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Case No: AC-2025-LON-003151

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

Royal Courts of Justice
Strand, London, WC2A 2LL
27th March 2026

B e f o r e :

MR JUSTICE MANSFIELD

Between:

The KING on the application of

**(1) CKS (a child, by her mother and litigation friend
CLE)**

**(2) CLV (a child, by her mother and litigation friend
CLE)**

**(3) CLG (a child, by her mother and litigation friend
CEA)**

Claimants

- and -

Secretary of State for Education

Defendant

**Stephen Broach KC and Jake Thorold (instructed by Rook Irwin Sweeney LLP) for the Claimants
Jonathan Auburn KC, Jack Anderson and Lucy Jones (instructed by the Government Legal
Department) for the Defendant**

Hearing dates: 28-29 January 2026

HTML VERSION OF APPROVED JUDGMENT 

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This judgment was handed down remotely at 10.30am on Friday 27th March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Mansfield:

Introduction

1. This is a challenge to the Defendant's Universal Infant Free School Meals policy ("UIFSM"). UIFSM requires state-funded schools to provide a free school meal to all pupils in state-funded schools in Reception and Key Stage 1 on a non-means-tested basis. It does not apply to private schools.
2. The Claimants are three children within the relevant age groups (their parents acting as litigation friends). They are members of the Charedi Jewish community and attend private schools for their community. They do not receive meals pursuant to UIFSM because they do not attend state-funded schools. However, the Charedi community has been recognised to have high levels of deprivation. Representatives of the community have sought to persuade the Defendant to extend UIFSM to include Charedi pupils. The Defendant has declined to do so.
3. The Claimants challenge the Defendant's refusal on three grounds.
 - i) Ground 1 is that the Defendant's refusal is discriminatory on grounds of their religion or race, contrary to article 14 European Convention on Human Rights ("the Convention") read with articles 8, 9 and article 2 of Protocol 1 ("A2P1").
 - ii) Ground 2 alleges a breach of the public sector equality duty ("PSED") found in s.149 Equality Act 2010.
 - iii) Ground 3 alleges a failure to adequately and rationally take into account the position of Charedi children.

Preliminary Matters*The Claimants' amendment application*

4. At the beginning of the hearing before me, the Claimants applied to amend the Statement of Facts and Grounds. The amendments were opposed, in part at least, by the Defendant. I heard argument on the application at the beginning of the hearing, but counsel agreed that I should defer a decision on the amendment until the conclusion of the hearing. The Defendant was content to address the amended form of the claim at the hearing.
5. I will allow the amendments:
 - i) They arise from material disclosed by the Defendant after the claim was issued.
 - ii) The amendments do not alter the nature of the claims. In relation to Ground 3, the Claimants argue that the amendment simply makes clear, and particularises, an irrationality challenge that was within the grounds as originally pleaded. I agree.
 - iii) The Defendant argued that the amendment would require consideration of whether it wished to file further evidence. It was not made clear to me what that evidence might be, and I cannot see what further evidence could be produced. The amendment to Ground 3, if it raises a new ground at all, is closely related to the original Ground 3. The original drafting alleged the Defendant failed to adequately and rationally take account of the position of Charedi children. Further, the ground is closely related to Ground 1 – the discrimination challenge. The Defendant has put in evidence relating to the design of UIFSM, the reasons for its scope, and the reasons for its decision not to extend UIFSM

to the Claimants. It is difficult to see what more it might have done had the amended paragraphs appeared in the original version.

iv) Accordingly, I see no prejudice to the Defendant in allowing the amendments. I am fortified in that view by the fact that the Defendant was willing and able to argue the amended case at the hearing.

Further submissions

6. Extensive reference was made at the hearing to the Divisional Court's decision in *R (ALR and others) v Chancellor of the Exchequer* [2025] EWHC 1467. That was a challenge to the removal of the exemption from VAT relating to private schools. One group of claimants in that claim were Charedi pupils, supported by Chinuch UK. On 27 February 2026 the Court of Appeal handed down its decision in the appeal by the Charedi claimants in that case: *R (BYL and others) v Chancellor of the Exchequer* [2026] EWCA Civ 170. Given the change in claimant cipher, I will refer to the two decisions collectively as "*the VAT Case*". With my permission, both parties filed further written submissions on the impact of the Court of Appeal's decision.

The Evidence

7. The Claimants relied on witness statements from CLE, mother of the First and Second Claimants, and CEA, mother of the Third Claimant. They also relied on three witness statements of Motty Pinter. Mr Pinter is the Director of Communal Affairs at Chinuch UK, the organisation representing strictly Orthodox Jewish schools across the UK.
8. The Defendant relies on two witness statements of Sophie Taylor, Director of the Educational Engagement, Access and Wellbeing Directorate within the Department of Education.

The Decision under challenge/Universal Infant Free School Meals

9. In broad terms, the decision under challenge is the Defendant's refusal, in 2025, to accede to Chinuch UK's request to extend UIFSM to Charedi schools. The particular target for the challenge is the document which sets out conditions for grant funding to local authorities, who in turn have duties in respect of the provision of free school meals. Before turning to the particular decision under challenge, it is helpful to consider the statutory framework for provision of free school meals.

Free School Meals: Statutory Framework

10. In England, local authority functions concerning the provision of school meals are governed by s.512-513 of the Education Act 1996.
11. By s.512(1) a local authority may provide registered pupils at any school maintained by the authority and other persons who receive education at such a school with milk, meals and other refreshments. By s.512(3) a local authority shall exercise its power under s.512(1) for any registered pupil if: (a) any prescribed requirements are met; (b) a request has been made on behalf of the pupil and (c) either the pupil is eligible for free lunches (within the meaning of s.512ZB(2)) or it would not be unreasonable for the authority to provide the lunches.
12. Section 512ZB is headed "*Provision of free school lunches and milk*". Section 512ZB(1) provides that where a local authority provides a school lunch in accordance with s.512(3) to a person who is eligible for free lunches, the authority shall provide the meal free of charge.
13. Section 512ZB(2) deals with eligibility for free lunches. Prior to 2014, a person was eligible if he or his parent were in receipt of certain defined state benefits. I will turn to the 2014 amendments to this section below.
14. Section 512ZB forms the basis of means tested free school meals for pupils of all ages at maintained schools. Means tested free school meals, which the Defendant refers to as "FSM" is a separate scheme to UIFSM. FSM is means tested but applied to a broader age range of pupils than UIFSM. Like UIFSM, FSM is limited to pupils in state-funded schools.

15. Prior to 2014, there was no "universal" (i.e. non-means tested) programme of free school meals in state-funded schools. UIFSM was introduced in 2014. Section 106 of the Children and Families Act 2014 amended s.512ZB(2) of the Education Act 1996 to the effect that a person is eligible for free school meals not only if they meet the relevant state benefit criteria in s.512(4) but also if he is within new s.512ZB(4A). A person is within that subsection if (a) he is a registered pupil at a maintained school or pupil referral unit; and (b) he is in reception, year 1, year 2, or any other prescribed year group at the school. Section 512ZB(4B) gives the Secretary of State the power, by order, to provide for children at maintained nursery schools or in other relevant funded early years education to be included within s.512ZB(4A).
16. The Children and Families Act 2014 also introduced s.512B of the Education Act 1996. Section 512B provides for school lunches in Academies. Academy arrangements in relation to an Academy school or alternative provision Academy must include provision imposing obligations on the proprietor that are equivalent to the school lunch obligations imposed under s.512(3) and s.512ZB(1).
17. UIFSM also provides meals to pupils who are in Alternative Provision. Alternative Provision means local authority arranged education for pupils who cannot be educated in mainstream state-funded schools for various reasons, for example due to special educational needs. Some of these pupils are placed in private schools by arrangement with and funded by a local authority.
18. The Defendant submits, and I accept, that when Parliament gave the Secretary of State the power to extend UIFSM to local authority maintained nursery schools and funded early years education (s.512ZB(4B)) it did not include a power to extend the scope of the programme to private schools.
19. It is clear from these provisions that:
 - i) The duty to provide school meals (free or otherwise) falls on local authorities and Academy proprietors;
 - ii) The duty arises in relation to pupils at state-funded schools; and
 - iii) In introducing UIFSM, Parliament chose to do so within the existing framework which was specifically limited to a duty owed to state-funded pupils (see s.512ZB(4A) and (4B), s.512B).

