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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered*:	**30/04/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY JR87 FOR JUDICIAL REVIEW

Mr Jaffey KC with Mr McQuitty KC (instructed by Phoenix Law Solicitors) for the Applicants/Respondents
Dr McGleenan KC with Mr P McAteer (instructed by Departmental Solicitor's Office) for the Respondent/Appellant
Mr P McLaughlin KC with Ms McCartan (instructed by EA Solicitors) for the Board of Governors
Mr Colmer KC with Ms Kiley KC (instructed by O'Reilly Stewart Solicitors) for the first intervenor, the Transferor Representatives' Council
Mr Bunting KC with Ms Smyth and Mr Fegan (instructed by McIvor Farrell Solicitors) for the second intervenor, Humanists UK

Before: Keegan LCJ, Treacy LJ and Horner LJ

TREACY LJ (*delivering the judgment of the court*)

Introduction

[1] We are asked in this appeal to rule on the legality of the provision of religious education in Northern Ireland. Religion in Northern Irish schools has long been controversial, and the subject has had a different history here than in other areas of the United Kingdom. In contrast to the secular reform of the education system in England and Wales facilitated through the 1870 and 1902 Education Acts, the Irish churches retained their ties to the school system. In Northern Ireland, the 1923 Education Act introduced by the first Belfast government maintained the influence of the main churches in our education system.

[2] A hundred years later, the provision of mandatory Christian education as standard in controlled schools was challenged by way of judicial review in these proceedings. In the court below the applicants contended that the mandatory Christian religious education ("RE") and collective worship ("CW") currently provided in controlled primary schools in Northern Ireland is contrary to the

religious freedom protections guaranteed by the European Convention on Human Rights ("ECHR"). For its part, the Department contended that the core curriculum is in line with Convention requirements, and that there is no Strasbourg caselaw that requires a departure from the present scheme.

[3] In July 2022 Colton J decided the case in favour of the applicant. The present case is an appeal from that decision. The appellant in this case is the Department of Education. It is represented by Dr McGleenan KC and Mr McAteer BL. The first respondent is JR87, a young child, with her mother acting as her next friend. The second respondent is the child's father. They are represented by Mr Jaffey KC and Mr McQuitty KC. The Board of Governors of JR87's school act as a notice party, represented by Mr McLaughlin KC and Ms McCartan BL. There are two further intervenors. An intervention on behalf of the appellant is made by the Transferor Representatives Council ("TRC"), who represent three churches in Northern Ireland. Their submissions have been provided by Mr Colmer KC and Ms Kiley KC. There is also an intervention on behalf of the respondents, made by Humanists UK, represented by Mr Bunting KC, Mr Fegan BL and Ms Smyth BL. All parties have made detailed written submissions that were developed at hearing by the appellant and respondents respectively.

Facts of the case and procedural history

[4] JR87, the first respondent, is now nine years old. From years 1 to 3 (P1-P3), she attended a controlled primary school in Belfast ("the school"). As part of the curriculum she took part in non-denominational Christian religious education ("RE") and collective worship ("CW").

[5] The child does not come from a religious family. In his grounding affidavit, her father (the second respondent in the present appeal) explained that neither he nor his wife profess any religious belief. They describe themselves as 'broadly humanist' and they made a joint decision as parents not to raise their daughter within any religious tradition.

[6] When JR87 began attending school they noticed that before eating she would repeat a prayer she had learned at school, and that she would ask them questions about God and religion. In May 2019, the parents wrote an initial letter to the school voicing concerns that their daughter's education did not appear to conform with their own religious/philosophical convictions. They asked the school to clarify their understanding of the law in relation to the provision of RE and CW, and enquired what inspection mechanisms were in place to ensure that children were receiving a balanced religious education.

[7] In a reply dated 21 June 2019, the school confirmed that its provision of RE and CW was "bible-based" and that it followed the core syllabus for education and complied with the requirements of the legislation and the core syllabus at an age-appropriate level.

[8] The parents then sent a detailed pre-action protocol letter to both the school and the Department of Education giving notice of their intention to seek judicial review of the impugned legislation. In this letter, the parents challenged provisions of the Education and Libraries (NI) Order 1986 ("the 1986 Order"), the Education (NI) Order 2006 ("the 2006 Order") and the Education (Core Syllabus for Religious Education) Order (NI) 2007 ("the 2007 Order"). We refer to these orders collectively as the 'impugned legislation' and the relevant provisions will be considered in detail below. The parents challenged the impugned legislation on the basis that it contravened their right to respect for freedom of thought, conscience and religion which is protected by Article 9 ECHR and by Article 2 of Protocol 1 ('A2P1') which requires any State that provides public education to 'respect the right of parents to ensure such education… is in conformity with their own religious and philosophical convictions.' The Department provided a substantive response denying that the impugned legislation breached the applicants' human rights.

[9] Before the initial judicial review, all parties agreed to submit the complaint to the Curriculum Complaints Tribunal as a means of alternative remedy. Under the 2006 Order, this Tribunal has jurisdiction to hear and determine complaints in relation to the duties or powers conferred upon a board of governors where the board has either:

> "(a) acted or proposes to act 'unreasonably' with respect to the exercise of any power or duty under the relevant provision; or
>
> (b) failed to discharge any such duty."

Both parties provided written submissions to the Tribunal, which met on 10 September 2020. Their decision was conveyed to the parties on 22 September 2020. It stated:

> "… the tribunal finds that the Board of Governors of (the school) did not act unreasonably with respect to the exercise of the powers conferred, or in the performance of the duties imposed on it by the statutory provisions relating to religious education and collective worship, as detailed above. The complaints are therefore unanimously dismissed."

[10] Colton J deals with the effect of this decision at para [16] of his judgment which states:

> "[16] Having considered the short determination of the tribunal it will be seen that its conclusion is based on the premise that the school had complied with its obligations

> under the Education (Northern Ireland) Order 2006, as implemented through the Education (Core Syllabus for Religious Education) Order (Northern Ireland) 2007. The decision points out that the school is statutorily obliged to adhere to this syllabus and has no powers to amend it. The tribunal, understandably, does not carry out any analysis of the school or the Department's obligations under the Convention and whether in fact the statutory scheme is compliant with A2P1. If anything, the decision reinforces the submission that the school's hands are tied in terms of its mandatory obligation to deliver the core syllabus in accordance with the relevant legislation. In no way could it be considered determinative of this application."

[11] JR87's parents submitted an amended Order 53 Statement to the High Court on 24 June 2021. Leave for judicial review had already been granted by the trial judge on 11 June 2021.

[12] The judicial review hearing was subsequently held, and Colton J gave his judgment in July 2022 with neutral citation [2022] NIQB 53. In broad summary he found that RE and CW is not conveyed in an objective, critical and pluralist manner in Northern Ireland (trial judgment, paras [74] and [83]). Accordingly, he found the impugned legislation to be in breach of the applicants' rights under Article 2 of Protocol 1 of the ECHR read with Article 9 ECHR (trial judgment, para [123]).

