claimant applied for judicial review of the GDC reconsideration decision, apparently as part of the same application as that concerning the review panel's decision.

15. On 11 July 2023 the Claimant's application for judicial review was dismissed by UTJ Church, sitting as a deputy High Court judge: *R (TZA) v A Secondary School* [2023] EWHC 1722 (Admin). UTJ Church summarised the Claimant's case as follows in paragraphs 12 to 14 of his judgment:

> "12. The thrust of the Claimant's case is that the Exclusion Decision was unlawful because the School failed to produce a written document which demonstrated that the Headteacher had had "due regard" to the PSED when deciding to exclude TZB permanently, and the Reconsideration Decision was itself unlawful because the only lawful option open to the GDC (given the unlawfulness of the Exclusion Decision) was to reinstate TZB. I will refer to these arguments on unlawfulness in relation to the PSED as "Ground 1".
>
> 13. The Claimant also challenges the Reconsideration Decision on the basis that it is inadequately reasoned ("Ground 2").

> 14. It was explained that TZB had no wish to return to the School to continue his education, but that his permanent exclusion was nonetheless prejudicial to him as it remained on his record and it affected the way he felt about himself."

16. In summary, UTJ Church decided that:

    (1) The public sector equality duty did not require the head teacher to produce a contemporary document demonstrating her compliance with that duty when making the expulsion decision.

    (2) The GDC was entitled to find in the GDC decision that the head teacher had complied with the public sector equality duty when making the expulsion decision. In particular, the GDC was not obliged to make further enquiries before making its decision.

    (3) The GDC gave adequate reasons for the GDC reconsideration decision.

    (4) The GDC had not misunderstood the public sector equality duty when making either decision.

17. I am told that permission has been granted to the Claimant to appeal to the Court of Appeal against UTC Church's decision.

(2)(b) The Application for Exceptional Case Funding

(2)(b)(i) The ECF Application

18. On Friday 21 January 2022 Just for Kids Law submitted an urgent application ("the ECF application") to the Director for exceptional case funding for representation at the review panel hearing which was listed for Tuesday 25 January 2022. The application stated, inter alia, that:

    (1) XWJ had suffered racial abuse as part of the incident in March 2021 when he was excluded for a fixed term.

    (2) The permanent exclusion had had a severe impact on XWJ and, in particular, a serious detrimental effect on his ability to sit his GCSEs.

    (3) XWJ had a history of mental health difficulties and adverse childhood experiences.

    (4) As a black pupil, XWJ was at disproportionate risk of permanent exclusion.

    (5) XWJ was the only student of Black Caribbean heritage involved in the incident and the only one who was permanently excluded.

19. The ECF application identified three public law grounds of challenge to the GDC decision. Reflecting the 18 November 2021 submission, these were: a failure to take into account relevant considerations; unreasonableness and

failure to follow the relevant statutory guidance; and a failure to conduct a fair hearing.

20. In relation to the availability of exceptional case funding in cases before a review panel, the ECF application stated as follows:

> "The Lord Chancellor's guidance suggests that Article 6 is not engaged in an IRP hearing, as a permanent exclusion is not determinative of a civil right. This relies on the case of *R (on the application of LG) v The Independent Panel for Tom Hood School* [2010] EWCA Civ 142. *Tom Hood* was handed down in February 2010 and relied upon *Simpson v UK*. However, in March 2010 the Grand Chamber of the European Court of Human of Rights decided *Orsus v Croatia*, which represented a sea change in the approach to Article 6 in the education context. It overturned *Simpson v UK* and held that Article 6 applied to an education dispute. As such, it would be an error of law to reject this application on the basis that Article 6 is not engaged.
>
> In any event, as with immigration ECF, our client could rely on the procedural aspect of Article 8 to the same effect."

21. The guidance referred to in this paragraph was the predecessor to the 2023 ECF Guidance, i.e. the Lord Chancellor's Exceptional Case Funding Guidance (Non-Inquests), published in January 2021 ("the 2021 ECF Guidance").

22. Although they may not have been enclosed with the ECF application, the following documents were provided to the Director: the exclusion letter, the GDC letter and the GDC minutes.

(2)(b)(ii) The Refusal of the ECF Application

23. On 25 February 2022 the Director refused the ECF application on two grounds:

(1) The Director decided that the merits criterion (set out in regulation 43 of the Civil Legal Aid (Merits Criteria) Regulations 2013) was not met.

(2) The Director also considered that exceptional case funding was unavailable, on the basis that the appeal to the review panel did not involve a determination of civil rights and obligations.

24. The Director said in the refusal letter that the Claimant had been assessed as financially eligible for legal aid without a contribution. In other words, it was accepted that the means criterion (set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013) was met.

25. In her refusal letter, the Director responded as follows to what had been said in the ECF application about the availability of exceptional case funding:

> "However, in the *Tom Hood* case, *Simpson v UK* was one [*sc.* of] the number of cases considered. The decision as to whether Article 6 was engaged was based on the three criteria set out in the case of *Engel v the Netherlands* (1976) 1 EHRR 647 and it is noted that Article 6 does not

> apply to regulatory and disciplinary matters that do not give rise to a criminal charge. In this present instance, the further appeal does not determine a criminal charge against her son. In *Tom Hood*, it was noted that the appeal is a disciplinary case which is decided on the balance of probabilities and the permanent exclusion form a particular school was insufficiently severe to render the charge against the child criminal. It did not infringe the child's right to a fair hearing before the decision-maker under art 6 of the European Convention on Human Rights and Fundamental Freedoms, since he had no arguable right under domestic law to continue to be educated at the school without good reason, and thus had no "civil right" to do so.
>
> The above applies in the present instance and as such this matter therefore does not involve a determination of civil rights and obligations."

(2)(b)(iii) Review Request

26. On Wednesday 9 March 2022 the Claimant requested a review of this decision. The review request was made only two days before the second day of the hearing before the review panel, which was on Friday 11 March 2022.

27. In relation to the merits, the review request identified "two key points that arose in the hearing that demonstrate that the claim has strong merits", namely:

    (1) concern allegedly expressed by the review panel about the wording of the exclusion letter; and

    (2) the alleged absence of any cogent evidence that the school had complied with the public sector equality duty, as to which it was said that a failure to comply with the public sector equality duty rendered an exclusion unlawful.

28. In relation to the availability of exceptional case funding, the review request stated as follows:

> "In *Orsus*, the educational dispute concerned discriminatory treatment of Roma children in schools by placing them in separate classes. This case concerns the permanent exclusion of a Black student, a group that is disproportionately permanently excluded. This results in Black students being disproportionately placed in Pupil Referral Units (PRUs) and receiving a poorer quality education with worse educational outcomes. Moreover, this case concerns a pupil with Special Educational Needs ("SEN") another group who are disproportionately excluded; research has found that 59% of permanent exclusions are given to those with SEN. The factual matrix is therefore on all fours with *Orsus*.
>
> You have not addressed our alternative argument that the procedural aspects of another ECHR right, such as Article 8 or Article 2 of Protocol 1, is engaged. The procedural aspect of Article 8 is why ECF is granted

> in the immigration context when Article 6 is not held to be engaged. It cannot be right that there are not procedural protections under the ECHR."

(2)(b)(iv) The First Review Decision

29. On 25 April 2022 the Director upheld her decision to refuse exceptional case funding, stating that:

> "A grant of Exceptional Case Funding is not made in this matter and the previous determination is upheld. It is not clear that there would have been a breach (or risk of a breach) in the applicant's Article 6 convention rights and the withholding of legal aid would have meant that the applicant is unable to present her case effectively and without obvious unfairness. The reason for this decision is as follows: (1) The issues at stake are not sufficiently serious when considered objectively – this case relates to historic issues only as [XWJ] has now moved to another school; (2) This case is not factually, procedurally or legally complex and turns on issues of fact that lie within the applicant's own knowledge; (3) The personal circumstances are not such that she is incapable of reasonably presenting her own case.

(2)(b)(v) The Pre-Action Protocol Letter

30. On 6 May 2022 Ms Simpson sent a letter before action pursuant to the pre-action protocol, in which, insofar as it concerned the availability of exceptional case funding, repeated reliance was placed on *Oršuš v Croatia* (2011) 52 E.H.R.R. 7. Enclosed with the letter before action was a copy of the review panel's decision.

31. The letter before action gave an account of the factual background. It referred to (but did not enclose) the submission dated 18 November 2021, but said nothing about the submission dated 20 September 2021. In relation to the submission dated 18 November 2021, it said (in paragraph 20) that:

> "On 18 November 2021, the Claimant filed submissions to the Defendant setting out why they considered the GDC decision was unlawful. Various arguments were raised, including the decision was unlawful and discriminatory as it breached section 149 Equality Act 2010 (the Public Sector Equality Duty)."

32. Paragraph 28 of the letter before action stated as follows:

> "The reconsideration hearing is stayed while the Claimant pursues a judicial review regarding the IRP's misapplication of the Public Sector Equality Duty, and its failure to quash the governing body's decision and direct reconsideration."

33. Paragraphs 32 and 33 of the letter before action stated as follows:

> "32. The Defendant also failed to address the Claimant's representations in their ECF application that even if Article 6 was not engaged, the IRP process engaged the procedural aspects of other ECHR rights including Articles 8 and 14 and Article 2 of Protocol 1, and legal aid should be granted on that basis: see [*Gudanaviciene*], at para 65.
>
> 33. The IRP hearing raised important issues regarding [XWJ's] school record, the impact of having a permanent exclusion on his mental health and whether there has been discriminatory treatment on the grounds of race and disability. These issues go to the heart of ECHR rights identified above, and therefore engage the procedural protections that they contain."

(2)(b)(vi) The Second Review Decision

34. The Director replied on 20 May 2022, stating that a fresh review of the decision would be conducted. This led to the decision of 28 June 2022 ("the second review decision") which is the subject of the application for judicial review.

35. In the second review decision:

(1) The Director did not contend that the merits criterion was not met.

(2) The Director noted that the factual circumstances were summarised in the letter before action and, in particular, recited the contents of paragraph 28 of that letter concerning the Claimant's judicial review of the review panel's decision concerning the application of the public sector equality duty.

(3) The Director said as follows in relation to the 2021 ECF Guidance:

> "I have also had regard to [the 2021 ECF Guidance]. I am particularly mindful that the guidance sets out some of the factors that caseworkers should consider in deciding exceptional funding applications, but that it is not intended to be an exhaustive account of those factors. I remind myself that the guidance is not intended to replace the need for consideration of representations in individual cases and any applicable case law. Each application is considered on a case-by-case basis."