The Defendant's power to fund free school meals

20. The Department for Education has no duty itself to provide free school meals, nor does it do so. The Defendant's power to fund free school meals programmes arises under section 14 Education Act 2002. That power is expressed in extremely general terms. The Defendant may give, or make arrangements for the giving of, financial assistance to any person for or in connection with any of the purposes stated in s.14(2). Those purposes, as one would expect, refer to a range of education related purposes. They are drawn widely. However, the Claimants particularly drew my attention to s.14(2)(j) "*the promotion of welfare of children and their parents*".

The introduction of UIFSM

21. The introduction of UIFSM followed a pilot scheme in three local authority areas between 2009 and 2011. I was shown a policy statement "*Children and Families Bill 2013: Note from the Department of Education for the House of Lords Report Stage: Universal Free School Meals for Infants*". The Introduction to that Note states:

Under existing legislation, local authority maintained schools are required to provide free school meals on request to pupils whose parents receive certain welfare benefits, such as income support. This entitlement is replicated for pupils in state-funded academies (including free schools) through individual funding agreements between the Secretary of State and each Academy trust.

On 18 September 2013, the government announced that, from September 2014, free school meal entitlement will be extended to all pupils in infant classes (covering the first

three years of primary school: reception year 1 and year 2) in state-funded schools. This reflects the evidence that a universal free school meals entitlement will deliver benefits for all pupils and disproportionately benefit those from low income backgrounds.

22. The Note goes on to explain the proposed changes to the Education Act 1996 to be introduced in the Children and Families Bill (which I have outlined above). In the section "*Policy Intent*", the Note summarises evidence from the pilot conducted in two areas, before saying "*We expect universal infant free school meals to reproduce these benefits in schools across England.*" Those benefits were:

- i) Increased take up of meals amongst children who were eligible for means tested free school meals but did not take them for partly for "stigma" reasons.
- ii) Higher take up amongst other children, more of whom ate a school lunch.
- iii) Improved performance in the classroom.
- iv) Social and behavioural benefits:

The whole school approach in the pilots engendered a culture where children sat down to eat with friends and teachers in a civilised environment: broadening social skills, teaching table manners and supporting equality and fairness by levelling differences in social background.

23. The Note also stated that the Defendant expected the new entitlement to bring longer term health benefits by instilling health eating habits and would help families manage the cost of living.

24. The Bill (including the provisions I have set out above) was introduced at the House of Lords Report stage by Lord Nash. I was shown his Opening Speaking Note and some notes for a closing section, setting out proposed answers if pressed on a range of questions. That includes the following contemplated answer:

Why are you not extending this to ... independent schools? The government does not fund provision at independent schools, as this is chosen and paid for by parents. It would not be appropriate to use taxpayers' money to subsidise it.

25. It is not clear whether this was said, but the note demonstrates the Defendant's policy thinking at the time.

26. At this point, it is convenient to note that various documents in this case refer to "independent" schools, and others refer to "private" schools. The terms are often used synonymously. However, the Defendant points out that the statutory definition of independent schools includes state-funded Academies, which benefit from UIFSM. In this judgment I have used the term "private school", unless referring to a document which uses the term "independent school". For the purpose of this claim, the relevant contrast is between private schools and state-funded schools.

27. The Defendant's evidence check memorandum explains the aims of UIFSM as follows:

The policy is designed to:

- Improve educational attainment and children's social skills and behaviour;
- Ensure that children have access to at least one healthy meal each day, and support the development of long-term healthy eating habits;
- Help families with the cost of living; and
- Increase the economic viability of school meals.

28. The following points are clear:

i) The scope of the policy, since its inception, was expressly designed to apply to state-funded schools and not private schools.

ii) Key elements of the policy intent were related to the position of children in the relevant schools, for instance improvement of educational attainment, removal of stigma from those entitled to means tested free school meals, and the social benefits of a "whole-school approach" to meals.

29. The Claimants, sought to argue that UIFSM is essentially a welfare benefit that is merely delivered through the mechanism of a school meal; it was therefore different from the other aspects of state provision of education. I do not accept that. The provision of a free meal at school is part of the fabric of state education provision: it is a policy designed to affect the learning outcomes and behaviours of pupils in schools for which the state has a funding and regulatory responsibility.

The Conditions of Grant

30. The particular decision under challenge in this claim is the Defendant's Guidance "*Universal infant free school meals (UIFSM): conditions of grant 2025 to 2026.*" (The Conditions of Grant"). This was published on 24 June 2025. The Guidance explains that the UIFSM grant will be paid under s.14 of the Education Act 2002. It lays down terms and conditions on which assistance is given to schools and local authorities. The Conditions of Grant is a "nuts and bolts" document that addresses the funding rates and methods of allocation that local authorities should follow. Section 4 explains that the grant supports schools in delivering the legal requirement to offer free school meals meeting the school food standards to all their reception, year 1 and year 2 pupils.

31. The Conditions of Grant says nothing about which pupils are entitled to free school meals, nor which schools are entitled to a grant to pay for such meals. It addresses the terms and conditions relevant to those schools which are within the scope of UIFSM.

32. The significance of this document, on the Claimants' case, lies in what it does not say. The Claimants' case is that it was open to the Defendant to have included Charedi schools within the grant; that the Conditions of Grant amount to the formalisation of the decision not to do so; and that the non-inclusion was unlawful.

33. The Conditions of Grant itself reflects no more than the implementation of a policy of a scope that had remained constant (in the scope of the schools to which it applied) since its inception in 2014. On the Claimants' case, the obligation to make a change in this document arose from the Defendant's interactions with representatives of the Charedi community in 2025.

Meeting with the Charedi community and the Defendant's decision

34. On 12 March 2025 representatives of Chinuch UK (including Mr Pinter) and another organisation, the Interlink Foundation, met with officials from the Defendant. According to the note of the meeting, Chinuch UK and the Interlink Foundation made "*a direct ask*" for the Defendant to review whether Charedi pupils could benefit from UIFSM.

35. On 23 April 2025, the Minister for Early Education was sent a Ministerial Submission entitled "*For Decision: Inclusion of Charedi Jewish pupils attending Independent Schools in Universal Infant Free School Meal policy*" ("the Ministerial Submission"). The recommendation was to maintain the Government's position that eligibility to UIFSM remains limited to registered pupils of state-funded schools.

36. The Minister agreed to this recommendation. The Defendant points to a letter from the Minister to Mr Pinter dated "XX June 2025". There is a factual dispute as to whether this letter was given to Mr Pinter at the time. I do not need to resolve that. Either way, the letter sets out the Defendant's decision following the 12 March 2025 meeting. The material paragraph reads:

The current policy position is that independent schools, including Independent Special Schools and Special Post-16 Institutions are not covered by the Department for Education's free school meals legislation as they have no statutory or regulatory duty to

provide free school meals, either in term time or during holidays. The duty to provide free meals to eligible infant peoples falls on schools in the state sector, with independent schools afforded greater autonomy. We will not be changing our position in this instance. I understand that this will be disappointing to hear.

37. The reasoning in the Ministerial Submission was based on three points (parts of which were redacted from the disclosed document on grounds of legal professional privilege).

Parental choice - whilst the Claimants argued that they have no choice other than to attend independent schools on account of their faith, Charedi parents have exercised the choice to educate their children in the independent sector, which is structurally different from the state sector. Independent schools enjoy greater autonomy, but at the cost of not receiving state support, meaning the situations are not analogous when considered as a whole.

There are other alternative choices Charedi parents could make - by sending their children to state schools or by educating them at home. Whilst there is a variety of orthodoxy within the Charedi community, state-funded education is available for them.