[13] As regards remedy, Colton J noted in an addendum to his judgment that the legislation was under review. He, therefore, declined to issue a quashing order against the legislation but did grant the following declaration:

> "The court declares that the teaching of religious education under the core syllabus specified under Article 11 of the Education (Northern Ireland) Order 2006 as implemented through Article 3 of the Education (Core Syllabus for Religious Education) Order (Northern Ireland) 2007 and the arrangements for collective worship in the primary school attended by the first named applicant breached her and her father's rights under Article 2 of the First Protocol read with Article 9 of the ECHR."

[14] The judge considered it inappropriate to make any order against the school.

[15] The entirety of Colton J's decision has been appealed by the Department. The Board of Governors have provided written submissions for this court's consideration; it has not formally joined the Department as an appellant.

Grounds of appeal

[16] The appellant has invited this court to consider the following questions:

(i) Did the trial judge err in concluding that the teaching of RE under the core syllabus and the arrangements for collective worship in the primary school attended by the first respondent breached her and her father's rights under Article 2 of the First Protocol (A2P1) read with Article 9 of the European Convention on Human Rights (ECHR)?

(ii) Did the trial judge err in failing to separately analyse and determine the claims made by both the respondent parent and the respondent child?

(iii) Did the trial judge err in concluding that both respondents' rights under A2P1 read with article 9 ECHR had been breached?

(iv) Did the trial judge err in making the declaration that he made?

These are the questions we will address in this appeal.

The impugned legislation and the core syllabus for religious education

[17] As noted above, the relevant domestic legislation is the 1986 Order, the 2006 Order and the 2007 Order. All relevant provisions of the legislation have been comprehensively set out by the parties in writing and by the trial judge in the judgment below (at paras [17]-[35]). Only the key provisions of the impugned legislation are set out here.

The 1986 Order

[18] Article 21(1) of the 1986 Order provides for religious education in controlled and voluntary schools:

> "(1) Subject to the provisions of this Article, religious education shall be given in every grant-aided school other than a nursery school and the school day in every such school shall also include collective worship whether in one or more than one assembly on the part of the registered pupils at the school."

[19] The religious education requirement is expanded upon in article 21(2) which provides that any such education shall be undenominational:

> "(2) … religious education, that is to say, education based upon the Holy Scriptures according to some

> authoritative version or versions thereof but excluding education as to any tenet distinctive of any particular religious denomination and the collective worship required by paragraph (1) in any such school shall not be distinctive of any particular religious denomination."

[20] Article 21(3) next provides that in grant-maintained schools, RE and CW will be under the control of the Board of Governors, with Article 21(3)(A) containing an insertion that such religious education will be in accordance with "any core syllabus specified under Article 11 of the Education (Northern Ireland) Order 2006." That provision is outlined at paragraph [26] below.

[21] Article 21(4) stipulates that:

> "(4) Religious education and collective worship required by paragraph (1) shall be so arranged that-
>
> (a) the school shall be open to pupils of all religious denominations for education other than religious education;
>
> (b) no pupil shall be excluded directly or indirectly from the other advantages which the school affords."

[22] Article 21(5) allows for parents to request that their child be excused from participation in the RE and/or CW activities of the school:

> "(5) If the parent of any pupil requests that the pupil should be wholly or partly excused from attendance at religious education or collective worship or from both, then, until the request is withdrawn, the pupil shall be excused from such attendance in accordance with the request."

[23] Article 21(7) permits:

> "(7) Ministers of religion and other suitable persons, including teachers of the school, to whom the parents do not object shall, subject to paragraph (8), be granted reasonable access at convenient times to pupils in any grant-aided school other than a nursery school for the purpose of giving religious education, whether as to tenets distinctive of a particular religious denomination or otherwise, or of inspecting and examining the religious education given in the school and education given by

> virtue of this paragraph may be in addition to that provided under paragraph (1)."

[24] Article 21(9) allows the Department to make such regulations as it considers necessary for securing that the provisions of the Article are complied with in all grant-aided schools.

[25] The final relevant provision of the 1986 Order is Article 44, which reads:

> "(44) In the exercise and performance of all powers and duties conferred or imposed on them by the Education Orders, the Department and [the Authority] shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils shall be educated in accordance with the wishes of their parents."

The 2006 Order

[26] Under Article 4 of the Education (NI) Order 2006, there is a general duty to respect the curriculum:

> "(1) It shall be the duty of the Board of Governors and principal of every grant-aided school to exercise their functions as respects that school (including, in particular, the functions conferred on them by this Part) with a view to securing that the curriculum for the school satisfies the requirements of this Article.
>
> (2) The curriculum for a grant-aided school satisfies the requirements of this Article if it is a balanced and broadly based curriculum which—
>
> (a) promotes the spiritual, emotional, moral, cultural, intellectual and physical development of pupils at the school and thereby of society; and
>
> (b) prepares such pupils for the opportunities, responsibilities and experiences of life by equipping them with appropriate knowledge, understanding and skills."

[27] The main requirements of the curriculum set out in Article 5 includes the provision of RE:

> "(1) The curriculum for every grant-aided school shall—
>
> (a) include provision for religious education for all registered pupils at the school in accordance with such of the provisions of Article 21 of the 1986 Order as apply in relation to the school"

[28] The core syllabus for RE is set out in Article 11 of the Order:

> "(1) Subject to paragraph (2), the Department may by order specify a core syllabus for the teaching of religious education in grant-aided schools, that is to say a syllabus which—
>
> (a) sets out certain core matters, skills and processes which are to be included in the teaching of religious education to pupils in such schools, but does not prevent or restrict the inclusion of any other matter, skill or process in that teaching; and
>
> (b) is such that the teaching in a controlled school (other than a controlled integrated school) of any of the matters, skills or processes set out in that syllabus would not contravene Article 21(2) of the 1986 Order."

[29] Article 11(2) sets out the drafting and consultation process required for the production and amendment of a core syllabus. It provides that the syllabus must be prepared by a drafting group representative of "persons having an interest in the teaching of religious education in grant-aided schools."

[30] Finally, Article 13(1)(a) sets out the duty that religious education "is given in accordance with the provision for such education included in the school's curriculum by virtue of Article 5(1)(a)."

The 2007 Order

[31] The 2007 Order was made by the Department in the exercise of powers conferred on it by Articles 11(1), (4) and 43(5) of the 2006 Order. The Order confirms that the contents of the document entitled "Core syllabus for religious education" are specified as the core syllabus for the teaching of religious education in grant-aided schools.

[32] Provision for the core syllabus is further made by Part 1 of Schedule 2 to the Education (Curriculum Minimum Content) Order (Northern Ireland) 2007 which provides that:

> "In order to meet their statutory requirements schools must provide learning opportunities in relation to the following:
>
> (a) religious education – in accordance with the core syllabus drafted by the four main Christian Churches in Northern Ireland as specified by the Department of Education."

The core syllabus for religious education

[33] The syllabus implemented by the 2007 Order was produced in conjunction with the four main churches in Northern Ireland who are represented as intervenors in this appeal by the Transferors Representatives' Council ("TRC"). Colton J set out a thorough outline of the curriculum at paragraphs [36]-[46] of his judgment, which is repeated here for completeness:

> "[36] As set out above the 2007 Order gave effect to the current core syllabus which is at the heart of this challenge. It specifies a syllabus for every stage of primary and compulsory education, that is from foundation stage through to key stage 4. The school only teaches foundation stage (years 1 and 2) and half of key stage 1 (years 3 and 4).
>
> [37] In the course of the hearing the parties sought to emphasise different aspects of the core syllabus. At this stage a summary of the key objectives is sufficient before further consideration of the detail later in the judgment.
>
> [38] In both of the stages under consideration … schools must follow three learning objectives. The objectives are the same for each stage, with different content.
>
> **Learning objective 1: Revelation of God**
>
> **Foundation stage**
>
> Pupils should begin to develop an awareness, knowledge, understanding and appreciation of the key Christian teachings about God, Father, Son and Holy Spirit, about

Jesus Christ, and about the Bible; and begin to develop an ability to interpret and relate the Bible to life.