(4) The Director noted that:

> "The only issue that arises in this application is whether the case involves the determination of civil rights or obligations. …"

(5) The Director also stated that:

> "The starting point is that the right to education in Article 2 Protocol 1 ECHR is not a guarantee of a right to be educated at or by a particular educational institution. …"

(6) The Director noted the Claimant's submissions in relation to *R (V) v Independent Appeal Panel for Tom Hood School* [2009] EWHC 369 (Admin); and [2010] EWCA Civ 142 ("*Tom Hood School*") and *Oršuš v Croatia* (including the submission that paragraph 54 of the 2021 ECF Guidance was incorrect), cited paragraphs 104 to 107 of the judgement in *Oršuš v Croatia*, summarised what the court said in *Tom Hood School* and said:

> "In my view and considering the above authorities properly it is correct that the decision of *Orsus v Croatia* can be distinguished on the basis that the educational dispute to which Article 6 was held to apply in that case was not about exclusion from school but about discriminatory treatment of Roma children in schools by placing them in separate classes. The court took into account that that breached a freestanding right of the applicants under the state's constitution not to be discriminated against (paragraph 107). The court also appeared to find at paragraphs 145 and 146 that the relevant practice was of direct relevance to the enjoyment of the right under Article 2 Protocol 1 ECHR, in terms of the right to benefit and receive recognition in respect of the education received.
>
> In respect of exclusion cases, *Tom Hood* remains a binding statement of the law of England and Wales in respect of the Convention right derived from Article 6 ECHR. The significance of the court's reliance in *Tom Hood* to the case of *Simpson v UK* (1989) 64 DR 188 is in any event overstated; Wilson LJ states at paragraph 17 when referring to *Simpson "I also agree that a decision of the Commission upon the existence or otherwise of "civil rights" within article 6, reached over 20 years ago, must be treated with considerable caution in the light of more recent widening in the interpretation of the phrase."*

(7) In relation to Article 8, the Director quoted what was said in the review request and the renewal letter about Article 8 and said:

> "I am unable to discern how Article 8 engages with the current factual dynamic as you have not developed your argument beyond the unsupported assertion as to equivalence with immigration cases above. Of course, no finding of a procedural obligation under Article 8 was made in *Tom Hood*."

(8) The Director concluded as follows:

> "In the circumstances I have determined that it is not necessary to make the services available to your client under section 10(3)(a) of the Act.
>
> I am also obliged to consider under section 10(3)(b) LASPO whether legal aid should be provided because of the risk of breach of your client's Convention rights. In that respect, it is noteworthy that the decision in *Tom Hood* has never been disapproved or challenged in the domestic courts in a period of over 12 years."

(2)(c) The Proceedings

36. The claim form was issued on 28 September 2022. The Claimant sought permission to apply for judicial review on two grounds, the first of which was that:

> "the Defendant erred in law and misapplied section 10 LASPO in finding that there was not a risk of an ECHR breach if ECF was not granted."

37. In relation to this ground, the Claimant submitted in her statement of facts and grounds that both Article 6 and Article 8 were engaged in the review panel proceedings and said as follows about those proceedings:

> "The Claimant's submissions at the IRP hearing focused in large part on the Headteacher's (lack of) compliance with the PSED in permanently excluding [*XWJ*], who is Black and disabled. The hearing therefore concerned [*XWJ's*] right not to be discriminated against in the sphere of education. …"

38. On 9 March 2023 Andrew Baker J refused permission to apply for judicial review. At a hearing on 21 November 2023 Morris J: granted permission to apply for judicial review of the second review decision on the first ground; refused permission to apply for judicial review of the 2021 ECF Guidance; and made the following orders in relation to a proposed challenge to the 2023 ECF Guidance and the proposed amendment of the claim form and statement of facts and grounds:

> "8. The Claimant shall (if advised) by 4pm on 8 December 2023 file and serve an amended claim form and statement of facts and grounds so as to:
>
> a) plead any challenge to the Revised Guidance (in paragraph 8.2 of the Annex to the Lord Chancellor's ECF Guidance as now in force since July 2023);

b) make any further consequential amendments to the claim form and statement of facts and grounds related to the Revised Guidance; and

c) add the Interested Party as a Defendant for that purpose.

9. Insofar as the Claimant seeks to amend in accordance with §8(a) of this Order and to join the Interested Party as a Defendant in accordance with §8(c) of this Order, no application shall be necessary and permission will be granted by operation of this Order unless the Interested Party raises any grounds of objection in his Detailed Grounds of Defence. In the event that objection is taken, the question of permission for that amendment shall be determined on a "rolled up" basis at the substantive hearing of this application, and the Interested Party shall be added as a Defendant for that purpose.

10. Insofar as the Claimant seeks to amend its Claim Form and/or Statement of Facts and Grounds in accordance with §8(b) to rely on additional grounds, this shall be treated as an application for permission in accordance with CPR 54.15. If that application is not consented to by the Defendant and/or Interested Party, that application be determined on a "rolled up" basis at the substantive hearing of the claim for judicial review."

39. The Claimant filed and served an amended claim form and statement of facts and grounds. These include, as envisaged in Morris J's order, an amendment to add a challenge to the 2023 ECF Guidance and also amendments which seek to expand the challenge to the second review decision by alleging that Article 2 of Protocol 1 alone and/or read with Article 14 was engaged in the review panel proceedings.

40. These amendments are opposed. I will deal later with the proposed challenge to the 2023 ECF Guidance. Although they were outside the scope of Morris J's order, I grant permission for the amendments invoking Article 2 of Protocol 1 and Article 14, since they were the articles at issue in *Oršuš v Croatia*, which has been central to the ECF application throughout, and do not raise new factual matters, but seek to place a different legal characterisation on the review panel proceedings and the ECF application.

41. On 16 May 2024 I granted permission to MIND to intervene by way of written submissions only. MIND supported the Claimant's submissions and provided much background information which evidenced, in particular, the wider context to which I have already referred.

(3) The Law

(3)(a) Permanent Exclusion

42. The school is an Academy for the purposes of The School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 ("the 2012

Regulations"). The head teacher, referred to as the principal, had power to exclude a pupil permanently pursuant to section 51A(1) of the Education Act 2002, read with regulation 21 of the 2012 Regulations. (It is relevant to note that section 51A was inserted into the Education Act 2002 with effect from 1 September 2012 by section 4(2) of the Education Act 2011.)

43. Regulation 24(2)(a) of the 2012 Regulations requires the proprietor of a school to decide whether or not a pupil who has been permanently excluded should be reinstated. In this case, the proprietor of the school was the governing body, which was also the "responsible body" for the purposes of section 51A(4) of the Education Act 2002, and which acted through the GDC.

44. Regulation 25 of the 2012 Regulations makes provision for the review by a review panel of the proprietor's decision not to reinstate a pupil who has been permanently excluded. It is for the "relevant person" to apply for a review. Since XWJ was under 18, the Claimant was the relevant person in the present case.

45. As to the powers of a review panel, section 51A(4) of the Education Act 2002 provides that:

> "On an application by virtue of subsection (3)(c), the review panel may—
>
> (a) uphold the decision of the responsible body,
>
> (b) recommend that the responsible body reconsiders the matter, or
>
> (c) if it considers that the decision of the responsible body was flawed when considered in the light of the principles applicable on an application for judicial review, quash the decision of the responsible body and direct the responsible body to reconsider the matter."

46. Regulation 25(6) of the 2012 Regulations provides that:

> "The review panel's decision is binding on the relevant person, the principal, the proprietor …"

47. Regulation 27 of the 2012 Regulations provides that:

> "In exercising their functions under section 51A(1) of the Act (as modified) or under these Regulations, the following persons and bodies must have regard to any guidance given from time to time by the Secretary of State—
>
> (a) the principal;
>
> …
>
> (b) the proprietor;

(c) the review panel; …"

48. The relevant guidance in force at all material times ("the DfE Guidance") was entitled "Exclusion from maintained schools, academies and pupil referral units in England" and was published in September 2017. Paragraph 146 of the DfE Guidance stated as follows:

> "The jurisdiction of the First-tier Tribunal (Special Educational Needs and Disability) and County Court to hear claims of discrimination relating to a permanent exclusion does not preclude an independent review panel from considering issues of discrimination in reaching its decision."

(3)(b) Exceptional Case Funding

49. Section 10 of LASPO provides, inter alia, as follows:

> "(1) Civil legal services other than services described in Part 1 of Schedule 1 are to be available to an individual under this Part if subsection (2) or (4) is satisfied.
>
> (2) This subsection is satisfied where the Director—
>
> (a) has made an exceptional case determination in relation to the individual and the services, and
>
> (b) has determined that the individual qualifies for the services in accordance with this Part,
>
> (and has not withdrawn either determination).
>
> (3) For the purposes of subsection (2), an exceptional case determination is a determination—
>
> (a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—
>
> (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or
>
> (ii) any rights of the individual to the provision of legal services that are assimilated enforceable rights, or
>
> (b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach."

50. The effect of subsection 10(2)(b) is that an application for exceptional case funding has to satisfy both the merits criterion and the means criterion. I need say no more about those criteria, since, despite what was said about the merits

criterion in the refusal letter, the First Defendant did not, in the second review decision, rely on either of them as a ground for refusing the ECF application.

51. The effect of subsections 10(2)(a) & (3) of LASPO was summarised in paragraph 32 of the judgment of the Court of Appeal in *R (Gudanaviciene & Ors) v Director of Legal Aid Casework* [2015] 1 WLR 2247 ("*Gudanaviciene*") as follows:

> ... if the Director concludes that a denial of ECF would be a breach of an individual's Convention or EU rights, he must make an exceptional funding determination. But as we shall see, the application of the ECtHR and CJEU case-law is not hard-edged. It requires an assessment of the likely shape of the proposed litigation and the individual's ability to have effective access to justice in relation to it. The Director may conclude that he cannot decide whether there would be a breach of the individual's Convention or EU rights. In that event, he is not required by section 10(3)(a) to make a determination. He must then go on to consider whether it is appropriate to make a determination under section 10(3)(b). In making that decision, he should have regard to *any* risk that failure to make a determination would be a breach. These words mean exactly what they say. The greater he assesses the risk to be, the more likely it is that he will consider it to be appropriate to make a determination. That is because, if the risk eventuates, there will be a breach. But the seriousness of the risk is only one of the factors that the Director may take into account in deciding whether it is appropriate to make a determination. He should have regard to all the circumstances of the case."

52. The Convention rights invoked in the present case are those arising under Article 6(1) and 8 and Article 2 of Protocol 1, taken with Article 14. I will consider each of these in turn.