Independent School Autonomy The duty to provide FSM is a duty that falls on schools in the state sector, reflecting that, structurally, independent schools enjoy greater autonomy (at the cost of not generally receiving state funding). It is open to independent schools to provide FSM if they wish and for parents not to send their children to independent schools if they cannot afford to.

Additional Burden – During the previous legal challenge, an alternative solution was provided by the Charedi community, whereby FSM provision would be required and state-funded for certain categories of independent school. However, attempts to restrict such payments to schools from a particular community or schools passing certain financial tests is likely to risk a snowball effect and require additional administrative apparatus. We would need to consider many other classifications of independent schools were we to approve their claim and drawing a line at Charedi Independent Schools will be difficult.

Based on the above, we recommend that we maintain our current position as restricting FSM and UIFSM eligibility to registered pupils of state schools. Not only is sending Charedi children to state schools an exercise of parental choice but it would also become increasingly difficult, if our position was not held, to draw the line at provision for meals without getting the state to fund other aspects of education, or support other independent communities.

38. Annexe A to the Ministerial Submission set out the background to UIFSM, the Charedi community, a previous challenge to the Mayor of London's free school meal programme (i.e. the challenge in *GH*, which I address below), and some data regarding school populations. Annexe B expressly considered the public sector equality duty under section 149(1) Equality Act 2010.

The Defendant's Impact Assessment

39. In September 2025, after the Claimants' pre-action protocol letter but before the claim was issued, the Defendant carried out an Equalities Impact Assessment for UIFSM ("the EIA"). The EIA analysed the impact of UIFSM in relation to a range of protected characteristics. The analysis in relation to the protected characteristic of religion included the following points:

- i) UIFSM applies to all state-funded schools including faith schools.
- ii) Attendance at private school is not a protected characteristic. However, some parents feel they have no choice but to educate their children privately because of factors in the state-funded sector that are incompatible with their faith.

iii) Infant pupils attending private religious schools may be negatively impacted with respect to limbs 2 and 3 of the PSED. There is evidence to suggest that some pupils with a shared faith are more likely to be socioeconomically disadvantaged than their peers.

iv) Despite those concerns, the Defendant's officials considered the justifications for restricting access to UIFSM to state-funded schools were strong. They included:

- a) Structural differences between the state-funded and private sectors.
- b) In the context of extremely limited government funding, it was reasonable to restrict access to state-funded schools.
- c) Extending UIFSM would be administratively complex.
- d) Alternative forms of support are available not linked to the setting in which children are educated.

The position of Charedi Schools and Charedi children

The Evidence

40. Mr Pinter provides much useful background information as to the Charedi community, the Chasidic group within that community, and the various sub-communities within the Chasidic group. He explained the economic circumstances of the community, and their schooling arrangements. His evidence included:
- i) Attendance at an Orthodox Jewish school is not regarded as a choice but as an essential facet of Charedi families' identity and belief.
 - ii) 85% of Charedi infant age children attend private schools, with 15% attending state-funded schools.
 - iii) There are no state-funded schools for primary age children in the relevant area that are "*religiously acceptable*". There are local Jewish primary state-funded schools, but because their intake includes many pupils from non-Jewish or non-observant Jewish backgrounds, they are not appropriate. Mr Pinter says Chasidic families' children require education in a Yiddish speaking and "*culturally homogenous*" environment.
 - iv) Given current levels of antisemitism, Charedi families could not entertain the thought of their children attending mainstream schools, even if religious and cultural barriers were not present.
 - v) The Charedi community faces a high level of deprivation. Mr Pinter makes this point by reference to the evidence in two other cases – *Z* and *ALR*, which I address below. He also says that in recognition of the relatively high levels of poverty in the community, in 2023 the Mayor of London made £450,000 available alleviate food insecurity in the Charedi communities in Hackney and Haringey.
 - vi) Charedi private schools are in financially precarious positions.
 - vii) Given the deprivation of the community and the financial position of the schools, Charedi private schools are in a different position to other private schools.
41. CLE is the mother and litigation friend of two of the Claimant children. She explains that within the Charedi community her family belongs to the Chasidic group and within that they belong to the Satmar community. She describes her family's financial circumstances and her children's schooling. She is in work and in receipt of universal credit. Her husband does not work as he is a carer for one of the Claimant children, who has learning difficulties. The children attend private Chasidic schools where they are taught a combination of the national curriculum and a Kodesh (religious Jewish) curriculum. Teaching is in Yiddish, though English is taught. The schools they attend are primarily attended by children from Satmar families.

42. CLE says that her children attend their respective schools because they are geared towards the needs and customs of the Satmar/Chasidic community and, importantly, they teach in Yiddish, the family's first language.
43. She says that a Jewish primary state-funded school would not be suitable for her family. Chasidic families have many cultural customs not shared by the wider Charedi community, so that even if the children were able to attend a Charedi state-funded school they would be deprived of a Yiddish education and she fears they would feel different and less accepted. She also points out that there are very few places in Jewish state-funded schools.
44. She describes as "absolutely unthinkable" that her children could attend a mainstream or secular non-Charedi school, as it would not follow any of the family's religious or cultural practices. She says:

Sending our children to Chasidic schools where the Kodesh curriculum is taught in Yiddish is not a choice for us, but is the only way to preserve our language and customs and to provide our children with the confidence that comes from learning among peers who share the same values and practices. It is unthinkable that our children could be educated away from their peers and community.

45. CEA is the mother of the Third Claimant. She provided a witness statement making similar points to CLE. Her circumstances are broadly similar. She too says that she does not have a choice to send her son to a state-funded school. She says the practices of Satmar Chasidic families are different to those of non-Chasidic Charedi families, so that even a local Charedi state-funded school would not be suitable. *"Its intake, language of teaching and religious ethos are not consistent with [her son's] upbringing as a Satmar Chasidic child"*. As with CLE, she says it is *"completely unthinkable"* for her son to attend a mainstream state-funded school, due to the differences in language, culture and religious practice.
46. Both CLE and CEA explain in their statements that due to their financial situation their children's schools have agreed that they do not have to pay school fees. The families are both also supported to an extent with food by community organisations or neighbours.

Other decisions relating to the Charedi community

47. I was referred to decisions in three other cases relating to the Charedi community.
48. At the hearing before me, the Claimants relied on the Divisional Court's decision in the *VAT Case (ALR)*, both for its approach to article 14 discrimination and for its factual findings concerning the Charedi community. That case concerned the removal, by ss.47-49 Finance Act 2025, of an exemption from VAT on private school fees.
49. The evidence in the *VAT Case* derived from Mr Pinter and from parents of affected Charedi children. It appears that the evidence included material very similar to the evidence in the current case. The Claimants rely on what they characterise as a series of important findings. Of those matters, a number are recitals of the evidence in that case, the gist of which is the same as the evidence in this case, which I have summarised above.
50. At paragraph 149 the Divisional Court said this:
- The evidence establishes three material features of the circumstances of most Charedi Jewish families. First, they have a strong religious and cultural preference for a Charedi education. Secondly, there are almost no state schools which offers such an education, so they do not have state alternatives which are religiously acceptable to them. Thirdly, they form a socio-economically deprived community and often have large families.
51. I note the Divisional Court's careful use of language in describing most Charedi families as having *"a strong religious and cultural preference"* for a Charedi education; and in saying that they do not have state alternatives which are *"religiously acceptable"* to them.

52. The Court of Appeal quoted paragraph 149 in describing three material features of the circumstances of most Charedi Jewish families. It went on to say (paragraph 26):

BYL attends a Charedi private secondary school for boys. BAU and his wife have low incomes and receive universal credit. They have little or no savings. There are no state-funded Charedi secondary schools for boys in their area. A secular state school is not considered by the parents to be a viable option. BAU is also concerned for the safety of his child and the likelihood of anti-Semitic abuse against him.