Key stage 1

[40] The objective is described in the same way save that it provides that pupils should "develop" rather than "begin to develop" awareness, knowledge and understanding of the same aspects of Christianity.

Learning objective 2: the Christian Church

Foundation stage

[41] Pupils should begin to develop a knowledge, understanding and appreciation of the growth of Christianity, of its worship, prayer and religious language; a growing awareness of the meaning of belonging to a Christian tradition, and sensitivity towards the beliefs of others.

Key stage 1

[42] Once again, the objective is the same save that pupils should "develop" rather than "begin to develop" the same knowledge, understanding and appreciation.

Learning objective 3: morality

Foundation stage

[43] Pupils should begin to develop their ability to think and judge about morality, to relate Christian moral principles to personal and social life, and begin to develop to identify values and attitudes that influence behaviour.

Key stage 1

[44] Once again the objective is the same, save that pupils should "develop" rather than "begin to develop" the abilities.

[45] In respect of each learning objective the syllabus provides sub-headings of topics in respect of which teachers should provide opportunities for learning for pupils.

Guidance

> [46] In addition to the core syllabus non-statutory guidance for teachers and pupils has been developed by the Council for the Curriculum Examinations and Assessment (CCEA), a non-departmental public body funded by and responsible to the Department. The guidelines were prepared along with the Religious Education Advisory Group, established by the Department and were published in 2014."

The international legal framework

[34] The crux of this appeal is whether or not the impugned legislation complies with the State's obligations under the ECHR. Article 9 of the Convention requires the State to respect freedom of thought, conscience and religion:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

[35] Both parties have also placed considerable reliance upon Article 2 of Protocol 1, which provides:

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

[36] Other provisions found in the wider corpus of international human rights law are also relevant. Specifically, Article 26(3) of the Universal Declaration of Human

Rights, provides that, within the right to education, "parents have a prior right to choose the kind of education that shall be given to their children."

[37] The Human Rights Covenants – which the United Kingdom have ratified but not incorporated – contain similar provisions. Article 18 of the International Covenant on Civil and Political Rights 1966 ("ICCPR") requires state parties to:

> "have respect for the liberty of parents … to ensure the religious and moral education of their children in conformity with their own convictions."

A similar provision is contained within Article 13 of the International Covenant on Economic, Social and Cultural Rights.

[38] In addition, guidance provided by the Human Rights Committee in respect of the implementation of that Covenant has stated that:

> "… public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians" (para 6).

[39] The United Nations Convention on the Rights of the Child, contains similar protections. For example, at article 5 it provides insofar as relevant that:

> "(i) "States Parties shall respect the responsibilities, rights and duties of parents or … other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."
>
> (ii) At article 14(2): "States Parties shall respect the rights and duties of the parents … to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child."
>
> (iii) At article 18(1): "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and

development of the child. The best interests of the child will be their basic concern.

(iv) At article 29(1)(c): "States Parties agree that the education of the child shall be directed to … (t)he development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own."

[40] We set this framework out because, although they are not binding authority, the European Court of Human Rights has previously had regard to wider international human rights law when making its decisions – see, for instance, *Catan v Republic of Moldova and Russia* (App. Nos. 43370/04, 8252/05 and 18454/06). Therefore, while the assessment below will be formed primarily through the prism of the Strasbourg caselaw, we keep in mind the wider requirements of international law.

Summary of arguments

[41] All parties presented detailed legal arguments both orally and in writing. These arguments will be analysed in greater depth in the consideration below, but here we shall summarise the core submissions of each party and indicate the general approach that this court will take in relation to the arguments.

[42] The appellant relied on two main arguments. In broad summary, their argument was that the trial judge erred in finding that the provision of RE and CW in controlled primary schools breached A2P1 because it did not amount to 'indoctrination' as it is understood in the Strasbourg jurisprudence. In the alternative, the appellant relied on the unfettered right of withdrawal from RE and CW provided to parents under article 21(5) of the 1986 Order which they say, protects the impugned legislation from breaching any of the parties' Convention rights. As article 21(5) provides parents with the right to request that their child be wholly excused from attendance at RE /CW activities in the school, and it requires the school to comply with any such request, the Department argues that the parents were fully protected against any disrespect for their religious or philosophical beliefs.

[43] In support of these arguments, reliance was place on the well-known *Ullah* principle. This principle states that domestic courts should mirror Strasbourg caselaw; that the "duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less" – see *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, *per* Lord Bingham at para [20]. The appellant contends that there is no clear case where the European Court has

ruled that the provision of RE and CW as it stands in Northern Ireland would violate A2P1 or Article 9 of the Convention, and that there is no indication that Strasbourg would find a breach where there already exists an untrammelled right of withdrawal where parents disagree with the content of the religious curriculum. For these reasons the appellant asks this court to allow the appeal because there is no clear or consistent caselaw that supports the contention that the provision of RE and CW amounts to a breach of Convention rights.

[44] The respondents replied to these arguments by emphasising that the trial judge was correct to apply the objective, critical and pluralistic test as set out by the Grand Chamber in *Folgerø v Norway* (2008) 46 EHRR 47. Their central contention was that the combined effect of the content of the core syllabus taken with the obligation to teach the syllabus in full amounted to 'indoctrination' as it required teaching children to believe in Christianity, rather than teaching them about it. It was further no answer, they averred, to simply exclude an affected child from RE lessons or CW assemblies, as an exemption was simply indicative of the lack of pluralism within the curriculum.

[45] Taken together, the respondents maintained that the practical effect of the RE and CW curriculum contravened the requirement of pluralism set out by the Convention caselaw, thus entitling the trial judge to make the declaration that he did.

The role of the appellate court

[46] Before embarking on our analysis proper, we must briefly mention the role of the appellate court. The court's role is not in dispute in the present case as both parties accept the principle most recently stated in this court's decision in *Lancaster & Others v Police Service of Northern Ireland and Secretary of State for the Home Department* [2023] NICA 63. As Keegan LCJ stated in that case:

> "[17] We have approached this case as a reviewing court in line with authority which was not disputed by any party to this appeal. Two decisions of the Supreme Court have dealt with this issue as follows. In Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33, it was held that the appellate court may only "consider whether there was any such error or flaw in the judge's treatment of proportionality" (per Lord Carnwath at para [65]) and that the appellate court must essentially decide whether the judge was wrong. This line of reasoning was affirmed in *H-W (Children) No 2* [2022] UKSC 17, where the court unanimously held that "the existence of the requirement of necessity and proportionality does not alter the near-universal rule that appeals in England and Wales proceed by way of review rather than by way of

> re-hearing." The same principle applies to the present case. As such, it is not for this court to start the proportionality analysis anew. Rather, the correct approach is to review the trial judge's findings and to intervene only if we consider that he was wrong."