53. An individual has the right under regulation 69 of the Civil Legal Aid (Procedure) Regulations 2012 to apply for a review of a determination that he does not qualify for exceptional case funding and on the review the Director may confirm or amend the decision which is the subject of the review or substitute a new decision.

(3)(c) Article 6(1)

54. Article 6(1) provides, insofar as is material, as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …"

55. It has been recognised since *Airey v Ireland* (1979) No 6289/73 that Article 6(1) guarantees a right of practical and effective access to a court or tribunal, which in turn can, in an appropriate case, require the provision of free legal

representation. It was primarily to meet that obligation that section 10 of LASPO was enacted.

56. However, Article 6 does not apply to all court or tribunal proceedings in which a person may be involved, but only "In the determination of his civil rights and obligations or of any criminal charge against him". The present case does not concern a criminal charge. A central question in the present case is whether the Director ought to have concluded that the proceedings before the review panel ("the review panel proceedings") involved the determination of the Claimant's civil rights and obligations. As to that question, it is established that, as set out by the ECtHR in *ITC Ltd v Malta* (2008) 46 E.H.R.R. SE13, at [39]:

> "for Art 6 s. 1 in its "civil" limb to be applicable, there must be a dispute ("*contestation*" in the French text) over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question (…)."

(3)(c)(i) "Civil right"

57. No distinction was drawn in the submissions before me between the position of XWJ and the Claimant. Although it was for the Claimant, as the "relevant person", to initiate the review panel proceedings, those proceedings were concerned with the expulsion of XWJ and, insofar as any rights were in issue in those proceedings, they were XWJ's rights, which the Claimant, as his mother, was seeking to enforce.

58. It was common ground before me that a civil right for the purposes of Article 6 can include either or both of two rights recognised in English law:

(1) The right conferred by section 85(2)(e) of the Equality Act 2010 ("the Equality Act") not to be discriminated against in respect of exclusion from a school. As to this:

(a) Pursuant to sections 85(7) and 89 of the Equality Act, section 85 applied to the school.

(b) Section 85(2)(e) provided that the responsible body of the school:

> "must not discriminate against a pupil—
>
> (e) by excluding the pupil from the school;"

(c) "Discrimination" includes both direct discrimination contrary to section 13 and indirect discrimination contrary to section 19 of the Equality Act.

(2) The right conferred by section 6 of the Human Rights Act 1998 not to be a victim of a violation of a Convention right. Section 6(1) of the Human Rights Act 1998 provides as follows:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

59. There was, however, a dispute whether the Director ought to have concluded that the proceedings before the review panel included a dispute about either of these rights.

60. As appears from the review panel's decision, the proceedings before the review panel included a dispute about whether the head teacher had, when making the exclusion decision, complied with the public sector equality duty imposed by section 149 of the Equality Act. However, there was a dispute before me about whether section 149 gave XWJ a civil right for the purposes of Article 6(1).

61. The concept of a "civil right" in this context is an autonomous concept, to be determined in accordance with the Strasbourg jurisprudence and not simply by the classification of a right according to domestic law. Thus, for instance, in paragraph 61 of its judgment in *Tinnelly & Sons Ltd & Others and McElduff & Others v United Kingdom* (1998) 27 E.H.R.R. 249 (*"Tinnelly"*), the ECtHR said as follows:

> "The Court notes that the 1976 Act guaranteed persons a right not to be discriminated against on grounds of religious belief or political opinion in the job market including, and of relevance to the instant case, when bidding for a public works contract or sub-contract.
>
> In the Opinion of the Court that clearly defined statutory right, having regard to the context in which it applied and to its pecuniary nature, can be classified as a "civil right" within the meaning of Article 6(1) of the Convention. It observes in this regard that in submitting their complaints in accordance with the procedures laid down in the 1976 and 1989 Acts, the applicants were seeking a ruling that they had been denied the opportunity to compete for and obtain work on the basis of their abilities and competitiveness alone and to be given security clearance for this purpose without regard to their religious beliefs or political opinions. Had it been established that the applicants were indeed the victims of unlawful discrimination, the county court in the case of Tinnelly and the Fair Employment Tribunal in the case of the McElduffs were ultimately empowered under the 1976 and 1989 Acts to assess the extent of the applicants' loss and order financial reparation in their favour including for direct and indirect loss of profits. The fact that the contracts at issue were public procurement contracts or that the applicants' offers were never accepted cannot prevent that right from being considered a "civil right" for the purposes of Article 6(1)."

62. *Araç v. Turkey* (9907/02) 23 September 2008 is an example of the ECtHR considering what constitutes a civil right in the context of education. The applicant was refused entry to a university because her identity photograph showed her wearing a headscarf, which was contrary to certain regulations. The ECtHR held (in paragraph 19 of its judgment) that the applicant had an arguable claim that Turkish law conferred on her the right to enrol in the university, provided that she satisfied the statutory conditions.

63. The ECtHR then said as follows in paragraphs 20 to 25 of its judgment:

> "20. According to the Government, the regulation of enrolment in higher-education establishments was a matter falling within the sphere of public law. In the Court's view, however, this public-law aspect does not suffice to exclude the right in question from the category of civil rights within the meaning of Article 6 § 1. It further points out that in several cases (see, in particular, *König and Le Compte, Van Leuven and De Meyere*, both cited above; *Benthem v. the Netherlands*, 23 October 1985, Series A no. 97; and *Feldbrugge v. the Netherlands*, 29 May 1986, Series A no. 99), State intervention by means of a statute or delegated legislation has not prevented the Court from finding the right in issue to have a private, and hence civil, character. Proceedings which fall within the sphere of "public law" in the domestic legal order may come within the scope of Article 6 § 1 where their outcome is decisive for civil rights and obligations.
>
> 21. In addition, in the *Kök v. Turkey* judgment (no. 1855/02, § 36, 19 October 2006), the Court found Article 6 to be applicable to a dispute concerning the setting-aside of the authorities' refusal to authorise the applicant to practise a medical specialisation. It also found that, where a State confers rights which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights within the meaning of Article 6 § 1 (see, along the same lines, *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, 10 July 1998, § 61, *Reports of Judgments and Decisions* 1998-IV).
>
> 22. It is important also to emphasise that Ms Araç was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but simply in her personal capacity as the user of a public service. Hence, she was challenging the regulations in force, which she considered prejudicial to her right to continue her studies in a higher-education establishment.
>
> 23. Furthermore, in its recent case-law the Court, leaving the door open for the application of Article 6 to the right to education, has consistently examined whether proceedings concerning the regulations on higher education conform to the requirements of Article 6 § 1 (see, by way of example, *Mürsel Eren v. Turkey (dec.)*, no. 60856/00, 6 June 2002; *D.H. and Others v. the Czech Republic (dec.)*, no. 57325/00, 1 March 2005; and *Tig v. Turkey (dec.)*, no. 8165/03, 24 May 2005).
>
> 24. Accordingly, given the importance of the applicant's right to continue her higher education (as regards the key role and importance of the right of access to higher education, see *Leyla Şahin v. Turkey [GC]*, no. 44774/98, § 136, ECHR 2005-XI), the Court does not doubt that the limitation in question, imposed by

> the regulations in issue, fell within the scope of the applicant's personal rights and was therefore civil in character.
>
> 25. In the light of the foregoing, and given that the lawfulness of proceedings concerning a civil right was capable of being challenged by means of a judicial remedy, of which the applicant made use, the Court considers that a dispute (*contestation*) concerning a "civil right" arose in the instant case and was determined by the Administrative Court.
>
> Article 6 § 1 is therefore applicable in the present case."

64. *R (Reprieve & Others) v Prime Minister* [2020] EWHC 1695 (Admin) and [2022] QB 447, CA ("*Reprieve*") concerned an application for judicial review of a decision not to establish a public enquiry to investigate allegations of involvement of the United Kingdom intelligence services in torture, mistreatment and rendition of detainees in the aftermath of events on 11 September 2001. The Divisional Court and the Court of Appeal considered the question whether Article 6(1) applied to the application for judicial review. In paragraphs 12 to 18 of its judgment the Divisional Court gave a summary of the law concerning what does, or does not, constitute a "civil right" for the purposes of Article 6(1). However, the Divisional Court held, and the Court of Appeal agreed, that Article 6(1) did not apply in that case.

(3)(c)(ii) "Directly decisive"

65. It was common ground between the Claimant and the Director that the review panel had jurisdiction to make a "directly decisive" determination whether a pupil's exclusion was unlawful because it involved a breach of a Convention right.

66. However, there was a dispute whether the review panel could make a "directly decisive" determination:

(1) whether a pupil's exclusion was unlawful because it involved a breach of the pupil's right under section 85(2)(e) of the Equality Act not to be discriminated against; and/or

(2) in respect of the alleged civil right said to arise under section 149 of the Equality Act, if (which was disputed) section 149 gave rise to a civil right.

67. In relation to section 85(2)(e) of the Equality Act, this dispute involves consideration of:

(1) *R (G) v Governors of X School* [2012] 1 AC 167 ("*X School*"), which was relied on by the Director and described by the Claimant's counsel as the leading domestic authority on when a determination is "directly decisive" of a civil right;

(2) the provisions of the Equality Act concerning jurisdiction over discrimination claims; and

(3) the provisions concerning the powers of a review panel, which I have already set out.

(3)(c)(iii) X School

68. The Claimant in *X School* was dismissed for misconduct from his post as a teaching assistant. He contended that Article 6(1) applied to the proceedings before the governors' disciplinary committee which resulted in the decision to dismiss him and to the subsequent appeal to the governors, on the basis that they involved the determination of his right to work with children in educational establishments. However, pursuant to the Safeguarding Vulnerable Groups Act 2006, it was for the Independent Safeguarding Authority ("the ISA") to decide whether or not to include the Claimant on the "children's barred list".

69. In those circumstances, Lord Dyson (with whom Lords Hope, Brown and Kerr agreed) said (in paragraph 35 of his judgment) that:

> "The principal question raised on this appeal is what kind of connection is required between proceedings A (in which an individual's civil rights or obligations are not being explicitly determined) and proceedings B (in which his civil rights or obligations are being explicitly determined) for article 6 to apply in proceedings A as well as proceedings B. Does the connection have to be so strong that the decision in proceedings A *in effect* determines the outcome of proceedings B (as Mr Bowers QC submits)? Or is it sufficient that the decision in proceedings A has an effect on proceedings B which is more than merely tenuous or remote (as Mr Drabble QC submits)? Or does the connection lie somewhere between these two positions?"