53. The Claimants also referred to *R (Z and another) v Hackney LBC* [2020] 1 WLR 4327 [2020] UKSC 40. That case concerned a challenge to a local authority's nominations agreement with a housing association which provided social housing primarily to members of the Orthodox Jewish community. The Claimants (who were not members of the Orthodox Jewish community) challenged the lawfulness of the arrangements as being contrary to the Equality Act 2010. It was common ground that the arrangements were directly discriminatory. The issue was whether the exceptions under s.158 and/or 193 of the Equality Act, allowing lawful positive action, were made out.

54. The Claimants relied on Lord Sales' summary of the factual findings made by the Divisional Court at paragraphs 35 and 39. I note the following:

i) The witnesses emphasised that Orthodox Judaism is not a lifestyle but a way of life, and that living as a community is a central part of that.

ii) The community has high levels of poverty and deprivation. The Divisional Court had found that there is a strong correlation between the evidenced poverty and deprivation and the religion. This is explained in part by the way of life, especially affecting educational and employment opportunities, which is characteristic of the Orthodox Jewish community.

iii) The Divisional Court had found that the community had a need to live together in relatively close proximity with a view to reducing apprehension and anxiety regarding personal security, anti-Semitic abuse and crime.

iv) At paragraph 39 Lord Sales said:

The Divisional Court considered section 158 and section 193 of the 2010 Act in turn, in the light of the findings it had made. As to section 158, the court reasoned in a series of steps which are not now disputed, as follows: (i) the disadvantages faced by Orthodox Jews are real and substantial. (ii) Those disadvantages are connected with the religion of orthodox Judaism. (iii) the needs of members of the Orthodox Jewish community are different from those who are not members of it. They have a relevant need to live relatively close to each other, with a view to reducing apprehension and anxiety regarding personal security, anti-Semitic abuse and crime. They also have a need for community facilities, including schools, synagogues and shops, as well as special features of accommodation. They also have a need for property that will accommodate substantially larger families. And (iv) AIHA's arrangements for allocating housing, which place orthodox Jews in a primary position, enable them both to avoid the disadvantages and to meet their needs referred to.

55. The context of *Z* was very different to this case, as were the issues to be decided. It concerned the justification of a housing policy which discriminated in favour of the Orthodox Jewish community. The passages I was taken to be relied on for the evidence as to the characteristics of the community, rather than for any binding finding of fact or principle of law.

56. In *R (GH and others) v The Mayor of London* [2024] EWHC 1305 (Admin) a challenge was brought on behalf of Charedi school children against the Mayor of London's own universal free school meals scheme. The Mayor introduced that scheme in 2023 as an emergency measure to help primary school children with the cost of living crisis. Like the UIFSM policy in this case, the Mayor's scheme was limited to state-funded primary schools. The scheme was subsequently extended for the school year 2024-2025. Chinuch UK and the Intralink Foundation made representations that the scheme should be

extended to Charedi pupils, but ultimately the Mayor decided not to extend the scheme beyond state-funded primary schools. In a reserved decision dated 5 June 2024, MacDonald J refused permission to apply for judicial review.

57. MacDonald J considered the claimants' irrationality challenge as unarguable. In doing so, he said (paragraph 33) that

in circumstances where the UIFSM scheme supplements the statutory scheme, in deciding the scope of that scheme the Defendant was plainly entitled to take account of the distinction drawn by Parliament limiting state-funded free school meal provision to state-funded schools.

58. MacDonald J also considered the claimants' article 14 challenge to be unarguable. The claimants argued that the decision not to extend the scheme to private schools was indirectly discriminatory because the majority of Charedi children attend private schools in circumstances where they have no choice but to do so for religious reasons. MacDonald J said that it was open to very significant doubt that the decision not to extend the scheme to Charedi schools was indirectly discriminatory. Even if it was, the decision was plainly based on objective factors unrelated to discrimination on a protected ground, and it was not reasonably arguable that the decision was not justified.

59. As a refusal of permission by a coordinate court, the decision in *GH* is not binding on me. In *GH*, the scheme in the present case was not itself under challenge. It may also be said that some of MacDonald J's doubts as to the disproportionate impact of the scheme on Charedi children have been superseded by the decision in the *VAT Case*, which accepted that there was a disproportionate impact that required to be justified. However, it is noteworthy that MacDonald J was considering a challenge to a similar policy to the policy in this case and found that it was not reasonably arguable that the exclusion of Charedi children was not justified.

Ground 1: Article 14 Discrimination

The Ground 1 issues

60. It is accepted by the Defendant that:

- i) The UIFSM policy falls within the ambit of article 8 and A2P1.
- ii) The Claimants are in a group defined by a common race and religion, which are statuses for the purposes of article 14.
- iii) Charedi Jewish families are in a materially different situation from at least some other private school users.

61. It is not necessary, for the purposes of this claim, to distinguish between the Charedi community's characteristics as a racial group or a religious group. The Defendant accepts the Claimants have a common race and religion. I have addressed the issues by reference to religion, but the same analysis applies whether the issues are addressed as matters of race or religion.

62. The following issues arise under this Ground (per the Agreed List of Issues 2-5):

- i) Does the alleged discriminatory treatment come within the ambit of article 9?
- ii) Does the complaint engage the *Thlimmenos* principle?
- iii) What is the scope of the margin of judgement to be afforded to the Defendant?
- iv) Has the Defendant provided an objective and reasonable justification for the alleged discriminatory treatment? As to this, and by reference to the 4 stage *Bank Mellat* test:

- a) The Claimants accept that, in principle, the objective of UIFSM is sufficiently important to justify the limitation of a protected right (stage 1); and that the UIFSM grant is

rationally connected to its objective (stage 2).

b) The Claimants submit that a less intrusive measure could have been used without unacceptably compromising the achievement of the Defendant's objectives (stage 3).

c) The importance of the UIFSM's objectives do not outweigh the severity of the discriminatory effects caused by the exclusion of Charedi infant children attending Charedi private schools (stage 4).

63. Issue (ii) requires some explanation.

i) In the response to the letter before claim the Defendant accepted that, in the light of the Divisional Court's findings at paragraph 149 of *ALR*, the Court would likely accept that Charedi Jewish families are in a materially different situation to other private school users and as such the uniform nature of UIFSM requires justification.

ii) However, the Defendant's subsequent position is that the justification stage is not reached at all, because the *Thlimmenos* principle is not engaged. The Defendant's argument is that the *Thlimmenos* principle applies where a claimant would be covered by a rule save for an exception. In this case, the Claimants effectively are arguing for a new benefit or scheme to be established. That, they say, is a pure claim for positive discrimination.

Article 14 and Thlimmenos discrimination: the legal framework

64. Article 14 of the Convention provides:

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.

65. The Claimants rely on a form of discrimination known as *Thlimmenos* discrimination, after the European Court of Human Rights decision in *Thlimmenos v Greece* (2001) 31 EHRR 15. The applicant was a Jehovah's Witness who had been found guilty of a felony for refusing to enlist in the army on religious grounds. He was later precluded from qualifying as a chartered accountant as the relevant Greek law excluded persons who had been convicted of a felony. The Court upheld his complaint that his freedom of religion was violated because the law did not distinguish between persons convicted as a result of religious beliefs and persons convicted on other grounds. The Court said (para 44):

The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

66. The requirements of a claim of discrimination under article 14, and *Thlimmenos* discrimination in particular, have been considered in recent years in four Supreme Court decisions: *R (A and another) v SSH (Alliance for Choice Intervening)* [2017] 1 WLR 2492 [2017] UKSC 41; *R (DA & Or) v SSSWP* [2019] 1 WLR 3289 [2019] UKSC 21; *R (SC & Ors) v SSWP* [2022] AC 223 [2021] UKSC 26 and *R (Jwanczuk) v SSWP* [2025] 3 WLR 741 [2025] UKSC 42. Article 14 has also recently been considered in the specific context of Charedi schools in the *VAT Case*.