The same approach is adopted here.

The first ground of appeal

[47] The first ground of appeal focuses on the trial judge's finding that the RE curriculum was not sufficiently objective, critical or pluralistic (for present purposes, the "objectivity test"). In essence, the parties dispute the proper test to be deduced from the Strasbourg jurisprudence. The appellant submitted that there was no basis to apply the objectivity test, and that properly understood, the line that the ECtHR draws is the prohibition of indoctrination. The respondents were careful in their reply, preferring not to reject outright the indoctrination standard, but rather sought to convince the court that the objectivity test is the proper elucidation of the indoctrination limit.

[48] At first instance, the trial judge was persuaded by the applicant/respondents' analysis of the caselaw, which we will consider in further detail below. Before doing so, however, it is beneficial to consider the margin of appreciation in A2P1 and how it impacts on the court's analysis, the related implications of the *Ullah* principle, and the test which, having considered the caselaw, the court considers the most appropriate to proceed on. We come to each of these in turn.

Stage 1: Lex specialis and the margin of appreciation

[49] It is uncontroversial that religious education under A2P1 is the *lex specialis* to Article 9 of the Convention. As the ECtHR set out in *Lautsi and Others v. Italy* (2011) Application no. 30814/06:

> "59. The court reiterates that in the area of education and teaching Article 2 of Protocol No.1 is in principle the lex specialis in relation to Article 9 of the Convention. That is, so at least where, as in the present case, the dispute concerns the obligation laid on Contracting States by the second sentence of Article 2 to respect, when exercising the functions they assume in that area, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions (see *Folgerø and others v Norway*). The complaint in question should therefore be examined mainly from the standpoint of the second sentence of Article 2 of Protocol No.1.

> 60. Nevertheless, that provision should be read in the light not only of the first sentence of the same article, but also, in particular, of article 9 of the Convention, which guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion, and which imposes on Contracting States a 'duty of neutrality and impartiality.'
>
> In that connection, it should be pointed out that States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs."

[50] Further, the parties accepted the well-recognised line that the court should afford a wide margin of appreciation to the State in matters concerning the implementation of a curriculum. This principle was first outlined by the Strasbourg Court in *Kjeldsen, Busk Madsen & Pedersen v Denmark* (1976) 1 EHRR 71. That case concerned the application of A2P1 to the provision of sex education, which the applicant parents objected to on the grounds of religious conscience. The Strasbourg court looked to the drafting history of A2P1 and found at paragraph 53 that:

> "… the setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the court to rule and whose solution may legitimately vary according to the country and the era. In particular, the second sentence of Article 2 of the Protocol (P1-2) does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have

> answers to every question of a philosophical, cosmological or moral nature."

[51] This line of reasoning was returned to in the more recent case of *Papageorgiou and Others v Greece* (2020) 70 EHRR 36. *Papageorgiou* was a case in which the applicants complained that the solemn declarations required to seek exemptions for their children from a religious education course amounted to a violation of their parental A2P1 rights. In considering the margin of appreciation to be afforded to the State, the European Court made the following observations:

> "79. The court further draws attention to its fundamentally subsidiary role in the Convention protection system. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in so doing enjoy a margin of appreciation, subject to the supervisory jurisdiction of the court. Through their democratic legitimation, the national authorities are, as the court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, inter alia, *Hatton and Others v the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII, and *Garib v the Netherlands* [GC], no. 43494/09, § 137, 6 November 2017).
>
> 80. Where the legislature enjoys a margin of appreciation, the latter in principle extends both to its decision to intervene in a given subject area and, once having intervened, to the detailed rules it lays down in order to ensure that the legislation is Convention compliant and achieves a balance between any competing public and private interests. However, the court has repeatedly held that the choices made by the legislature are not beyond its scrutiny and has assessed the quality of the parliamentary and judicial review of the necessity of a particular measure (see *Lekić v Slovenia* [GC], no. 36480/07, § 109, 11 December 2018)."

[52] Thus, the Strasbourg jurisprudence makes clear that, in the first place, the State should be afforded a margin of appreciation when setting the curriculum.

[53] In this arena due deference is afforded to the State at the Strasbourg level. Properly regarded, the setting of a curriculum is a social policy issue. Recent Supreme decisions envisage a less intense standard of review in such cases (see

R (SC, CB and 8 children) v Secretary of State for Work and Pensions [2021] UKSC 26; and *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56).

[54] Moreover, as the inclusion of "respect" in A2P1 implies some positive obligation on the State, caution is to be employed (see *Campbell and Cosans v United Kingdom*, para 37 (1982) 4 EHRR 293). As Lord Reed stated in *Elan-Cane*:

> "55. Turning to consider the margin of appreciation, this is a concept of particular significance in relation to positive obligations. That is because the imposition of such obligations requires contracting states to modify their laws and practices, and possibly (as in the present case) to incur public expenditure, in order to advance social policies which they may not wholly support, or which they may not regard as priorities, without the imposition of the obligation being supported by any democratic mandate or accountability. While not a conclusive objection, those characteristics of positive obligations indicate the importance of exercising caution before they are imposed. An important conceptual mechanism by which the European court exercises such caution is by interpreting and applying the Convention in a way which allows contracting states a margin of appreciation.
>
> 56. As explained in para 35 above, the width of the margin of appreciation varies according to the circumstances. In that regard, two particularly important factors are, first, whether a particularly important facet of an individual's existence or identity is at stake, and secondly, whether there is a consensus within the member states of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues."

His Lordship continued:

> "58. In relation to the second issue, the importance of a consensus within the Council of Europe is readily understood. Courts, including the European court, are expert in adjudication. They do not, on the other hand, possess the capacity, the resources, or the democratic credentials to be well-suited to social policy-making. When adjudication by the European court requires it to consider questions of social policy, it accordingly finds

> guidance in a consensus on the part of the contracting states, and is cautious before embarking on such policy-making in the absence of a consensus."

[55] A similar sentiment was expressed by the Supreme Court in *SC*:

> "208. The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies."

[56] Thus, it is clear that a court should exercise caution before imposing positive obligations on the state.

Stage 2: The limits of the Strasbourg jurisprudence

[57] A related concern is the extent to which the Strasbourg Court has ruled on this issue. Domestic jurisprudence is clear that "courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court" (*R (Ullah) v Special Adjudicator* [2004] UKHL 26, *per* Lord Bingham at para 20). The corollary of this position is that domestic courts were required "to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

[58] This, the *Ullah* principle, has received sustained judicial attention, and may further be understood as a requirement to follow Strasbourg jurisprudence "no less and certainly no more" (*R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, *per* Lord Brown of Eaton-under-Heywood at para 106). It is not for this court to establish new principles of Convention law. Rather, the correct approach was outlined in *R (AB) v Secretary of State for Justice* [2021] UKSC 28 as:

> "59. […] In situations which have not yet come before the European court, they [the domestic courts] can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law."

[59] This approach is not disputed by the parties. What is in contention is the direction in which the Strasbourg Court takes us. It is in this light that we turn to the caselaw to determine the proper test.

Stage 3: The proper test

[60] The present case concerns an issue that is to be afforded a margin of appreciation. However as a domestic court we can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law.