70. Lord Dyson considered the relevant Strasbourg authorities in some detail, but expressed the view (in paragraph 63 of his judgment) that:

> "… in my view, the jurisprudence contains no clear explanation of what "directly decisive" means. …"

71. Having derived various principles (set out in paragraphs 64 to 68 of his judgment) from the cases, Lord Dyson concluded (in paragraph 69 of his judgment) by approving the test proposed by Laws LJ in the Court of Appeal, which was that the "directly decisive" requirement was:

> "… likely to be met where the decision in the relevant proceedings has a substantial influence or effect on the later vindication or denial of the Claimant's Convention right. …"

72. In the event, Lord Dyson decided, for the reasons set out in paragraphs 72 to 84 of his judgment, that the proceedings before the governors' disciplinary committee were not directly decisive of the right in question because the ISA would make its own findings of fact in determining whether the claimant had

committed misconduct and whether his misconduct merited inclusion on the children's barring list. Lords Hope and Brown and Lady Hale agreed with this result.

(3)(c)(iv) Jurisdiction over Discrimination Claims

73. Section 113 of the Equality Act provides, insofar as is material, as follows:

> "(1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part."
>
> "(3) Subsection (1) does not prevent—
>
> (a) a claim for judicial review;"

74. Section 114 of the Equality Act provides, insofar as is material, as follows:

> "(1) The county court … has jurisdiction to determine a claim relating to—
>
> (a) a contravention of Part 3 (services and public functions);
>
> …
>
> (c) a contravention of Part 6 (education);"
>
> "(3) Subsection (1)(c) does not apply to a claim within section 116."

75. Section 85 is in Part 3 of the Equality Act. Section 116 of the Equality Act is not relevant to the present case. It is, however, relevant to note that sections 113 and 114 came into force on 1 October 2010.

76. The effect of sections 113 and 114 of the Equality Act in a case concerning conflicting jurisdictional provisions was considered in *Hamnett v Essex County Council* [2014] 1 WLR 2562; and [2017] 1 WLR 1155, CA. The claimant wished to challenge two experimental traffic regulation orders ("ETROs") made under the Road Traffic Regulation Act 1984 ("the 1984 Act"), alleging, inter alia, that the ETROs discriminated against her in relation to the provision of services, contrary to section 29 of the Equality Act, which is in Part 3 of the Act.

77. The claimant applied for a statutory review of the ETROs by the High Court under paragraph 35 of Schedule 9 to the 1984 Act, which provides as follows:

> "If any person desires to question the validity of, or of any provision contained in, an order to which this Part of this Schedule applies, on the grounds—
>
> (a) that it is not within the relevant powers, or
>
> (b) that any of the relevant requirements has not been complied with in relation to the order,

> he may, within 6 weeks from the date on which the order is made, make an application for the purpose to the High Court …"

78. At first instance, Singh J held that sections 113 and 114 of the Equality Act meant that the county court had exclusive jurisdiction to determine a claim relating to a contravention of section 29 and that the High Court did not have jurisdiction to consider the complaint based on section 29, holding (in paragraph 58 of his judgment) that:

> "In my judgment the phrase "claim for judicial review" as used in section 113 of the Equality Act is a term of art and refers only to a claim for judicial review in the strict sense of a claim under CPR Part 54. …"

79. On appeal, Gross LJ, with whom Tomlinson and King LJJ agreed, held (in paragraphs 24 and 25 of his judgment) that there was a conflict between the Equality Act and the 1984 Act as to the forum in which such a claim should be brought. As he put it in paragraph 27:

> "… the Appellant, insofar as she alleges that the ETROs contravene s.29 of the 2010 Act, faces irreconcilable provisions as to jurisdiction: the RTRA 1984 providing for the High Court and the 2010 Act providing for the County Court. …"

80. Gross LJ then held that, for the reasons set out in paragraphs 26 to 30 of his judgment, the doctrine of implied repeal applied, i.e. the doctrine that:

> "… where the provisions of two statutes cannot stand together, the later provisions prevail and the earlier provisions are treated as repealed by implication or amended to the extent necessary to remove the inconsistency. …"

81. By virtue of that doctrine, paragraph 35 of Schedule 9 to the 1984 Act was impliedly repealed, section 114(1)(a) of the Equality Act prevailed and the complaint that the ETROs were contrary to section 29 of the Equality Act could only be brought in the county court.

(3)(d) The Public Sector Equality Duty

82. Section 149(1) of the Equality Act provides as follows:

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

83. The public sector equality duty is a duty of process, not outcome. There is no provision in the Equality Act concerning jurisdiction over claims alleging breach of the public sector equality duty. Instead, section 156 of the Equality Act provides as follows:

> "A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law."

84. However, the Claimant submitted that that, in itself, is not determinative of the issue whether section 149 conferred a "civil right" on XWJ for the purposes of Article 6(1), since "civil right" is an autonomous concept. In relation to that issue, I was referred to the following authorities.

(3)(d)(i) Authorities relied on by the Claimant

85. *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 (*"Elias"*) was primarily a case about discrimination, in which a compensation scheme introduced by the Secretary of State was found to have been indirectly discriminatory. The judge also found that the Secretary of State had failed to observe his duty under section 71 of the Race Relations Act 1976, which was a precursor to section 149 of the Equality Act. The Claimant relied on certain observations made by Arden LJ in paragraphs 268 to 275 of her judgment, including her statement (in paragraph 274) that:

> "… This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. …"

86. In *Coll v Secretary of State for Justice* [2017] 1 WLR 2093, SC (*"Coll"*) the Supreme Court found that the Secretary of State had discriminated directly against women in the arrangements made for the provision of approved premises for prisoners serving life sentences who were released from prison. At first instance, Cranston J held that the Secretary of State had failed to discharge the public sector equality duty: see paragraph 65 of his judgment: [2013] EWHC 4077 (Admin). Baroness Hale, with whom the other members of the Supreme Court agreed, said as follows in paragraph 42 of her judgment:

> "Cranston J's finding that the Secretary of State was in breach of the public sector equality duty also means that the ministry is not in a position to show that the discrimination involved in the different provision made for men and for women is a proportionate means of fulfilling a legitimate aim. It may or may not be. But it is for the Secretary of State to show that the discrimination is justified. Given that the Ministry has not addressed the possible impacts upon women, assessed whether there is a disadvantage, how significant it is and what might be done to mitigate it or to meet the particular circumstances of women offenders, it cannot show that the present distribution of APs for women is a proportionate means of achieving a legitimate aim."

87. *R (Hussein and Rahman) v Secretary of State for the Home Department* [2018] EWHC 213 (Admin) (*"Hussein and Rahman"*) was another case in which the

Secretary of State's failure to discharge the public sector equality duty made it difficult to justify arrangements which were indirectly discriminatory. In that case, the arrangements concerned the detention of Muslims in an immigration removal centre in conditions which interfered with their right under Article 9 ECHR.

88. In *R (Bridges) v Chief Constable of South Wales Police* [2020] 1 WLR 5037, CA (*"Bridges"*) the arrangements made by the Chief Constable for the use of automated facial recognition technology were held by the Court of Appeal to involve a violation of Article 8 and the Court of Appeal also held that the Chief Constable had, when making those arrangements, failed to discharge the public sector equality duty, in relation to which the court said as follows in paragraph 176 of its judgment:

> "We accept (as is common ground) that the PSED is a duty of process and not outcome. That does not, however, diminish its importance. Public law is often concerned with the process by which a decision is taken and not with the substance of that decision. This is for at least two reasons. First, good processes are more likely to lead to better informed, and therefore better, decisions. Secondly, whatever the outcome, good processes help to make public authorities accountable to the public. We would add, in the particular context of the PSED, that the duty helps to reassure members of the public, whatever their race or sex, that their interests have been properly taken into account before policies are formulated or brought into effect."

89. *Metropolitan Housing Trust Ltd v TM* [2021] EWCA Civ 1890 was a case in which a breach of the public sector equality duty was relied on as a defence to a claim for possession (as in *London and Quadrant Housing Trust v Patrick* [2020] HLR 3, approved in *Forward v Aldwyck Housing Group Ltd* [2020] 1 WLR 584, CA ("*Forward v Aldwyck*")). Nugee LJ (at paragraphs 41 to 51) and Green LJ (at paragraphs 62 to 64) discussed the effect of belated compliance with the duty, which might or might not lead to the court declining to make a possession order.

90. I have already referred to UTJ Church's decision in the present case. The Claimant submitted that that decision proceeded on the basis that the review panel had power to quash the GDC's decision for breach of the public sector equality duty. I do not doubt that the review panel had such a power. The exercise of such a power is a different matter, however, as can be seen from the next authority.

(3)(d)(ii) Authorities relied on by the First Defendant

91. The Director relied in this context on *Reprieve*, to which I have already referred, and *Forward v Aldwyck*, which concerned a claim for possession against a disabled tenant by a landlord which failed to comply with the public sector equality duty before commencing the claim or obtaining the possession order. Longmore LJ, with whom Bean and Moylan LJJ agreed, held that, as he said in paragraph 21 of his judgment:

> "I would for my part decline to accept the proposition that, as a general rule, if there is a breach of the PSED, any decision taken after such breach must necessarily be quashed or set aside or even the proposition that there is only a narrow category of cases in which that consequence will not follow."

(3)(e) Article 2 of Protocol 1 and Article 14

92. Article 2 of Protocol 1 provides as follows:

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

93. Article 14 provides as follows:

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

(3)(e)(i) Lord Grey School

94. In paragraph 24 of his speech in *Lord Grey School*, Lord Bingham, with whom Lords Nicholls, Hoffmann and Scott agreed, said as follows (emphasis added):

> "The Strasbourg jurisprudence, summarised above in paras 11–13, makes clear how article 2 should be interpreted. The underlying premise of the article was that all existing member states of the Council of Europe had, and all future member states would have, an established system of state education. It was intended to guarantee fair and non-discriminatory access to that system by those within the jurisdiction of the respective states. The fundamental importance of education in a modern democratic state was recognised to require no less. But the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. <u>There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil</u> (as in *Eren v Turkey* (Application No 60856/00) (unreported) 7 February 2006). The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils? …"

(3)(e)(ii) Tom Hood School

95. *Tom Hood School* was a case in which the claimant unsuccessfully contended that a review panel's decision to uphold his exclusion from school was unlawful because the review panel had applied the civil, rather than the criminal, standard of proof. The claimant contended that the proceedings before the review panel involved the determination of his civil rights, because he had an arguable "right to continue the studies he had begun at the school": see paragraph 20 of the judgment of Silber J.