67. From these cases, the Claimants correctly derive the following ingredients of a *Thlimmenos* claim:

- i) The alleged discrimination falls within the ambit of one of the substantive articles of the Convention;
- ii) The discrimination is on one of the grounds expressly referred to in article 14, or on the grounds of an identified "other status";
- iii) The identification of comparator groups in "relevantly different situations";
- iv) Similar treatment of those comparator groups;

v) The absence of an objective and reasonable justification for the similar treatment.

68. The requirements of article 14 discrimination are addressed in *SC* per Lord Reed. At paragraph 37 he said:

37. The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* (2010) 51 EHRR 13, para 61 ("*Carson*"). For the sake of clarity, it is worth breaking down that paragraph into four propositions:

(1) "The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14 ."

(2) "Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations."

(3) "Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

(4) "The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background."

69. Lord Reed went on at paragraphs 46 to 50 to distinguish three types of discrimination under article 14: direct discrimination, *Thlimmenos* discrimination and indirect discrimination. The Court was concerned with indirect discrimination in *SC*. Lord Reed summarised the *Thlimmenos* case at paragraph 48, concluding with the statement that in that case "*The discrimination lay in not introducing an exception to a general rule.*"

70. At paragraph 103 of *DA*, Lord Carnwath said:

Although the *Thlimmenos* principle is now well established, it does not in my view materially change the nature of the inquiry from that undertaken in *SG*. In particular it does not diminish the need under article 14 to show that the alleged discrimination arose from a relevant "status" and to identify a relevant "comparator" with whose treatment that of the claimant group can be compared (Lord Wilson JSC's issues 2 and 4).

71. Lord Carnwath went on (paragraph 106) to point out that in *Thlimmenos* the difference in treatment on grounds of a relevant status was not in issue. He said it was clear that an important feature of the case was the close link between the alleged discrimination and the protected religious right under article 9.

72. At paragraph 107, he said:

The *Thlimmenos* formulation has been often repeated and is not in doubt. However, there are few illustrations of its practical scope and application.

73. He identified the relevant issues, at paragraph 109 as:

whether those groups or sub-groups are sufficiently different from other comparable groups to have required separate treatment under the *Thlimmenos* principle to avoid interference with their article 8 rights, and whether a failure in that regard can be justified.

74. Once a "prima facie" discriminatory treatment has been established, the burden is on the Defendant to show objective and reasonable justification. There are two components (a) does the impugned measure

pursue a legitimate aim; and (b) is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

75. In its very recent decision in the *VAT Case*, the Court of Appeal reviewed and summarised the proper approach to proportionality, by reference principally to three decisions of the Supreme Court: *SC, Bank Mellat v HM Treasury (No.2)* [2014] AC 700 [2013] UKSC 38 and *Shvidler v. Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] UKSC 30, [2025] 3 WLR 346.

76. In *Bank Mellat* Lord Reed set out a four-stage test at paragraph 74:

(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

77. In the *VAT Case*, the Court of Appeal summarised the Supreme Court's guidance as to the approach to be taken by the court in assessing proportionality as follows (paragraph 49):

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

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

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

(4) There is room, in the context of the proportionality assessment to be carried out by the court, for appropriate respect and weight to be given to the views of the executive or legislature as to how the balance between the interests of the individual and of the general community should be struck, depending on the nature of those respective interests.

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

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

78. The Court of Appeal referred to *SC* as the leading authority on the assessment of proportionality under article 14 (paragraph 68). I note the following points from Lord Reed's judgment in *SC*:

i) It is well settled in the European court case law that states have a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment; the scope of that margin will vary according to the circumstances, the subject matter and the background (paragraph 98).

ii) There are a range of factors which tend to heighten, or lower, the intensity of review. The case law indicates that some factors have greater weight than others (paragraph 99).

iii) Paragraph 100:

One particularly important factor is the ground of the difference in treatment. In principle, and all other things being equal, the court usually applies a strict review to the reasons advanced in justification of a difference in treatment based on what it has sometimes called "suspect" grounds of discrimination. However, these grounds form a somewhat inexact category, which has developed in the case law over time, and is capable of further development by the European court. Furthermore, a much less intense review may be applied even in relation to some so-called suspect grounds where other factors are present which render a strict approach inappropriate, as some of the cases to be discussed will demonstrate.

iv) The European court has generally adopted a strict approach to differences in treatment on the grounds of religious belief (paragraph 109).

v) Lord Reed set out, at paragraphs 145-146 and 158-162, a nuanced approach which in general accords a high level of respect to the judgment of public authorities in the field of economic and social policy but balances that with the need for close scrutiny where differences in treatment are based on "suspect" grounds. All things being equal, a "low intensity of review" is appropriate in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors depending on the circumstances of the particular case. Very weighty reasons will usually have to be shown, and the intensity of the review will usually be correspondingly high, if a difference in treatment on "suspect" grounds is to be justified. But other factors can sometimes lower the intensity of review even where a suspect ground is in issue. The focus should be on the question whether a wide margin of appreciation is appropriate in the light of the circumstances of the case. The weight to be given to the primary decision maker will normally be substantial in fields such as economic and social policy, national security, penal policy and matters raising sensitive moral or ethical issues.

vi) At paragraph 162, Lord Reed concluded his analysis of the approach to justification with the following:

It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in *JD* para 11:

"Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore, any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts."

In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so

easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented (*ibid*):

"Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated."

Does the alleged discriminatory treatment come within the ambit of Article 9?

79. As is clear from the wording of article 14 itself, it gives rise to no free-standing right. Article 14 is breached if, on prescribed discriminatory grounds, there is a failure to secure the enjoyment of one (or more) of the other rights and freedoms in the Convention. As to this requirement, Lord Reed and Lady Simler said in *Jwanczuk* that the requirement that an allegation of breach of article 14 must relate to the "enjoyment of the rights and freedoms" in the Convention has been interpreted as meaning that the complaint must fall within the ambit or subject matter of another Convention right.
80. The Defendant accepts that article 14 is engaged, as the treatment complained of is within the ambit of A2P1 (right to education) and article 8 (right to private family life). However, the Defendant does not accept that the complaint falls within the ambit of article 9 (freedom of thought, conscience and religion).
81. The Claimants argues that the discriminatory treatment comes within article 9 as it directly bears upon their freedom of religion.
82. The Defendant argues, by reference to *Smith v Lancashire Teaching Hospitals* [2018] QB 804 that the provision of UIFSM is not connected with the "modality" of the exercise of the Claimants' article 9 rights. The exclusion of the Claimants' schools from UIFSM does not bear upon their freedom of religion.
83. *Smith* was a case concerning article 8 (it concerned the inability of a same sex partner to claim dependency damages under the Fatal Accidents Act 1976). Sir Terence Etherton MR said (paragraph 55):

The legal position may, therefore, be summarised as follows in the case where, as here, the claim is that there has been an infringement of article 14, in conjunction with article 8. The claim is capable of falling within article 14 even though there has been no infringement of article 8. If the state is brought into existence of positive measure which, even though not required by article 8, is a modality of the exercise of the rights guaranteed by article 8, the state will be in breach of article 14 if the measure has more than a tenuous connection with the core values protected by article 8 and is discriminatory and not justified. It is not necessary that the measure has any adverse impact on the complainant in a positive modality case other than the fact that the complainant is not entitled to the benefit of the positive measure in question.

84. The concept of a "modality of the exercise" of a Convention right derives from European court authorities as cited in *Smith* at paragraph 42.
85. I am inclined to accept the Defendant's submission on this point. I have considerable doubt as to whether the limitation of UIFSM to state-funded schools, is a modality of the exercise of the Claimants' article 9 rights. Further, if it is such a modality the scope of the policy has no more than a tenuous connection with the core values of article 9.
86. However, this case does not turn on this question. The relevance of the question, according to the Claimants, is that the test for justification may differ depending on whether article 9 is engaged, as the

intensity of scrutiny is higher where "suspect" grounds (including religion) are involved. However, the Claimants' position elides two separate questions. The intensity of review at the justification stage depends whether the alleged discrimination in the enjoyment of a right is on grounds that are "suspect". See Lord Reed in *SC* at para 142 which I quote above: "*In the context of article 14, the fact that a difference in treatment is based on a "suspect" ground is particularly significant.*" The Claimants' submission confuses the "ambit" question and the "grounds" question. Whether or not the claim falls within the ambit of article 9, there is no doubt that the Claimants allege that their religion is the ground upon which their enjoyment of Convention rights has been infringed. I will consider below the justification of the provision under challenge on the assumption that there is arguably discrimination on "suspect" grounds.