[61] The genesis of the A2P1 caselaw sees us return to the *Kjeldsen* case. The key passage begins at para [52] and flows into para [53] (already discussed in part above). The court engaged in an analysis of the drafting history of A2P1, setting out the obligation's grounding principles:

> "52. As is shown by its very structure, Article 2 constitutes a whole that is dominated by its first sentence. By binding themselves not to "deny the right to education", the Contracting States guarantee to anyone within their jurisdiction "a right of access to educational institutions existing at a given time" and "the possibility of drawing", by "official recognition of the studies which he has completed", "profit from the education received" (judgment of 23 July 1968 on the merits of the "*Belgian Linguistic*" case, Series A no. 6, pp. 30-32, paras. 3-5).
>
> The right set out in the second sentence of Article 2 (P1-2) is an adjunct of this fundamental right to education (paragraph 50 above). It is in the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education. On the other hand, "the provisions of the Convention and Protocol must be read as a whole" (above-mentioned judgment of 23 July 1968, ibid., p. 30, para 1). Accordingly, the two sentences of Article 2 must be read

not only in the light of each other but also, in particular, of Articles 8, 9 and 10 (art. 8, art. 9, art. 10) of the Convention which proclaim the right of everyone, including parents and children, "to respect for his private and family life", to "freedom of thought, conscience and religion", and to "freedom ... to receive and impart information and ideas."

53. It follows in the first place from the preceding paragraph that the setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the court to rule and whose solution may legitimately vary according to the country and the era. In particular, the second sentence of Article 2 of the Protocol does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature.

The second sentence of Article 2 implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. *The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.* That is the limit that must not be exceeded." [emphasis added]

The end of this passage represents the classic statement on the provision of religious education in schools. It has, however, been given a fuller treatment in the subsequent caselaw. To this extent, the orthodox treatment of A2P1 has now been set out most comprehensively by the Grand Chamber in *Folgerø*:

"1. **General principles**

84. As to the general interpretation of Article 2 of Protocol No. 1, the court has in its case-law (see, in particular, *Kjeldsen, Busk Madsen and Pedersen*, cited above, §§ 50-54; *Campbell and Cosans v the United Kingdom*, 25 February 1982, §§ 36-37, Series A no. 48; and *Valsamis v Greece*, 18 December 1996, §§ 25-28, Reports of Judgments and Decisions 1996-VI) enounced the following major principles:

(a) The two sentences of Article 2 of Protocol No. 1 must be interpreted not only in the light of each other but also, in particular, of Articles 8, 9 and 10 of the Convention (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 52).

(b) It is on to the fundamental right to education that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between State and private teaching. The second sentence of Article 2 of Protocol No. 1 aims in short at safeguarding the possibility of pluralism in education, which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 50).

(c) Article 2 of Protocol No. 1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 51). That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State. The verb "respect" means more than "acknowledge" or "take into account." In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State.

The term "conviction", taken on its own, is not synonymous with the words "opinions" and "ideas." It denotes views that attain a certain level of cogency, seriousness, cohesion and importance (see *Valsamis*, cited above, §§ 25 and 27, and *Campbell and Cosans*, cited above, §§ 36-37).

(d) Article 2 of Protocol No. 1 constitutes a whole that is dominated by its first sentence. By binding themselves not to "deny the right to education", the Contracting States guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time and the possibility of drawing, by official recognition of the studies which he has completed, profit from the education received (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 52, and Case "relating to certain aspects of the laws on the use of languages in education in *Belgium v Belgium* (merits), 23 July 1968, Series A no. 6, pp. 31-32, § 4).

(e) It is in the discharge of a natural duty towards their children – parents being primarily responsible for the "education and teaching" of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education (see *Kjeldsen, Busk Madsen and Pedersen*, ibid.).

(f) Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Valsamis*, cited above, § 27).

(g) However, the setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the court to rule and whose solution may legitimately vary according to the country and the era (see *Valsamis*, cited above, § 28). In particular, the

second sentence of Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 53).

(h) The second sentence of Article 2 of Protocol No. 1 implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded (ibid.).

(i) In order to examine the disputed legislation under Article 2 of Protocol No. 1, interpreted as above, one must, while avoiding any evaluation of the legislation's expediency, have regard to the material situation that it sought and still seeks to meet. Certainly, abuses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism (ibid., § 54)."

[62] These principles have been applied in further decisions of the European Court. They include *Lautsi v Italy* [2012] 54 EHRR 3; *Yalçin & Ors v Turkey* (Application No 21163/11); *Papageorgiou v Greece* [2020] 70 EHRR 36; *Perovy v Russia* (Application No 4742909) and *Zengin v Turkey* [2008] 46 EHRR 44. These cases have been referred to by the parties but serve only as guidance as to how *Folgerø* has been applied in practice.

[63] The trial judge was further referred to the decision of Warby J in *Fox and Others v Secretary of State for Education* [2015] EWHC 3404 (Admin) which also considered the same principles before us now. We discuss the impact of *Fox* below.

[64] In consideration of the above caselaw, the trial judge set out what he considered the key principles to be at paragraph 60 of his judgment. At paragraph 60(viii), the trial judge stated:

> "In fulfilling the function assumed by it in setting a curriculum for the teaching and instruction of religious education it [the State] must take care that the information or knowledge included is conveyed in an objective, critical and pluralist manner. It must accord equal respect to different religious convictions and to non-religious beliefs. *That is the limit which must not be exceeded.*"
> [our emphasis]

[65] This is not a correct statement of the applicable principle as to the limit that must not be exceeded. In *Kjeldsen* at para [53] the court said the second sentence in A2P1:

> "implies...that the State…must take care that information or knowledge in the curriculum is conveyed in an objective, critical and pluralistic manner. *The state is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious or philosophical convictions.* ***That is the limit that must not be exceeded."***

[66] This formulation has been repeatedly adopted in the Strasbourg caselaw. The Grand Chamber in *Folgerø* recently confirmed this approach. The limit not to be exceeded is not objectivity as the trial judge held and which the respondents assert is the proper limit. The limit is indoctrination. In fact, the judge did find that this limit had been passed.

[67] The State must take care to impart information or knowledge in an "objective, critical and pluralistic" manner. In *Yalçın* the ECtHR held that the fact that a syllabus gave greater prominence to one religious belief could not in itself be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination (*Yalçin*, para 71). The threshold is instead crossed where an effective remedy to respect Article 9 religious convictions is not in place; only then will a finding of indoctrination be made. The respondents do not argue that giving greater prominence to one religious belief of itself can be viewed as such a departure. What they complain about is something of a different magnitude which they assert goes well beyond giving greater prominence and in fact descends into the territory of "a departure from the principles of pluralism and objectivity amounting to

indoctrination." In this respect they rely on the judge's finding that the curriculum at issue was not conveyed in an objective, critical and pluralistic manner.

[68] Thus, departure from compliance with the principles of pluralism and objectivity inevitably feeds into and is relevant to the determination of whether what is impugned amounts to indoctrination, thus crossing the limit that must not be exceeded. If the trial judge employed solely the standard of objectivity, he would have been wrong to do so. However, if the "principles" of objectivity and pluralism are in fact not met, as the judge found, *and* there is no effective remedy against violation of those principles a finding of indoctrination and breach of A2P1 will follow.