96. Insofar as the claimant alleged that this right arose under Article 2 of Protocol 1, Silber J said in paragraph 37 of his judgment that the matter was resolved finally by what Lord Bingham had said in *Lord Grey School*. Silber J also dismissed arguments that the alleged right arose under domestic law and/or under Article 8. (In the present case, the Claimant has not asserted that such a right arose under English law or under Article 8, although she does contend that Article 8 was engaged by the review panel proceedings, a matter to which I will return.)

97. When the claimant appealed, he only relied on his alleged right under domestic law "to continue the studies he had begun at the school" or, as counsel put it in the Court of Appeal, "not to be permanently excluded [from the school he attended] without good reason". The Court of Appeal held that the claimant had no such right in English law and that Article 6 was therefore not engaged in the proceedings before the review panel.

98. As Wilson LJ noted in paragraph 12(c) of his judgment, it was because of what Lord Bingham had said in *Lord Grey School* that the claimant did not rely in the Court of Appeal on his alleged right under Article 2 of Protocol 1.

(3)(e)(iii) Oršuš v Croatia

99. The claimants in *Oršuš v Croatia* were members of the Roma community in Croatia who were placed in Roma-only classes. In relation to the alleged violation of Article 14, taken in conjunction with Article 2 of Protocol 1, the Grand Chamber of the ECtHR said (in paragraphs 143, 153, 155, 185 and 186 of its judgment) that:

(1) it saw the case as raising primarily a discrimination issue;

(2) the measure in question clearly represented a difference in treatment;

(3) the measure in question was applied exclusively to members of a single ethnic group and called for an answer from the state to show that the practice in question was objectively justified by a legitimate aim and that the means of achieving that aim were appropriate, necessary and proportionate;

(4) there had been a violation of Article 14 taken together with Article 2 of Protocol 1; and

(5) it was not necessary to examine the complaint under Article 2 of Protocol 1 taken alone.

100. The claimants also alleged that there had been a violation of Article 6(1) in that the domestic proceedings had not been concluded within a reasonable time. In response to the government's contention that Article 6(1) was inapplicable, the Grand Chamber said as follows:

> "106. As to the present case, it seems clear that a "dispute" arose in respect of the applicants' initial and then continuing placement in Roma-only classes during their schooling in primary schools. The proceedings before the domestic courts concerned the applicants' allegations of infringement of their right not to be discriminated against in the sphere of education, their right to education and their right not to be subjected to inhuman and degrading treatment. The applicants raised their complaints before the regular civil courts and the Constitutional Court and their complaints were examined on the merits.
>
> 107. Furthermore, the applicants' right not to be discriminated against on the basis of race was clearly guaranteed under art.14(1) of the Constitution and, as such, enforceable before the regular civil courts in the national legal system (see, mutatis mutandis, *Tserkva Sela Sosulivka v. Ukraine*, no. 37878/02, at [42], 28 February 2008, and *Gülmez v. Turkey*, no. 16330/02, at [29], 20 May 2008).
>
> In view of the above, the Court concludes that art.6(1) is applicable in the instant case."

101. The Claimant submitted in the ECF application that *Oršuš v Croatia* effected a "sea change" in the law, but in my judgment that is not correct. The ECtHR regarded the case as raising primarily a discrimination issue, which was not an issue arising in *Lord Grey School* or *Tom Hood School*. The ECtHR noted that the applicant had an enforceable right under Croatian law not to be discriminated against. In the present case, as I have already indicated, it is acknowledged that the right under section 85 of the Equality Act not to be discriminated against is a civil right.

(3)(e)(iv) The Alleged Procedural Requirement

102. The Claimant alleged in the review request and the letter before action that Article 2 of Protocol 1 has a procedural requirement, but I note that I was not taken to any authority in which it has been decided that Article 2 of Protocol 1 has a procedural requirement which requires the grant of legal aid in circumstances where Article 6 is not engaged.

(3)(f) Article 8

103. Article 8 provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

104. Article 8 is potentially relevant to the present case in two ways:

(1) As I have already said, it is common ground that Article 6(1) would apply to the review panel proceedings if those proceedings involved the determination of a dispute whether there had been a violation of XWJ's rights under Article 8.

(2) In addition, Article 8 has its own procedural requirements, which can require the grant of legal aid in proceedings where Article 8 is engaged: see paragraphs 65 and 66 of the Court of Appeal's judgment in *Gudanaviciene*.

105. It may be, however, that there is no practical difference for present purposes between these two approaches to considering Article 8, since the Court of Appeal held in paragraph 70 of its judgment in *Gudanaviciene* that the procedural requirements of Article 8 are in practice the same as those of Article 6.

106. In paragraph 86 of his judgment in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647, Underhill LJ said that:

> "… the engagement of article 8 is of its nature a question of fact to be determined on the facts of the particular case …"

107. Aspects of "private life" include mental health (see *Bensaid v United Kingdom* (2011) 33 E.H.R.R. 10, at paragraph 47) and "a right to personal development, and the right to establish and develop relationships with other human beings and the outside world" (see *Pretty v United Kingdom* (2002) 35 E.H.H.R. 1, at paragraph 61, cited in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, at paragraph 9).

108. *Gudanaviciene* concerned the application of the procedural requirements of Article 8 in immigration cases, where it was not in dispute that Article 8 was engaged. The only case to which I was referred which concerned the potential application of Article 8 to school exclusion cases was *Tom Hood School*. As I have said, Silber J dismissed the claimant's contention that the proceedings before the review panel in that case involved the determination of his civil rights

because he had an arguable "right to continue the studies he had begun at the school" which arose under Article 8.

109. Silber J said in paragraph 42 of his judgment that he accepted:

> "… that there may be cases in which the permanent exclusion of a pupil from, say, the only school in an area which he or she had attended for years could engage Article 8 rights."

110. However, Silber J dismissed the claim based on Article 8 in *Tom Hood School* for the following reasons:

> "43. Thus it is said that being excluded from the School might infringe V's arguable Article 8 rights. I am unable to accept that for four main and to some extent overlapping reasons which individually and cumulatively lead me to that conclusion. First, there is no suggestion whatsoever in the contentions put before the Panel or in the claim form that V's personal relationships have been interfered with in such a way whatsoever by his exclusion from the School. In other words this case was totally different from those of the claimants in *Wright*'s case. Second V has not wanted to return to the School and that decision undermines an Article 8 claim.
>
> 44. A third reason is that even if Article 8 (1) might have been engaged, then Article 8 (2) would preclude the claimant showing even an arguable article 8 right as it provides insofar as is relevant that "*there shall be no interference by a public authority with the exercise of [the Article 8 right] except such as is in accordance with the law and is necessary in a democratic society in the interests of … public safety …for the prevention of disorder or crime…or for the protection of the rights and freedoms of others*". In this case, the exclusion of V was for precisely those reasons as it was to prevent knives being brought to the School and being used there in a criminal manner so as endanger others at the School.
>
> 45. Fourth, there is no authority to support the conclusion that there is an Article 8 right to attend a school or not to be expelled from a particular school. Indeed, the Court of Appeal flatly rejected the argument that Article 8 was engaged by a child's exclusion from school and Sedley LJ with whom Hughes and Ward LJJ agreed, explained that "*I am unable to accept that the want of meaningful educational provision at home during the material period, undesirable though it was, can have amounted to a violation of A's right to respect for his private or family life*" *A v Essex County Council* [2008] EWCA Civ 364 [24]. By the same token, the contention that V had any arguable Article 8 claim so as to engage Article 6 must be rejected."

(3)(g) The ECF Guidance

(3)(g)(i) Guidance under LASPO

111. Section 4 of LASPO provides, inter alia, as follows:

> "(3) The Director must—
>
> (a) comply with directions given by the Lord Chancellor about the carrying out of the Director's functions under this Part, and
>
> (b) have regard to guidance given by the Lord Chancellor about the carrying out of those functions."
>
> "(5) The Lord Chancellor must publish any directions and guidance given under this section."

(3)(g)(ii) The Content of the ECF Guidance

112. The Lord Chancellor has issued guidance in relation to exceptional case determinations, the current version of which is the 2023 ECF Guidance. The previous version was the 2021 ECF Guidance, paragraph 54 of which provided as follows:

> "A decision of an Independent School Appeal Board to permanently exclude a pupil does not involve the determination of civil rights and obligations."

113. Paragraph 54 was something of an oversimplification. Certainly, if it was intended to mean that Article 6(1) can never be engaged in proceedings before a review panel in expulsion cases, then it was incorrect.

114. Paragraph 54 has been replaced by paragraph 8.2 of the 2023 ECF Guidance, which provides as follows:

> "Proceedings before an Independent School Appeal Board in relation to the permanent exclusion of a pupil may involve the determination of civil rights and obligations, if on the particular facts the exclusion is an arguably disproportionate restriction on the right to an education under Article 2 Protocol 1 of the European Convention of Human Rights, and/or if such exclusion arguably gives rise to a right to a judicial remedy under the applicable law."

115. This is the paragraph of the 2023 ECF Guidance which the Claimant seeks to challenge, if I grant permission to amend her claim form and statement of facts and grounds. Paragraph 8.2 is part of the Annex to the 2023 ECF Guidance which deals with specific case types. The general part of the 2023 ECF Guidance includes the following:

> "1.2 This guidance sets out some of the factors that caseworkers should take into account in deciding exceptional funding

applications under section 10(2) and (3) of the Act. It is not intended to be an exhaustive account of those factors. In particular, it is not intended to replace the need for consideration of representations in individual cases and any applicable case law. Applications should be considered on a case by case basis."

"2.4 In considering whether it is **necessary** to make civil legal services available, caseworkers should ask themselves whether a failure to do so would be a breach of Convention rights or retained enforceable EU rights by reference to the principles identified in this Guidance and in any relevant case law."

"3.1. Whereas Article 6(3)(c) ECHR provides a specific right to legal assistance in the context of criminal proceedings, the Convention contains no such specific right in relation to civil proceedings. However, the ECtHR has recognised that there are circumstances in which the failure of the State to provide civil legal aid may amount to breach of an individual's rights under the European Convention on Human Rights.

3.2. Caseworkers will need to consider, in particular, whether it is necessary to grant funding in order to avoid a breach of an applicant's rights under Article 6(1) ECHR."

"3.6. In deciding whether the case involves the determination of civil rights or obligations, caseworkers must consider the nature of the proceedings in question."