Is the Thlimmenos principle engaged in this case?

87. The Claimants argue that this case entails a straightforward application of the *Thlimmenos* principle: the Defendant operates a policy; the Claimants are excluded from the policy along with other private school pupils; the Claimants' circumstances are significantly different to those of other private school pupils; it is discriminatory not to treat the Claimants differently to the other private school pupils.
88. The Defendant argues that article 14 is not engaged at all in this case, because the Claimants are not subjected to any relevant treatment at all, nor are other private school pupils. They are simply outside the policy altogether, unaffected by it. The Defendant submits that the *Thlimmenos* principle requires that someone caught by a rule should be excepted from it. It does not operate to extend a policy to provide benefits outside its remit. To apply the *Thlimmenos* principle in such a situation would be simply to require positive discrimination in favour of a particular group.
89. The Claimants argue that the distinction drawn by the Defendant is wrong in principle and unsupported by authority. They argue that the Defendant draws a distinction without a difference: there is no difference between a situation where (a) a person is excluded from a benefit because the rules of entitlement are not designed to include him; and (b) a person is excluded because the rules would include that person apart from an exception which applies to that person.
90. The Defendant relies on two cases in support of its position. First, *R (A and another) v Secretary of State for Health* [2016] 1 WLR 331. Second, *R (Drexler) v Leicestershire CC* [2019] ELR 412.
91. *A's* case concerned the provision of abortion services in England. The Secretary of State for Health was obliged to provide NHS abortion services for women resident in England. He also had the power to provide services on the same basis to women resident in Northern Ireland. He refused to exercise that power. The Claimants, (a pregnant woman resident in Northern Ireland and her mother) sought judicial review, arguing that the failure of the Secretary of State to exercise the power to provide abortion services was in breach of article 14 read with article 8. The claim failed in the High Court, Court of Appeal and Supreme Court.
92. The judgment of the Court of Appeal was given by Elias LJ. He considered whether the *Thlimmenos* principle was engaged at all. At paragraphs 36 and 37 he said:

The contention is that even though it is in general justifiable to limit the benefit of free abortion services to residents and therefore to refuse to extend them to non-residents, the position of women in Northern Ireland should be distinguished from other non-residents for two related reasons: first, because of the fact that their law generally forbids abortion; and second, because they are citizens of the United Kingdom.

I very much doubt whether this way of putting the case even engages the *Thlimmenos* principle. In *Thlimmenos* the applicant argued that it was unfair not to differentiate him from others caught by a general rule. Here, the general rule is that, exceptional cases apart, only those resident in England can have an abortion free on the NHS. The first claimant is not someone caught by that rule who is seeking to be an exception to it; on the contrary, she is complaining that she has not been brought within it when she should have been. She is seeking to be differentiated from those who fail to comply with the rule rather than those to whom it is applied.

93. When *A* came before the Supreme Court, the issues were framed differently. The Supreme Court accepted that "usual residence" was an "other status" for the purposes of article 14. The primary presentation of the claim was that abortion services were made available only to those usually resident in England, and not to those who were not usually resident in England. The claim was that the claimant group (present in England but not usually resident) should have been treated in the same way as the comparator group who were entitled to abortion services. The Secretary of State had treated those not usually resident differently from those who were usually resident, and the difference in treatment required justification. So, the case was put on the basis of direct discrimination.
94. The *Thlimmenos* formulation of the case was treated as an alternative and was not subject to any detailed consideration. At paragraph 31, Lord Wilson said "*I do not see how the claimant's alternative presentation, based on the Thlimmenos case, adds anything to their first and obvious presentation – apart from an extra level of unwelcome complexity.*" None of the other justices addressed the *Thlimmenos* formulation of the claim, or the scope of application of the principle.
95. The Claimants argue that Elias LJ's dicta at paragraph 37 (beginning "*I very much doubt*") was obiter and in any event only a tentative view. The ratio of the decision lay in the subsequent findings as to grounds of treatment and justification. Regardless of whether paragraph 37 is obiter, in my judgment, Elias LJ's reasoning is persuasive.
96. The Defendant also relies on the judgment of Swift J in *Drexler* as confirming the restricted scope of the *Thlimmenos* principle. *Drexler* does not assist one way or the other. The reason the *Thlimmenos* claim failed in *Drexler* was that there was no sufficient similarity in the treatment afforded to the comparator groups. The differences in treatment of each of the comparator groups meant that it was not possible to identify any consistent practice applied across the groups which affected the groups differently (paragraph 57). The passages upon which the Defendant relies in paragraph 58 of Swift J's judgment need to be seen in the context of the issue he was addressing. As the Claimants point out, Swift J made it clear that the *Thlimmenos* principle applies where a single practice is applied to the disadvantage of a protected group. Swift J said nothing relevant to determining whether the situation in the instant case falls within the scope of the *Thlimmenos* principle.
97. The Claimants say that the situation in the instant cases is no different to the treatment which was the subject of complaint in the cases where the courts have recognised the *Thlimmenos* principle. They rely, in particular, on *Burnip v Birmingham CC* [2012] EWCA Civ 629, *Jwanczuk*, the European Court of Human Rights case of *Taddeucci v Italy* (2016) 51362/09 and the *VAT Case*.
98. As to *Burnip*, the Claimants rely in particular on the following passage from the judgment of Maurice Kay LJ:

17 On behalf of the Secretary of State, Mr Tim Eicke QC submits that the *Thlimmenos* principle is not as wide as is suggested. He submits that there is no example of the courts applying the *Thlimmenos* case so as to require a state to take positive steps to allocate a greater share of public resources to a particular person or group. The limited instances in which the principle has been invoked concern exclusionary rules (as in the *Thlimmenos* case itself and the *AM(Somalia)* case).

18 Whilst it is true that there has been a conspicuous lack of cases post *Thlimmenos* in which a positive obligation to allocate resources has been established, I am not persuaded that it is because of a legal no-go area. I accept that it is incumbent upon a court to approach such an issue with caution and to consider with care any explanation which is proffered by the public authority for the discrimination. However, this arises more at the stage of justification than at the earlier stage of considering whether discrimination has been established. I can see no warrant for imposing a prior limitation on the *Thlimmenos* principle. To do so would be to depart from the emphasis in article 14 cases which, as Lady Hale demonstrated in *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, para 25 is to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification. I would apply the same approach to a *Thlimmenos* failure to treat differently persons whose situations are significantly different.

99. *Burnip* does not assist the Claimants.

i) The *Thlimmenos* claim in that case was an alternative basis of claim to the primary claim based on indirect discrimination (see paragraphs 11-13). While Maurice Kay LJ was not persuaded that there was a "legal no-go area" in respect of cases where article 14 may oblige the state to allocate resources (as opposed to disapplying an exclusionary rule), there was no detailed consideration of the scope and application of the *Thlimmenos* principle.

ii) It is important to see paragraphs 17 and 18 in the context of what the case was about. All of the claimants in *Burnip* were in receipt of housing benefit. Their benefits were calculated by reference to the number of bedrooms they were deemed to need – in the same way as all housing benefit recipients, whether disabled or not. The claimants argued, successfully, that the neutral rule applied to them and their comparators in determining their level of benefit (i.e. bedroom need) failed to take account of the differences between the disabled and the able bodied.

iii) The alleged discrimination in *Burnip* was very different to this case: in *Burnip* claimants and the comparator group were all in receipt of benefit; the rules as to benefit were designed to include them and did include them. In the instant case, neither the Claimants nor their comparators (other private school children) are within the state-funded school sector at all, and UIFSM does not apply to them.