The Core Syllabus and A2P1-The trial judge's assessment

[69] To establish that there has been a breach of A2P1 it must be shown that the State has crossed the line of pursuing the forbidden aim of "indoctrination that might be considered as not respecting parents' religious or philosophical convictions." An important and necessary step on that journey will be to establish whether the "principles" of objectivity and pluralism have been respected.

[70] Colton J conducted a detailed analysis of whether the curriculum and the statutory requirements for collective worship were sufficiently objective, critical and pluralistic. Following his comprehensive analysis, he concluded that they were not. We set below a summary of the judge's reasoning for so concluding.

[71] The trial judge first considered the provision of the curriculum. He was of the opinion that any analysis of the syllabus displayed the priority afforded to promoting the practice of Christianity. This conclusion was reached having looked at the statements of attainments for key stage 1 which included, *inter alia*, being able to read from the Bible and service of worship, dramatise a Bible reading and make up prayers addressing God the Father. As such, the trial judge concluded at para [74] that under the curriculum RE is not conveyed in an objective, critical and pluralist manner.

[72] The judge next addressed the collective worship provisions and their impact on JR87 and her parents. He identified the collective worship provisions at JR87's school, which included visits from Christian ministers and representatives from the Scripture Union and CFC Belfast. Both these organisations have a specific mission to proselytise. The judge concluded at paragraph [83] "that collective worship is not conveyed in an objective, critical and pluralist manner. Furthermore, the lack of pluralism identified in each aspect is reinforced by the combination of RE and CW under the current arrangements."

[73] These conclusions fed into the judge's analysis of whether there had been a breach of A2P1. He went further by considering the effect of the non-statutory guidance (trial judgment, paras [86-101]) and the possibility of withdrawal (paras

[102-122]). This is the proper approach. The guidelines recognise that in recent decades society has become much more culturally and religiously plural in Northern Ireland and further encourages learning about and learning from religion. The trial judge concluded that "the guidelines, whilst helpful, do not take away from the court's analysis of what the [statutory provisions for] core curriculum and requires" (para [97]) and that it is further "no answer that the core curriculum is a minimum requirement if it has the effect of failing to provide religious education in an objective, critical and pluralist manner." (para [98])

Principles to be applied by an appellate court reviewing the findings of fact of a first instance judge

[74] The principles to be applied when reviewing findings of fact as here are clearly set out in the unanimous decision of the Supreme Court in *DB v Chief Constable of the PSNI* [2017] UKSC 7. That decision reveals a principled reluctance to interfere with the findings of fact of a trial judge even in the judicial review context where the evidence is on affidavit. Lord Kerr said:

> "[78] On several occasions in the recent past this court has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. For the purposes of this case, perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. In para 1 of his judgment he referred to what he described as "what may be the most frequently cited of all judicial dicta in the Scottish courts" - the speech of Lord Thankerton in *Thomas v Thomas* [1947] AC 484which sets out the circumstances in which an appeal court should refrain from or consider itself enabled to depart from the trial judge's conclusions. Lord Reed's discourse on this subject continued with references to decisions of Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36-37, where he said that an appellate court should intervene only it is satisfied that the judge was "plainly wrong"; that of Lord Greene MR in *Yuill v Yuill*[1945] P 15, 19, and that of Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he stated that:
>
> > 'It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in

finding that the trial judge had formed a wrong opinion.'

[79] Lord Reed then addressed foreign jurisprudence on the topic in paras 3 and 4 of his judgment as follows:

> '3. The reasons justifying that approach are not limited to the fact, emphasised in *Clarke's* case and *Thomas v Thomas,* that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in *Anderson v City of Bessemer* (1985) 470 US 564, 574-575:
>
> > 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be "the 'main event' … rather than a 'tryout on the road.'" … For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception.'
>
> Similar observations were made by Lord Wilson JSC in *In re B (A Child)*[2013] 1 WLR 1911, para 53.

> 4. Furthermore, as was stated in observations adopted by the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235, para 14:
>
> > 'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.'

> [80] The statements in all of these cases and, of course, in *McGraddie* itself were made in relation to trials where oral evidence had been given. On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in *Anderson* that the first instance trial should be seen as the "main event" rather than a "tryout on the road" has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent. In the present appeal, I consider that the Court of Appeal should have evinced a greater reluctance in reversing the judge's findings than they appear to have done."

[75] Applying the above principles to this case we have not been persuaded that this is an appropriate case in which to depart from the trial judge's clear factual

findings. We reach this conclusion applying the 'clearly erroneous' standard - with its deference to the trier of fact.

[76] In addition, we observe that Article 21(1) of the 1986 Order requires that RE "*shall* be given in every grant-aided school…and *the school day* in every such school *shall* also include ***collective worship*** whether in one or more than one assembly." This provision therefore imposes two separate and distinct duties, one for 'religious education' as defined (*ie* based on the Christian Holy Scriptures) and another for daily 'collective worship' in one or more than one assembly. The practical effect of the 'collective worship' provision is a requirement for daily, collective, and public worship. 'Worship' plainly goes beyond and is different in character from 'religious education.' Education is the process of teaching or learning and information about or training in a particular subject whereas worship is the practice. It is important not to conflate these vital distinctions. The effectiveness of the exemption, even an unqualified exemption, must take into account the scale of the transparent exclusion for the child that would result from the exercise of the right of exemption.

[77] Plainly, the trial judge's findings are capable of constituting evidence supporting an inference that the forbidden line had been crossed in this case.

[78] However, notwithstanding the judge's findings, it is argued that the unqualified exemption rescues the appellant from the conclusion that A2P1 has been breached in this case on the basis that the provision of the non-discriminatory exemption could accommodate the wishes of the parents.

The exemption

[79] When dealing with exemption, the trial judge considered the decision of Warby J in *Fox & Ors v Secretary of State for Education* [2015] EWHC 3404 (Admin). As in this case, *Fox* concerned the striking of a balance between the teaching of religious and non-religious world views, albeit at GCSE and not primary level. In the judgment, Warby J considered the same principles before us now, and held that "the complete exclusion of any study of non-religious beliefs for the whole of Key Stage 4, for which the Subject Content would allow, would not in my judgment be compatible with A2P1" (Fox, para [74]). As such, "[t]he need to withdraw a Child would be a manifestation of the lack of pluralism in question" (*ibid*, para [79]).

[80] Colton J said:

> "[122] The court considers that the *concerns* raised by the parents in relation to exclusion are valid. Whilst an unfettered right to exclusion is available it is not a sufficient answer to the lack of pluralism identified by the court. It runs the *risk* of placing undue burdens on parents. There is a danger that parents will be deterred from seeking exclusion for a child. Importantly, it also

> runs the *risk* of stigmatisation of their children. As Warby J said, 'the need to withdraw a child *would* be a manifestation of the lack of pluralism in question.'"
> [our emphasis]

[81] In view of the scale of exclusion from the daily public routine of the school assembly that the exemption would entail we understand what the judge was getting at. We would replace 'would' with 'could' on the basis that an exemption is not a get out of jail card and their child is not a guinea pig for some social experiment to test the effectiveness of the exemption. The judge in this passage is addressing the subjective concerns of the parents and the general danger that other parents might also be deterred from exercising the unfettered right of exemption because of the risk of stigmatisation. This is a legitimate concern.