"3.9 Caseworkers should always consider whether the proceedings in question actually involve the determination of any of the substantive issues in a case. It will also be relevant to consider whether the question at issue in the set of proceedings under consideration will be directly decisive, or will substantially influence or affect other proceedings which determine civil rights and obligations. …"

(3)(g)(iii) Judicial Review of Guidance: the Gillick *Test*

116. In *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 ("*A*") Lords Sales and Burnett (with whom Lords Reed, Lloyd-Jones and Briggs agreed) analysed the law governing the judicial review of policy statements, starting with *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ("*Gillick*"). They said as follows in paragraph 38 of their judgment:

> "In our view, *Gillick* sets out the test to be applied. It is best encapsulated in the formulation by Lord Scarman at p 181F (reading the word "permits" in the proper way as "sanction" or "positively approve") and by adapting Lord Templeman's words: does the policy in question authorise or approve unlawful conduct by those to whom it is directed? So far as the basis for intervention by a court is concerned, we respectfully consider that Lord Bridge and Lord Templeman were

> correct in their analysis that it is not a matter of rationality, but rather that the court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of case, it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way. In this limited but important sense, public authorities have a general duty not to induce violations of the law by others."

117. In paragraph 46 of their judgment they said that:

> "In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (ie the type of case under consideration in *Gillick*); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. …"

118. In paragraphs 51 and 52 of their judgment in *R (BF (Eritrea)) v Secretary of State for the Home Department* [2021] 1 WLR 3967 (decided on the same day as *A*), they said as follows:

> "51 In our view, this submission involves a misinterpretation of what was said in *Gillick* and cannot be sustained. As we explain in our judgment in the *A* case, the meaning of the formula used by Lord Scarman is much narrower than suggested by Mr Hermer. It involves comparing two normative statements, one being the underlying legal position and the other being the direction in the policy guidance, to see if the latter contradicts the former. Mr Hermer's submission as to the effect of *Gillick* distorts this test by comparing a normative statement with a factual prediction, ie comparing the underlying legal position with what might happen in fact if the persons to whom the policy guidance is directed are given no further information. If correct, this would involve imposing on the person promulgating the guidance a very different, and far more extensive, obligation than that discussed in *Gillick*. It would transform the obligation from one not to give a direction which conflicts with the legal duty of the addressee into an obligation to promulgate a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty. There is no general duty of that kind at common law.

> 52 Whenever a legal duty is imposed, there is always the possibility that it might be misunderstood or breached by the person subject to it. That is inherent in the nature of law, and the remedy is to have access to the courts to compel that person to act in accordance with their duty. An asylum seeker has the same right to apply to the courts as anyone else. Save in specific contexts of a kind discussed below and in our judgment in the *A* case, there is no obligation for a Minister or anyone else to issue policy guidance in an attempt to eliminate uncertainty in relation to the application of a stipulated legal rule. Any such obligation would be extremely far-reaching and difficult (if not impossible in many cases) to comply with. It would also conflict with fundamental features of the separation of powers. It would require Ministers to take action to amplify and to some degree restate rules laid down in legislation, whereas it is for Parliament to choose the rules which it wishes to have applied. And it would inevitably involve the courts in assessing whether Ministers had done so sufficiently, thereby requiring courts to intervene to an unprecedented degree in the area of legislative choice and to an unprecedented degree in the area of executive decision-making in terms of control of the administrative apparatus through the promulgation of policy."

(3)(g)(iv) The UNISON *Principle*

119. Lords Sales and Burnett addressed in paragraph 80 of their judgment in *A* the judgement of the Supreme Court in *R (UNISON) v Lord Chancellor* [2020] AC 869 ("*UNISON*"), as to which they said as follows:

> "… In *UNISON* this court held that there is a fundamental right under the common law of access to justice, meaning effective access to courts and tribunals to seek to vindicate legal rights, which means that the executive is under a legal obligation not to introduce legal impediments in the way of such access save on the basis of clear legal authority: see the discussion by Lord Reed in *UNISON* at paras 66-98. The decision was concerned with the introduction of an order imposing fees to bring claims in an employment tribunal, but the principles stated are of general application. The test applied was whether the making of the order created "a real risk that persons will effectively be prevented from having access to justice" (para 87; see also para 85, where *R (Hillingdon London Borough Council) v Lord Chancellor (Law Society intervening)* [2009] 1 FLR 39 is referred to as authority for such a test)."

(4) Some Preliminary Points

120. Before I address the question whether Article 6 (or the procedural requirements of Article 8 or Article 2 of Protocol 1) was engaged in the review panel proceedings, it is worth addressing a number of preliminary points.

121. First, I note that neither party contended that the answer to that question should be the same for all proceedings before review panels in exclusion cases. In

particular, the Claimant did not contend that Article 6 (or the procedural requirements of Article 8 or Article 2 of Protocol 1) will always be engaged in such proceedings and the Director did not contend that they will never be engaged in such proceedings. This accords with the statement in *Gudanaviciene* that an assessment is required of the likely shape of the proposed litigation.

122. Secondly, and related to the first point, I do not accept the Claimant's submission that the Director made an error of law by taking into account paragraph 54 of the 2021 ECF Guidance. I have already noted that the Director acknowledged in the second review decision both the nature of the 2021 ECF Guidance (i.e. that it was not intended either to be exhaustive or to replace the need for consideration of representations in individual cases and any applicable case law) and the Claimant's submission that paragraph 54 of the 2021 ECF Guidance was incorrect. The Director did not simply follow that guidance, but instead considered relevant authorities, i.e. *Tom Hood School* and *Oršuš v Croatia*. I will deal later with the submissions made in relation to those authorities, but there was no error of law on the part of the Director in her consideration of the 2021 ECF Guidance.

123. Thirdly, the lawfulness of the second review decision falls to be assessed by reference to the documents provided to the Director, whether addressed to the Director (i.e. the ECF application, the review request and the letter before action) or not (i.e. the exclusion letter, the GDC letter, the GDC minutes and the review panel's decision). I will refer to these as "the ECF application materials".

124. Fourthly, it is an unusual feature of the present case that, by the time of the second review decision, the hearing before the review panel had taken place, the review panel had produced its decision and that decision was available to the Director. Insofar as the Director considered the "shape" of the review panel proceedings, she was able to do so retrospectively, rather than, as is usual, prospectively.

(5) The Public Sector Equality Duty

125. It is appropriate to begin by considering the Claimant's case in relation to the public sector equality duty, since it is clear that the question whether the head teacher had complied with that duty was, as the review panel put it, "at the heart of" the Claimant's case before the review panel.

(5)(a) The Public Sector Equality Duty: Submissions

126. I have already quoted the Claimant's submission in her statement of facts and grounds that the fact that compliance with the public sector equality duty was in issue before the review panel meant that those proceedings concerned XWJ's right not to be discriminated against in the sphere of education. In effect, the Claimant submitted, by reference to the authorities which I have mentioned, that, although a breach of the public sector equality duty does not give rise to a cause of action in English law, it would, in a case such as the present, constitute a violation of the Claimant's civil right, recognised in *Oršuš v Croatia*, not to be discriminated against in the sphere of education.

127. The Director submitted that:

(1) The Claimant did not contend in the ECF application that Article 6 was engaged by reason of the fact that there was an issue in the review panel proceedings in relation to compliance with the public sector equality duty. Consequently, it was not an error of law for the Director not to address a contention which was not put to her.

(2) The public sector equality duty does not confer a civil right on an individual. In this context, the Director relied in particular on *Forward v Aldwyck* and on *Reprieve*.

(3) Even if the public sector equality duty was capable of giving rise to a civil right, the decision of the review panel was not "directly decisive" on this point. The Director submitted that it was for the High Court, on the application for judicial review, to make a "directly decisive" decision.

(5)(b) The Public Sector Equality Duty: Decision

(5)(b)(i) The Scope of the ECF Application

128. I accept the Director's submission that the ECF application and the review request did not assert that Article 6 was engaged by reason of the fact that there was an issue in the review panel proceedings in relation to compliance with the public sector equality duty. It is also the case that there was no clear statement to that effect in the letter before action, but that letter did refer (in paragraphs 20 and 33) to the Claimant's allegations that the exclusion decision was discriminatory because it breached section 149 of the Equality Act and that the issue whether there had been discriminatory treatment was an issue which engaged the procedural protections of the Convention.

129. Moreover, the letter before action had to be read in the context of the enclosed review panel decision, which made clear that the public sector equality duty was at the heart of the Claimant's case before the review panel. Indeed, the Director acknowledged in the second review decision that the Claimant was applying for judicial review of the review panel's decision concerning the application of the public sector equality duty.

130. In all the circumstances, the issue in the review panel proceedings whether the public sector equality duty had been complied with was a feature of those proceedings which fell to be considered in assessing whether Article 6 was engaged. However, the fact that the Claimant did not expressly assert that that issue engaged Article 6 meant that the Director was not obliged to say more than she did about the public sector equality duty in the second review decision.

(5)(b)(ii) Was there a "Civil Right"?

131. Although the classification of the relevant issues under English law is not determinative of the question whether the review panel proceedings involved a "civil right", it is relevant to consider the applicable English law.

132. As the Court of Appeal held in *Tom Hood School*, English law did not give XWJ a right of the kind contended for in that case, i.e. a "right to continue the studies he had begun at the school" or a right "not to be permanently excluded [from the school he attended] without good reason". XWJ did have a right not to be discriminated against in relation to his education, but that right was conferred by section 85 of the Equality Act, not by section 149.

133. The head teacher had power to exclude XWJ from the school. XWJ had the opportunity to challenge the exercise of that power, but the nature of that challenge was a public law challenge, as is spelt out in section 51A(4)(c) of the Education Act 2002. In challenging his exclusion, XWJ could rely on purely public law issues, such as irrationality, and also on private law issues, as would have been the case if he had alleged that the head teacher or the GDC had discriminated against him, contrary to section 85 of the Equality Act 2010.

134. One of the matters which XWJ could rely on in challenging his exclusion was an alleged failure to comply with the public sector equality duty. Section 149 of the Equality Act imposed a duty on the head teacher and on the GDC, but it did not give the Claimant or XWJ a private law right under English law. Section 156 of the Equality Act makes that clear. The fact that XWJ was able to rely on section 149 in challenging his exclusion did not change the nature of the duty imposed by section 149.

135. Section 149 is intended to promote equality of treatment and to reduce discrimination, and has been recognised (for instance, in *Elias* and *Bridges*) to be important in that respect. It does not follow, however, that non-compliance with the public sector equality duty can be equated with discrimination:

    (1) Discrimination will only be established if a party can prove direct or indirect discrimination as defined in sections 13 and 19 of the Equality Act.

    (2) Compliance with the public sector equality duty does not, in itself, prove that there has been no discrimination.

    (3) Cases such as *Coll* and *Hussain and Rahman* demonstrate that non-compliance with the public sector equality duty may make it more difficult for a party to resist a claim of discrimination, but non-compliance with the public sector equality duty does not necessarily mean that there has been discrimination. In particular:

        (a) A decision made by a body which has failed to comply with the public sector equality duty will not necessarily be held to be unlawful: see *Forward v Aldwyck*.