100. The Claimants next relied on *Jwanczuk*. That case concerned the lawfulness of a condition imposed for receipt of a bereavement support payment – a non-means tested contributory benefit directed at assisting with additional expenditure associated with a spouse's bereavement. The claimant would have been entitled to the benefit, but for a "contribution condition" which required a minimum history of national insurance contributions. The contribution condition was not satisfied because the claimant's deceased spouse had never worked due to disability. The application of the condition was said to be discriminatory. The Supreme Court recognised and applied the *Thlimmenos* principle, but there was no examination as to its scope.

101. At paragraph 33 Lord Reed and Lady Simler described the principle in terms consistent with Defendant's characterisation of the principle in this case:

Since the discrimination relied on here is *Thlimmenos* discrimination, article 14 may impose a positive duty to treat individuals differently in certain situations, by introducing an exception to an otherwise general rule in their case.

102. The key issues in dispute in the Supreme Court were whether the claimant had a relevant status for article 14 purposes and justification. Once the status question was determined, there was no dispute between the parties that there was treatment within the ambit of a Convention right that required to be justified (see paragraph 119).

103. In *Taddeucci*, the applicants were in a same sex relationship. The first applicant was an Italian national. The second applicant applied for a residence permit on family grounds, but this was refused as the applicants were unmarried cohabiting partners and not "members of the same family". The Court found that applicants, a same sex couple, were treated in the same way as persons in a significantly different situation from theirs, namely unmarried heterosexual couples. Only homosexual couples faced an insurmountable obstacle in obtaining a residence permit for family reasons, as they did not have the possibility of marriage in Italy, whereas heterosexual couples did. The Court held that the failure to apply different treatment was not justified.

104. The issue in the case was similar to that in *Thlimmenos*: the applicant was prevented from obtaining a particular status, which he desired and for which he had applied, by reason of a condition that he could not satisfy (in *Thlimmenos* – "not being a felon"; in *Taddeucci* - "being a family member"). As such, the case sheds no light on the application of the *Thlimmenos* principle in the instant case.

105. In the *VAT Case*, it was argued that Charedi Jewish children should be exempted from the requirement to charge VAT that applied to other private schools. However, in the *VAT Case* there was no doubt that there was treatment applied to the claimants: the effect of the Finance Act was that VAT was applied to Charedi schools. The claimants argued that there should be an exception from the application of the

rule. The claim was thus of the type recognised by *Thlimmenos* itself: a general rule was applied to the claimants, but it was argued that the rule was discriminatory by failing to treat them differently to others to whom the rule applied.

106. The Claimants argue that the present claim is structured in a very similar way to the claim in the *VAT Case*. They argue that they have been excluded from a general entitlement because they cannot meet a qualifying condition (attendance at a state-funded school).
107. I do not agree that the Claimants' claim is of the same kind as in the *VAT Case*, or for that matter as the claims in the other cases they rely on. The logic of the Claimants' case is that they applied for (or wished to apply for) free school meals and were only prevented from obtaining them by the application of an exclusionary condition – "being a state-funded pupil". That is overly simplistic.
- i) The Claimants are wrong to characterise UIFSM as a "general entitlement" from which they are excluded by a qualifying condition. UIFSM is not a general entitlement, it is part of the package of features provided only to children at state-funded schools, in the same way that access to books, pencils, teachers and classrooms are provided by the state to state-funded pupils. Being a state-funded school pupil is not merely a condition for entitlement to a benefit.
 - ii) The Claimants do not complain that they have applied to be state school pupils but have been excluded from state-funded school on discriminatory grounds; their claim is that they should be entitled to one aspect of the state-funded school provision while remaining outside the state-funded school system and retaining the benefits of private schooling.
 - iii) In reality the Claimants are arguing not just for the disapplication of a condition or the application of an exception. In effect they are asking for a different scheme. UIFSM applies to state-funded schools, not to other schools. A change to include Charedi schools would involve a difference in scope and a difference in administration (because the UIFSM provision would be made to those in private schools outside the state-funded administrative and regulatory framework).
108. Contrary to the Claimants' submission. There is a real distinction between:
- i) the *VAT Case* (for example) – where there was no doubt that the imposition of VAT was treatment applied to Charedi schools and the argument was that an exception should be made for those schools; and
 - ii) the present case, where the Claimants' schools (and all other private schools) are completely outside a scheme which is designed to provide meals for the schools for which the Defendant has funding and regulatory responsibility. In this case, private school children are neither subject to a rule (such as the imposition of VAT) nor are they deprived of a benefit to which they otherwise would be entitled simply because of an exception applied to them. The exception the Claimants rely on is central to the design of the scope of the benefit.
109. As a first step in considering whether the Defendant treats alike groups whose situations are relevantly different, it is necessary to determine what if any treatment of either group there has been. Neither the Claimants nor the comparator group fall within the scope of UIFSM at all. In my judgment, the Defendant is right to say that the Claimants simply seek a form of positive discrimination.
110. In my judgment, article 14 is simply not engaged in this case. However, if I am wrong about that, I next consider the question of justification on the assumption that article 14 is engaged.

Justification

111. In their supplementary written submissions (4 March 2026), the Claimants set out their position on the 4 stage *Bank Mellat* test. They accept that in principle the objective of the UIFSM grant is sufficiently important to justify the limitation of a protected right. They accept also that the grant is rationally connected to its objective. Their challenge is at stages 3 and 4. They argue:

- i) Stage 3: a less intrusive measure could have been used without unacceptably compromising the achievement of the objective – i.e. inclusion of Charedi infant children attending Charedi private schools within the UIFSM grant.
- ii) Stage 4: the importance of the UIFSM grant do not outweigh the severity of the discriminatory effects caused by the exclusion of Charedi infant children attending Charedi private schools. On the Claimants' evidence, the impact is severe.
112. A central plank of the Claimants' argument is that Charedi children are in need of state-funded school meals due to their economically marginal position. To make them available to those children would further two of the aims of the grant: to tackle child poverty and to support low-income families. In the Claimants' submission, state-funded schools are merely the vehicle by which meals are delivered to children. Further, the distinction between state-funded and private has been blurred, because there are instances where UIFSM are provided to children in private schools. The Claimants therefore argue that inclusion of Charedi school children within UIFSM is a "less intrusive measure", in terms of interference with the Claimants' rights, that could have been used to achieve the Defendant's objectives.
113. I do not accept that a less intrusive measure could have been adopted without compromising the achievement of the Defendant's objectives.
114. First, as I have already indicated, I reject the characterisation that state-funded schools are merely a "vehicle" by which meals are delivered to children. The scheme has a number of objectives which are expressly educational and address the life and culture of children within state-funded schools.
115. Second, the fact that UIFSM are provided to some children in private schools does not assist the Claimants. Those are children who are subject to Alternative Provision. Where children are subject to Alternative Provision the state provides funding for their education and the state has regulatory and monitoring responsibilities in relation to that education. Those children are not in a comparable position to the Claimants, and the fact that they receive UIFSM does not detract from the "bright line" nature of the scope of the policy.
116. Third, given (i) that UIFSM is designed specifically to apply to state-funded schools and not private schools and (ii) that its objectives include educational objectives relevant to those schools, it is inevitable that any extension to the private sector would require significant redesign of the existing policy. I accept the Defendant's submissions that the private school sector is less regulated and enjoys more autonomy. I also accept the Defendant's evidence that if the scheme were to be extended, it would create considerable challenges in terms of data collection, administration and monitoring.
117. Fourth, I accept the Defendant's evidence as to potential cost consequences of a change. I accept the evidence of Ms Taylor (first witness statement paragraph 53) that an extension of UIFSM would likely lead to a reduction in the benefit to all schools across the board.
118. Fifth, any extension of UIFSM to the benefit of the Claimants would give rise to problems of delineation. Were the Claimants (or their schools) to be included within UIFSM, it would give rise to a very real risk of two types of delineation dispute:
- i) There would be a real risk of claims for inclusion by other groups arguing that they should now be included if the Charedi schools are to be included.
- ii) If the state were to fund access to free school meals to pupils in the private sector, it is difficult to see how that would not lead to arguments that the state should also fund other aspects of private schooling.
119. As to the first of these points, the problem can be seen from consideration of the relief sought by the Claimants. The Claim Form seeks a mandatory order requiring the Defendant to devise an appropriate scheme for the inclusion of Charedi Jewish children attending Charedi private schools. In considering whether a less intrusive measure could have been used consistent with the Defendant's policy

objectives, it is relevant to consider what could or should have been done. As I understood the submissions, the Claimants had two alternative proposals.

i) Either, that low school fees could be taken as a proxy for deprivation/need, and the scheme extended to low fee schools.

ii) Or, that specific funding be provided to local authorities where Charedi schools are located, so that those authorities can provide funding specifically for the benefit of Charedi schools.