[82] Whether an exemption, even a complete exemption, constitutes an effective remedy may depend on the circumstances of the particular case. Sometimes the cure can be worse than the problem. Thus, parents understandably wish to protect their children from any potential harmful consequences of decisions they are contemplating. Obviously, they want to mitigate, so far as reasonably possible, potential adverse impacts on the child from requesting withdrawal from a curriculum which is not, as it ought to be, objective, critical and pluralistic. We understand that parents ought not to have to shield their child from such a curriculum and be forced to make difficult choices, difficult because of the reasonably feared risk that their child may suffer in other ways. Choices forced upon them because of statutory requirements which do not conform to what they, and potentially many others in this day and age, wish for their child's education. Statutory requirements which, as the judge held, do not comply with the principles of objectivity and pluralism underpinning A2P1.

[83] The appellant's argument is that Article 21(5) allows for an unfettered right of withdrawal from both CW and RE. There is no obligation on the parent to provide reasons for requesting an exemption. This provision is further bolstered, the appellant says, when read in line with Regulation 21(3) of the Primary Schools Regulations (Northern Ireland) 1973.

[84] In support of this argument, the appellant correctly pointed out that the 'exemption' cases before the ECtHR concerned only partial rights of withdrawal. Therefore, there is no Convention jurisprudential basis for this court to find that the full withdrawal under Article 21(5) is insufficient to safeguard against indoctrination. The appellant contends that the provisions insure against indoctrination of children in a school setting. Therefore, the limit of the margin of appreciation has not been reached, and there can be no breach of Article 9 or A2P1.

[85] We consider that the exemption provisions *can* provide an important safeguard against indoctrination. As against this it might be naïve not to acknowledge that those who want to preserve the status quo may be alert to the

Hobson's choice faced by parents which could create the illusion of a safeguard which may in fact be neither practical nor effective and for that reason rarely exercised. In the present case the parents did not ultimately exercise their unfettered right of exemption nor complete the process to identify the practical outworkings of excusal. That is not to be taken as a criticism of the parents. It is not. On the contrary, the parents have succeeded in exposing fundamental difficulties with aspects of the mandatory core syllabus which sit uneasily with the spirit of A2P1.

[86] On the issue of withdrawal, the respondents argued that the trial judge correctly applied Strasbourg principles. They pointed to the case of *Zengin v Turkey*, decided only a few months after *Folgerø*, where the European Court held that arrangements for an exemption are a factor to be taken into account when making an assessment on religious indoctrination (*Zengin*, para 53). Thus, the respondents stressed that any arrangement for exemptions needed to be practical and effective to avoid a breach of A2P1. They argued that the practical effects of the exemption under Article 21(5) were objectively likely to stigmatise JR87 as she would be the only child in a close-knit community not to participate in religious instruction. This would further have the effect of 'revealing' the convictions of JR87's parents to the wider community. They further raised the point that the lack of an alternative curriculum is emblematic of the lack of the exemption's practical effect. As such, it was argued that the exemption should be considered as part of the problem, not the solution.

Consideration

[87] The standard required by the Strasbourg caselaw to establish an A2P1 breach is not easily met. The underpinning rationale for the applicable standard is "…that the State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious or philosophical convictions. That is the limit that must not be exceeded" (*Kjeldsen*, para 53). From this it is reasonably clear as to what the court considers indoctrination to be. Counsel for the appellant referred the court back to the *Lautsi* case where in its primary judgment, the court considered indoctrination to be instruction that "might be considered as not respecting parents' religious and philosophical convictions" (*Lautsi*, para 62). Judge Bonello in his concurring opinion stated:

> "3.3 In my view, what the Convention prohibits are any indoctrination, arrant or devious, the aggressive confiscation of young minds, invasive proselytism, the putting in place by the public educational system of any obstacle to the avowal of atheism, agnosticism or alternative religious options."

This passage shines a useful light on the need for curriculum space for non-religious world views.

[88] Judge Bonello's portrayal of indoctrination as something that might confiscate the mind goes some way to demonstrating what indoctrination means in practice. Looking at the ordinary meaning of indoctrination likewise provides guidance. To indoctrinate is to teach systematically to accept ideas uncritically.

[89] Promotion of one religion that forms the majority belief system within a community is not, *in itself*, a contravention of the ECHR (*Yalçin v Turkey*). However, it does not follow from the school census figures that the curriculum as formulated caters to the majority of families in Northern Ireland. The 2018/19 School Census indicates that 87.5% of all pupils come from a Christian background. Updated figures for the 2022/23 school year further show that, although the percentage has dropped somewhat, the majority of students still come from religious *backgrounds*. It does not however follow that the study and promotion of Christianity in Northern Irish schools may be said to be in keeping with the wishes of the majority of families in our society.

[90] All the Census figures indicate is that many parents may have Christian backgrounds. But many parents born into such backgrounds may not now share the convictions of their own parents. For example, the fact that someone was born into a Catholic family and raised as such may not reflect their current convictions. He/she for a variety of reasons may have outgrown or rejected their background and found a new set of convictions, religious or otherwise. Many parenting units of all hues - married, single, same sex or cohabiting - may have very different views about how a child of theirs should be educated. Even parents that have and share Christian religious convictions or enduring cultural attachment to their background, may not wish, for various reasons, to expose the children for whom they are responsible to the same education that either or both of them experienced. Indeed, their own experience may be the catalyst for wanting their children to have a different educative experience. Hence no reliable assumptions about the wishes of parents can be made from their background. Information about their actual wishes for the religious education (or otherwise) of their children can only be reliably gleaned from a proper inquiry into their specific wishes. Given the changing demographic and in order to maximise choice, policy makers have a range of options to contemplate including an 'opt out' model.

[91] The appellant and the other parties supporting the appeal drew attention to the progression of the curriculum through the various stages emphasising that this case is concerned with education at the earliest stages. This is not a persuasive point. The ability to indoctrinate, via a curriculum which offends the principles of objectivity and pluralism, may be at its highest among this age group. This is reflected in the quotation from St Ignatius of Loyola with which Colton J commenced his judgment "give me the child until he is seven years old, and I will show you the man." Someone might ask how could it be plausibly contended that it is not the aim of the statutory requirements to indoctrinate when the system thereby established requires very young children from the age of four onwards to participate in daily, collective public worship over many years?

[92] We consider that the judge's important conclusion that the curriculum is not conveyed in an objective, critical and pluralistic manner should remain undisturbed. As mentioned earlier such a finding can constitute evidence capable of supporting an inference that the forbidden line had been crossed. Indeed, it could legitimately be asked, why would the State with input from the Christian churches put so much effort into devising and retaining a curriculum which was not objective, critical and pluralistic if it was not in furtherance of the prohibited aim?

[93] However the trial judge's finding that the curriculum was not objective, critical and pluralistic, whilst important, is not dispositive of the issue whether A2P1 has been breached in this case. What saves the appellant from the conclusion that A2P1 has been breached in this case is the provision of the non-discriminatory exemption that could accommodate the wishes of the parents which remedy the parents did not exhaust. We have not been persuaded that the subjective fears of the parents are objectively made out. A process which had begun, but not completed, was an exercise by the school to accommodate. In fact, what happened was that the parents never exercised their right of exemption. Had they done so the school would have been obliged to comply with their request.