        (b) Non-compliance with the public sector equality duty can be "remedied", as discussed in *Metropolitan Housing Trust v TM*.

136. That being the position under English law, I do not consider that the Convention requires section 149 to be seen as conferring a civil right on XWJ. The decision of the House of Lords in *Lord Grey School*, to which effect was given in *Tom*

Hood School at first instance, meant that XWJ did not have a civil right of the kind contended for in *Tom Hood School*. XWJ arguably had a Convention right not to be discriminated against in relation to the provision of education, as illustrated by *Oršuš v Croatia*, but that is addressed in English law by section 85 of the Equality Act. I do not consider, in the words used by the ECtHR in paragraph 21 of its judgment in *Araç v Turkey* (by reference to *Tinnelly*), that section 149 of the Equality Act gives rise to a situation "where a State confers rights which can be enforced by means of a judicial remedy" and which can, therefore, be regarded as civil rights.

(5)(b)(iii) Was the Review Panel's Decision "Directly Decisive"

137. Although the issue does not arise for decision, it may be helpful for me to say that, if the issue in the review panel proceedings as to compliance with the public sector equality duty had concerned a civil right, I would have concluded that the review panel's decision on that issue was capable of being "directly decisive" of that issue, since it would have been binding on the Claimant, the head teacher and the governing body pursuant to regulation 25(6) of the 2012 Regulations.

138. I say that the review panel's decision was capable of being decisive because the public law nature of the review panel's jurisdiction meant that there were a range of decisions which the review panel could have made, not all of which would have involved a decision by the review panel on the question whether the public sector equality duty had or had not been complied with. For instance, the review panel could have decided to quash the GDC decision on the basis that the GDC had not properly considered that question, without itself making a decision on that question, but leaving it for reconsideration by the GDC.

139. However, a decision by the review panel that the GDC decision was flawed and should be quashed because the exclusion decision had been taken without complying with the public sector equality duty would have been binding on the head teacher and the governing body. I do not consider that the fact that such a decision could be challenged in judicial review proceedings would prevent it from being "directly decisive".

(6) Discrimination contrary to Section 85(2)(c) of the Equality Act

(6)(a) Discrimination: Submissions

140. The Claimant submitted that:

(1) The Claimant alleged before the review panel that XWJ's exclusion involved discrimination on the grounds of race and special educational needs.

(2) Both the ECF application and the review request made clear that that was her case before the review panel. In support of this submission, the Claimant relied in particular on the aspects of the ECF application which I have listed in paragraph 18 above.

(3) The review panel had jurisdiction to determine alleged breaches of the Equality Act and could therefore make a "directly decisive" determination of such a claim.

141. The Director accepted that XWJ's right under section 85(2)(c) of the Equality Act not to be discriminated against was a civil right for the purposes of Article 6(1), but contended that:

(1) The ECF application and the review request made no reference to any claim in the proceedings before the review panel that XWJ had been discriminated against contrary to section 85(1)(c).

(2) In any event, the review panel could not make a determination which was directly decisive of a discrimination claim, which had to be brought before the county court.

(6)(b) Discrimination: Decision

(6)(b)(i) The Issues in the Review Panel Proceedings

142. The lawfulness of the second review decision falls to be assessed by reference to the ECF application materials. It follows that it is not necessary for me to decide whether the Claimant and/or XWJ had in fact made a claim in the review panel proceedings that his exclusion was unlawful because of discrimination contrary to section 85(1)(c) of the Equality Act.

143. It may be helpful, however, for me to set out my conclusions as to the issues in the review panel proceedings:

(1) It is clear from paragraph 10.10 of the GDC minutes that the GDC considered the question whether XWJ's exclusion had resulted from discrimination on the grounds of disability.

(2) Moreover, the submission dated 20 September 2021 contained a claim that XWJ's exclusion was unlawful by reason of discrimination.

(3) However, this claim was not repeated in the submission dated 18 November 2021, nor was it advanced at the hearing before the review panel. It forms no part of the review panel's summary of the Claimant's case and closing submissions.

(4) The review panel did not purport to determine any such claim, no doubt because the review panel did not understand that any such claim was being advanced before it.

(5) There was no complaint thereafter by the Claimant, despite the fact that the Claimant sought judicial review of the review panel's decision, that the review panel had omitted to address one of the claims advanced before it.

144. In these circumstances, had it been necessary for me to decide this issue, I would have decided that XWJ's right pursuant to section 85(2)(e) of the Equality Act

not to be discriminated against was not, at the time of the ECF application or thereafter, going to be the subject of any determination in the review panel proceedings and it was not in fact the subject of any determination in the review panel proceedings.

(6)(b)(ii) The ECF Application Material

145. The Claimant did not, in the ECF application, the review request or the letter before action, state that XWJ's right pursuant to section 85(2)(e) of the Equality Act not to be discriminated against was going to be the subject of any determination in the review panel proceedings. The Claimant identified in the ECF application the grounds of challenge to XWJ's exclusion, but these did not include any allegation that XWJ had been the subject of direct or indirect discrimination.

146. There is no scope for implying such an allegation into a document which was drafted by a lawyer and which purported to set out the grounds of challenge to the GDC decision. The aspects of the ECF application relied on by the Claimant do not assist in this respect. For instance, the statement that, as a black pupil, XWJ was at disproportionate risk of permanent exclusion did not constitute a claim that XWJ had in fact been the subject of direct or indirect discrimination on the grounds of race.

147. It follows that the Director was under no obligation to conclude that Article 6(1) applied to the review panel proceedings on the basis that they would involve a determination of XWJ's right not to be discriminated against. On that basis, this aspect of the application for judicial review falls to be dismissed.

(6)(b)(iii) Could the Review Panel make a Directly Decisive Determination?

148. In the light of that decision, it is unnecessary for me to decide the issue whether the review panel could have made a "directly decisive" determination of XWJ's right not to be discriminated against. However, since this is an issue which could well arise in other cases, it may be helpful for me to set out my view.

149. The public law nature of the review panel's jurisdiction meant that the review panel would not have been obliged to make a decision itself on the question whether XWJ had been discriminated against, if that had been an issue in the review panel proceedings. It could, for instance, have confined itself to deciding that the GDC had, or had not, properly addressed the allegation of discrimination. However, I consider that a decision by the review panel that the GDC decision should be quashed because XWJ's exclusion had been unlawful by reason of discrimination contrary to section 85(2)(e) of the Equality Act would have been directly decisive for the purposes of Article 6(1).

150. It was accepted on behalf of the Director that the review panel had jurisdiction to make such a decision, if the issue of discrimination had been raised. The review panel was obliged by section 51A(4)(c) of the Education Act 2002 to consider the GDC decision in the light of the principles applicable on an application for judicial review, which involved considering any allegation (if made) that the head teacher had acted unlawfully by discriminating against

XWJ. Moreover, any such decision made by the review panel would have been binding on the head teacher and the governing body, pursuant to regulation 25(6) of the 2012 Regulations. It is difficult to see how it can be said that a decision made by the review panel which was both within its jurisdiction and binding on the parties would not have been decisive.

151. Such a decision would only have determined the question whether the GDC decision should be quashed. It would not have determined any of the other issues (such as a claim to damages) which might have arisen if XWJ had brought a discrimination claim in the county court. On the other hand, such a decision by the review panel would have been binding on the parties, regardless of whether a separate claim had been, or was going to be, brought in the county court.

152. As to the authorities referred to by the parties on this issue, I do not consider that *X School* is helpful, since it concerns a materially different situation from the present case, as can be seen from the formulation by Lord Dyson of the "principal question" in that case. In *X School*, there had to be two sets of proceedings (i.e. before the governors and the ISA) before the Claimant could be placed on the children's barred list.

153. In the present case, by contrast, only one set of proceedings was needed to determine whether the GDC decision should be quashed and there was only one set of proceedings, i.e. the review panel proceedings. XWJ was not obliged to, and did not, bring a discrimination claim in the county court.

154. *Hamnett v Essex County Council* can also be distinguished. In that case, Gross LJ found that there was a conflict between the jurisdictional provisions of section 113 of the Equality Act and paragraph 35 of Schedule 9 to the 1984 Act. However, there is no such conflict in the present case, since it is accepted that the review panel had jurisdiction to consider a contention that the exclusion decision was unlawful by reason of discrimination.

155. Section 114 of the Equality Act 2010 confers jurisdiction on the county court to determine a claim relating to a contravention of Part 6 of the Act. Subsection 113(1) makes that jurisdiction exclusive, but that is subject, inter alia, to subsection 113(3)(a), which provides that subsection 113(1) does not apply to a claim for judicial review. Section 51A(4) of the Education Act 2002 then provides that the review panel was obliged to consider the GDC decision in the light of the principles applicable on an application for judicial review, which, as I have said, clearly involved considering whether the exclusion decision was unlawful by reason of discrimination.

156. Moreover, even if there were a conflict in the present case of the kind found in *Hamnett v Essex County Council* and if, as in *Hamnett v Essex County Council*, it were necessary to rely on the doctrine of implied repeal in order to resolve the conflict, section 51A of the Education Act 2002 was enacted by the Education Act 2011, after sections 113 and 114 of the Equality Act had come into force, and therefore section 51A of the Education Act 2002 would prevail.

(7) Article 2 of Protocol 1 and Article 14

157. I have already addressed, in my consideration of the public sector equality duty and section 85 of the Equality Act, the Claimant's primary submissions relating to Article 2 of Protocol 1, whether considered on its own or in conjunction with Article 14. I consider now whether there is any remaining aspect of those articles which meant that Article 6 (or any equivalent procedural requirement) was engaged in the present case.

(7)(a) Article 2 of Protocol 1 and Article 14: Submissions

158. The Claimant submitted that:

(1) The ECF application identified facts which supported a claim that his exclusion was a disproportionate interference with his right to an education. The Claimant relied for this purpose on the aspects of the ECF application identified in paragraph 18 above.

(2) The ECF clearly raised the issue of discrimination in the exclusion decision.

(3) The Director simply did not address Article 2 of Protocol 1 or Article 14 in the second review decision.

159. I have already noted the Director's acceptance that section 6 of the Human Rights Act 1998 conferred a civil right on XWJ, such that an alleged violation of Article 2 of Protocol 1 would concern a civil right. However, the Director submitted that:

(1) Article 2 of Protocol 1 was not engaged in the review panel proceedings.

(2) The Claimant did not apply for exceptional case funding on the basis that Article 2 of Protocol 1 was engaged in the review panel proceedings.

(7)(b) Article 2 of Protocol 1 and Article 14: Decision

160. Were it necessary to do so, I would accept the Director's submission that Article 6 (or any procedural requirement of Article 2 of Protocol 1, if that article contains such a procedural requirement) was not engaged in the review panel proceedings by reason of Article 2 of Protocol 1, since the review panel was not asked to find that there had been a violation of Article 2 of Protocol 1, either alone or in conjunction with Article 14. The review panel made no decision whether there had been a violation of Article 2 of Protocol 1. In my judgment, when one considers the "shape" of the litigation, as required in *Gudanaviciene*, it is not enough for the Claimant to say that the review panel proceedings concerned matters which might have given rise to an allegation of violation of Article 2 of Protocol 1, if no such allegation was in fact made.

161. It is sufficient, however, for me to base my decision on the terms of the ECF application:

(1) The ECF application itself made no reference to Article 2 of Protocol 1.

(2) The only reference to Article 2 of Protocol 1 in the review request or in the letter before action was a complaint that the Director had not addressed the Claimant's alternative argument that the procedural aspect of Article 2 of Protocol 1 was engaged. However, the Claimant had made no such argument in the ECF application.

(3) The Director was not obliged to address an argument which had not been formulated by the Claimant.

162. The Claimant undoubtedly did rely on *Oršuš v Croatia* in the ECF application, and that was a case concerning Article 2 of Protocol 1 and Article 14 (although not any procedural requirement thereof). However, the decision in that case was that there had been discrimination against the Claimant in relation to the provision of education, but discrimination in the present case was catered for by section 85 of the Equality Act.

163. I note in that respect that both *Oršuš v Croatia* and the earlier case of *Araç v Turkey* concerned challenges to the measures or regulations governing the provision of education, rather than allegations of discrimination in the particular case. (See, in this respect, the discussion of *Araç v Turkey* by Wilson LJ in paragraphs 18 and 19 of his judgment in *Tom Hood School*.) There was no such systemic challenge in the present case. Nor did the present case involve the question formulated by Lord Bingham in paragraph 24 of his speech in *Lord Grey School*:

> "… have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils? …"

(8) Article 8

(8)(a) Article 8: Submissions

164. The Claimant submitted that Article 8 was engaged in the review panel proceedings and that this was made clear to the Director. The Claimant relied, in particular, on:

(1) The school's alleged failure to take seriously racial abuse of XWJ in the March 2021 incident.

(2) The school's alleged failure to identify and put in place provision for XWJ's special educational needs.

(3) The alleged discrimination on the grounds of race and/or disability.

(4) The alleged disproportionality of excluding XWJ so soon before his GCSEs.

(5) The impact of the exclusion on XWJ, including:

(a) The effect on XWJ's mental health.

(b) The stigma which results from a permanent exclusion.

(c) The other consequences which the wider evidence shows result from permanent exclusion, which adversely affects attainment, relationships, identity, social inclusion, health and welfare.

165. The Director submitted that:

(1) Article 8 ECHR was not engaged in the review panel proceedings.

(2) In any event, this was not the basis on which the Claimant applied for exceptional case funding.

(8)(b) Article 8: Decision

166. Again, were it necessary to do so, I would accept the Director's submission that Article 8 was not engaged in the review panel proceedings. The submission dated 20 September 2021 did allege that Article 8 had not been considered, but that allegation was not repeated in the submission of 18 November 2021 or in the submissions made to the review panel. Although matters were referred to in the review panel proceedings which might be said to be relevant to the right conferred by Article 8: there was no allegation that there had been a violation of Article 8; the review panel made no decision whether or not there had been a violation of Article 8; and the Claimant did not contend, in her application for judicial review of the review panel's decision, that the review panel had omitted to address an issue which had been raised before it.

167. In my judgment, the Director was not obliged to address any alleged Article 8 issues because the only reference in the ECF application to Article 8 was the statement that the Claimant could rely on the procedural aspect of Article 8, with no explanation of how it was alleged that Article 8 was engaged in the review panel proceedings. The review request and the letter before action did not provide any such explanation. On the contrary, the letter before action enclosed the review panel's decision, from which it could be seen that the review panel had not made a decision whether or not there had been a violation of Article 8.

168. Given that decision, it is unnecessary for me to say anything about the circumstances in which an allegation in proceedings before a review panel that an expulsion amounted to a violation of Article 8 might give rise, for the purposes of section 10(3) of LASPO, to either a need to provide exceptional case funding or a risk that failure to provide exceptional case funding would be a breach of the individual's Convention rights. That is an issue which would be better addressed on the facts of an individual case, albeit in the context of Silber J's decision in *Tom Hood School*.

(9) The Challenge to the 2023 ECF Guidance

(9)(a) The 2023 ECF Guidance: Submissions

169. The Claimant submitted that the 2023 ECF Guidance was produced pursuant to a duty, i.e. the duty imposed by section 4(5) of LASPO, and therefore fell within the second category of cases identified in paragraph 46 of the judgment of Lords Sales and Burnett in *A*.

170. In addition, while accepting that the 2023 ECF Guidance need not contain an exhaustive list of relevant factors, the Claimant submitted that paragraph 8.2 is unlawful, both under the test set out in *A* and pursuant to the *UNISON* principle, because:

(1) It does not address Article 6 and how civil rights may be engaged.

(2) It makes no reference to discrimination in the sphere of education engaging Article 6.

(3) It makes no refence to Article 8, Article 14 or Article 2 of Protocol 1.

(4) It does not explain what could constitute a "disproportionate restriction on the right to an education".

(5) It is unclear what is meant by the words "if such exclusion arguably gives rise to a right to a judicial remedy under the applicable law".

(6) Legal aid practitioners such as Ms Simpson cannot understand the 2023 ECF Guidance and consequently do not know how to complete the application form so as to satisfy the Director that exceptional case funding should be granted.

171. The Lord Chancellor submitted that:

(1) She was not under a duty to issue the 2023 ECF Guidance, only to publish any guidance which she decided to issue.

(2) The 2023 ECF Guidance:

(a) in terms of the test identified in *A*, does not positively authorise or approve unlawful conduct;

(b) does not purport to be exhaustive and contains no material omissions; and

(c) is clear.

(3) The *UNISON* principle is not engaged and there is no evidence that the 2023 ECF Guidance constitutes an impediment to access to justice. In particular, there is no evidence (other than assertions by Ms Simpson in her second witness statement) that the 2023 ECF Guidance creates "a

real risk that persons will effectively be prevented from having access to justice".

(9)(b) The 2023 ECF Guidance: Decision

172. The present case does not fall within any of the categories identified by Lords Sales and Burnett in paragraph 46 of their judgment in *A*:

(1) Category (i) is not relevant because the Claimant does not allege that the 2023 ECF Guidance contains a positive statement of law which is wrong. In particular, it is not suggested that paragraph 8.2 is inaccurate in any respect, merely that it is incomplete and unclear.

(2) Section 4 of the 2012 Act did not impose a duty on the Lord Chancellor to issue guidance, let alone a duty to provide accurate advice about the law, merely a duty to publish such guidance (if any) as she decided to issue.

(3) The Lord Chancellor did not purport in the 2023 ECF Guidance to provide a full account of the legal position. The 2023 ECF Guidance did not purport to be exhaustive, but instead said that it was not intended to be exhaustive. Moreover, it stated that applications were to be considered on a case by case basis and by reference to any relevant case law.

173. I do not consider that the *Gillick* test is met in the present case. The 2023 ECF Guidance does not "authorise or approve unlawful conduct by those to whom it is directed". On the contrary, it encourages caseworkers to apply section 10(2) and (3) of LASPO.

174. The only complaints which are made concern paragraph 8.2 of the 2023 ECF Guidance, but:

(1) Paragraph 8.2 has to be read in the context of the guidance as a whole, including, in particular, paragraphs 1.2 and 3.9.

(2) Paragraph 8.2 begins by recognising, correctly, that proceedings before a review panel in relation to the permanent exclusion of a pupil may involve the determination of civil rights and obligations.

(3) As to the allegation that paragraph 8.2 is incomplete, the *Gillick* test does not require that guidance addresses every case or every argument which caseworkers may have to deal with. Indeed, given the nature of the Strasbourg jurisprudence, it is not to be expected that any guidance would attempt to do so.

(4) In any event, the specific criticisms of paragraph 8.2 are misguided. For instance, while it is true that paragraph 8.2 itself does not mention Article 6, the significance of Article 6 is clear from the 2023 ECF Guidance as a whole. Terms such as "proportionate" and "disproportionate" do not

require further elaboration and, indeed, further elaboration of such terms would often be unhelpful at best.

(5) I do not consider that paragraph 8.2 is unclear or lacks transparency, but, in any event, clarity and transparency are not part of the *Gillick* test. Indeed, a caseworker who found paragraph 8.2 to be unclear would not thereby be authorised or approved to engage in unlawful conduct, but would, instead, have reason to follow the guidance in, e.g., paragraph 1.2 to make decisions on a case by case basis and by reference to decided cases.

175. In my judgment, the 2023 ECF Guidance does not offend the *UNISON* principle, if that principle is capable of applying to guidance (as to which I make no decision). It does not create "a real risk that persons will effectively be prevented from having access to justice". The Claimant contends, in effect, that the 2023 ECF Guidance makes it more difficult for the representatives of parents and pupils to apply for exceptional case funding, but I do not consider that the guidance adds significantly, if at all, to the complexity of the issues created by the underlying case law. For instance, the words "if such exclusion arguably gives rise to a right to a judicial remedy under the applicable law" are taken directly from the Strasbourg jurisprudence, as illustrated by paragraph 21 of the ECtHR's judgment in *Araç v Turkey*.

176. Indeed, it is relevant to note that the present case is one in which the Claimant's legal representatives, far from being prevented by the 2021 ECF Guidance from applying for exceptional case funding, were able to make repeated submissions that that guidance was wrong.

177. I consider that the challenge to the 2023 ECF Guidance is so lacking in merit that it is appropriate for me to refuse permission to make the relevant amendments to the claim form and statement of facts and grounds.

(10) Conclusion

178. For all of these reasons:

(1) I grant permission to the Claimant to amend the claim form and the statement of facts and grounds insofar as the proposed amendments concern the challenge to the second review decision.

(2) I dismiss the application for judicial review of the second review decision.

(3) I refuse permission to the Claimant to amend the claim form and the statement of facts and grounds so as to add a challenge to the 2023 ECF Guidance.

179. I express my gratitude to all counsel and solicitors for the efficient and helpful manner in which all of the documents and submissions were presented in this case, which has been of considerable assistance to me.