[94] As *Folgerø* principles make clear:

> "(f) Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see Valsamis, cited above, § 27)."

[95] The Article 21(5) exemption is worth setting out again at this point:

> "(5) If the parent of any pupil requests that the pupil should be wholly or partly excused from attendance at religious education or collective worship or from both, then, until the request is withdrawn, the pupil shall be excused from such attendance in accordance with the request."

[96] The exemption is to be read in line with Article 21(3) of the Primary Schools (General) Regulations of 1973:

> "(3) The time or times during which religious instruction is given or collective worship is held in a school shall be so arranged as to cause as little inconvenience as possible to any pupils attending the school who, in pursuance of paragraph (5) of Article 16 of

> the Order, have been excused from attendance at such religious instruction or collective worship."

[97] The respondents in effect ask the court to ignore the distinction between qualified and unqualified exemptions and invite the court to regard the need for exemption as evidence of the problem. It is certainly easier to see matters in that light when the curriculum is not conveyed in an objective, critical and pluralistic manner. The respondents argue that so long as there is no alternative provision no exemption can bring the impugned legislation into line with the Convention requirements. We can find no precedent in the Strasbourg jurisprudence to support this argument.

[98] Rather, an overview of the European caselaw shows that only qualified exemptions have been found to be in breach of the Convention. In *Folgerø*, the court found that the impugned withdrawal provision was "capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life" (*Folgerø*, para 102). Equally, where parents were obliged to inform the school authorities of their religious or philosophical convictions, this was an inappropriate means of ensuring respect for their freedom of conviction (*Zengin v Turkey* paras 75-76). Likewise, the court held in *Papageorgiou* that where an exemption is dependent on a "solemn declaration", this would have the effect of forcing parents "to adopt behaviour from which it might be inferred that they themselves and their children held, or did not hold, any specific religious beliefs" (*Papageorgiou*, para 88).

[99] Thus, in the court's view, the guidance on exemptions that emerges from the Strasbourg Court is that, exemptions will not, in principle, result in violations of the Convention where they are practical and effective so as to safeguard parental rights under the second sentence of A2P1 (see *Folgerø*, para 100).

[100] On this point, the respondents have also argued that the Article 21 exemption is nevertheless ineffective as it does not provide for alternative education, and that the filing of an exemption would result in stigmatisation. We are not satisfied that the evidence supports such a conclusion. The correspondence between JR87's parents and the school reveals that the school sought to explore options for JR87 while her classmates took part in RE and CW.

[101] The evidence supplied by the Board of Governors shows that the school further provided options for children who would sit out of RE and CW. These included the possibility of engaging in additional literacy tasks or completing ICT activities. Such alternatives would further be agreed in advance with the child's parents. JR87's parents did not explore these options with the school to any meaningful extent. They opted instead to pursue a course of litigation on the perceived fear that they would be stigmatised or placed under an undue burden while working with the school. We very much doubt that those fears would have been realised in practice.

[102] On a proper analysis we consider that the State was plainly alive to the consideration that there may be parents who have other religious or philosophical convictions. Article 21(5) was the mechanism designed to accommodate those with such convictions or indeed those who, despite their backgrounds, wanted such an accommodation for their children so as to maximise their freedom of choice. Thereby the State struck a legislative balance by making provision for an absolute exemption now contained in Article 21(5) of the 1986 Order. By this provision the parents of JR87 had an unfettered absolute right to have their child excused from the aspects of the curriculum to which they did not want their child exposed. They chose ultimately not to exercise that right.

[103] The existence of such a right does not sit easily with the allegation that the State is pursuing the aim of indoctrination. One asks rhetorically if that was the aim of the State why would it have legislated as it did by creating the very mechanism that could avoid the alleged objective? If the state is pursuing the forbidden aim of indoctrination why on earth would it furnish the necessary safeguard to frustrate its own objective? The existence of the provision demonstrates that the State was alive and responsive to the consideration that there may be parents who have other convictions which needed to be accommodated, hence this legislative balance was struck making provision for an unfettered exemption.

[104] The scope, breadth and simplicity of the statutory right of exemption is manifest from the express terms of the provision. It is a total unqualified non-discriminatory statutory right vested in the requesting parent with a concomitant obligation on the State to comply in full with the request for exemption - an obligation enforceable as a matter of public law. All that is required is a request for whole or partial exemption from attendance at religious education or collective worship or both which then triggers the mandatory obligation ('shall') requiring the child to be excused from such 'attendance in accordance with the request.' If indoctrination was the goal this was a strange way to pursue it.

[105] We are supported in our analysis by General Comment 22 on article 18 of the ICPPR which sets out its authoritative interpretation thereof in the following terms:

> "6. The Committee is of the view that article 18.4 permits school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18.4, is related to the guarantees of the freedom to teach a religion or belief stated in article 18.1. The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 *unless* the provision is made for non-discriminatory

exemptions *or* alternatives that would accommodate the wishes of persons and guardians."
[our emphasis]

[106] The General Comments are generally considered a source of International Law within the meaning of article 38(1)(d) of the Statute of the International Court of Justice. The ECtHR has also given weight to the ICCPR in previous decisions. The UKSC, in *AAA & Ors v SSHD* (the *Rwanda* appeal) [2023] UKSC 42 likewise relied on an interpretation of the Human Rights Committee - see paras [22] and [26].

[107] Given that the Article 21 exemption is – and always has been – unqualified in nature and given that the school in this instance engaged with JR87's parents in good faith, we are satisfied that the requirements of the ECHR caselaw have been met. The statutory right of exemption may be capable of being a safeguard against indoctrination in the school setting.

[108] In light of the limits of Strasbourg jurisprudence, and applying the *Ullah* principle, we do not consider that we could reliably anticipate how the European Court might be expected to decide this case, on the basis of the principles established in its case law. Specifically, we adopt the clear steer given by the House of Lords in *Ullah* that in the absence of some special circumstance (which it has not been suggested arises in this case) the domestic courts should follow any clear and constant jurisprudence of the ECtHR. This reflects the fact that the ECtHR is the specialist forum in which Convention law is developed. In addition, the court also articulated the "mirror principle" that it is "the duty of national courts to keep pace with Strasbourg jurisprudence as it evolves over time, no more, but certainly no less." The judgment that we have reached holds true to these principles and applies the ECHR jurisprudence on this issue as it stands.

Conclusion

[109] Accordingly, we uphold the trial judge's finding that the curriculum at issue in the present case is not conveyed in an objective, critical and pluralistic manner. However, we hold that no breach of A2P1 has been established because of the existence of the unqualified statutory right of the parents to have their child excused wholly or partly from attendance at religious education or collective worship, or both in accordance with their request. We therefore allow the appeal from which it follows that the declaration made by Colton J was wrong in law. In light of this conclusion, it is unnecessary to deal with the remaining grounds save to say that we do not consider that the trial judge erred when considering the applicants' claims together.

[110] In concluding this case we also note that this subject matter has been subject to an overarching review. Policy makers in this area are clearly minded to consider a refresh to the NI curriculum and that will inevitably include consideration of

religious instruction to take into account the complexion and changing needs of our modern society.