120. Both of those methods would be fraught with difficulty.

i) The "low school fees" method was considered at length in the *VAT Case* (Court of Appeal judgment, paragraphs 91-97). The Court of Appeal said that an exemption for low-cost schools would have serious detrimental consequences. I accept that the measure in that case (imposition of VAT) is different to the measure in this case, but the implementation challenges and fairness issues to which the Court referred in that case are also relevant in this case. I also accept the evidence of Ms Taylor (first statement paragraph 44) as to the practical challenges and potential for abuse.

ii) An extension of the scheme specifically aimed at Charedi schools would give rise to issues of fairness and discrimination as between Charedi schools and others left outside the scope of UIFSM. As Ms Taylor points out (first witness statement paragraph 43), other pupils of faith-based schools, or other families who send their children to private schools for other reasons, could similarly claim that they should be included within UIFSM.

121. The Claimants submitted that it was irrelevant whether others within the private school sector may also have good reason to be treated differently. Other groups could make a case to be included in UIFSM should they wish to do so; none had yet done so. I do not accept that submission. In looking at whether there is a less intrusive measure that could have been adopted, it is important to look at the consequences of a proposed measure and to assess the impact of such a measure on the Defendant's policy objectives. It is highly relevant if an extension to one specific community gives rise to a risk of claims to extension by others. That would give rise to disputes, for example of discrimination, if the Charedi group benefit from special treatment based on religion compared to other private school pupils. If further extensions were granted, that would completely change the scope and application of the policy.

122. Accordingly, I am not persuaded that the Defendant's policy objectives could have been achieved by less intrusive (or less discriminatory) measures. There is, in my judgment, considerable benefit in a "bright line" distinction between state-funded and private schools in the application of the UIFSM policy, and any departure from that would be fraught with difficulty.

123. Stage 4 of *Bank Mellat* requires consideration of whether the importance of UIFSM's objectives outweigh the discriminatory effects caused by the exclusion of the Claimants.

124. In carrying out this assessment, on the one hand, I accept that where the enjoyment of Convention rights is interfered with on grounds of religion, or race, very weighty reasons are required to justify such discrimination. However, as I have set out above by reference to *SC*, the level of scrutiny is nuanced and context specific. I take account of the fact that the Executive's decision making in areas of social policy concerning the allocation of limited resources. Further, while UIFSM is a matter of the Defendant's policy, the shape of the policy tracks a distinction which is long established and recognised in statute between state-funded schools and private schools. In the event, this case does not turn on the margin of appreciation to be afforded to the Defendant. I am satisfied that there are very weighty reasons to justify any discriminatory treatment in this case.

125. At this point, it is convenient to address the question of whether Charedi families have a choice in whether to send their children to state-funded or private schools. I do not accept that the Defendant was wrong to characterise the issue as matter of choice.

i) The English state-funded school system provides education to children of all religious and cultural minorities. I accept the Defendant's submission that accommodating the needs of religious and cultural

minorities has long been part of the tradition of the state-funded school system. The state funds not only maintained schools, which themselves cater for a wide range of cultural and religious backgrounds, but also voluntary aided schools, many of which are faith based – indeed a number of those are Jewish faith based.

ii) The Claimant families could send their children to those schools. Or the schools which they attend could seek to become voluntary aided. That they do not do so is a matter of choice. While that choice may be based on strong religious and cultural preference it is, nonetheless, a choice.

iii) I do not accept that antisemitism means that Charedi families are unable to send their children to state-funded schools. I accept that the problem of antisemitism is a very real and serious one. I also accept the Defendant's evidence that she is dedicated to tackling antisemitism, and that within the state-funded sector there are schools which already serve a breadth of Jewish communities, including Orthodox communities.

iv) I do not accept the argument that Charedi pupils do not have a choice to go to state-funded schools as there are not enough places in Orthodox Jewish state-funded schools. I accept the Defendant's submission the availability of school places follows demand. If there were more demand, more places would be made available.

126. The same position as to choice could be taken by a wide range of religious communities, each of whom may say that the state-funded system does not cater for their religious or cultural preferences. I accept the Defendant's point (Taylor first witness statement paragraph 58) that if Charedi children are unable to attend state-funded schools the same could be said for many children in other faith groups. Further, the protected statuses in article 14 are wide: the non-exhaustive list includes "political or other opinion" and "other status" means that the categories of protected status are not closed. Within the private school sector there may well be others who say that by reason of their "political or other opinion", or other status they have no choice but to educate their children outside the state-funded system. Others may have a strong preference for private schooling, even if they accept that they have a choice. The state is not well equipped to adjudicate as to the relative validity of these various beliefs, nor as to the degree of intensity with which they are held. Three things flow from that.

i) To make an exception for the Charedi community would very likely lead to a range of claims by other communities which would be difficult to determine.

ii) To extend state funding to potentially a wide range of private schools would, as the Defendant says, profoundly change the scope and nature of state-funded education.

iii) There is no real evidence as to the characteristics of the comparator group in terms of their position as to whether they have a choice to attend state-schools. The limited evidence relied on by the Claimants in relation to the group of "other private school pupils" is addressed to the question of deprivation. It is clear however that the comparator group comprises other faith schools – the *VAT Case* concerned some of those. It is highly likely also to include a range of political and other views. Some, or many, of the comparator group may take the view they have no choice. If that is so, it calls into question whether the Claimants and the comparator group are in a relevantly different situation.

127. It is not incumbent on the state to make provision for the Claimants to be educated, at state expense, in a "*culturally homogenous environment*" (per Pinter second statement paragraph 17). Such a requirement is at odds with the pluralistic nature of the state-funded system. The Divisional Court in the *VAT Case (ALR)* recognised that the general policy of the Defendant is that non-denominational state schools should be and are capable of providing a broad, pluralistic curriculum suitable for children of all religions and none (paragraph 156). In the Court of Appeal in the same case (*BYL*), the Charedi claimants challenged the Defendant's position that a faith school carve out would be inconsistent with its broader pluralism policy (paragraph 8, paragraph 45(i), paragraph 96(f)). The Court of Appeal did not accept that challenge (paragraph 97). It also rejected an argument by another group of claimants where a similar point was framed in terms of A2P1 (paragraphs 119-133).

128. The case law of the European court does not require a state to provide education which conforms to parents' religious or philosophical beliefs (see e.g. *Konrad v Germany* (2007) 44 EHRR SE8). The

Claimants do not claim that the Defendant has breached their A2P1 rights in failing to provide state-funded schooling in accordance with their religious beliefs. That being so, it is difficult to see how the Defendant can be said to have breached their rights in not providing them with one of the incidents of a state-funded education.

129. It is also relevant, in considering proportionality, to consider the nature of what the Claimants are asking for. They are not seeking to be admitted to a state-funded school, nor for their schools to be state-funded. They are entitled to attend state-funded schools and were they to do so they would be provided with free school meals within the framework of the benefits and restrictions of the state-funded offer. What the Claimants seek instead is to be provided with one particular benefit of the state offer, while maintaining the different benefits and autonomy that is a feature of the private sector.
130. Finally, it is relevant to have regard to other measures which are in place to assist Charedi families and to tackle their deprivation, both by central government and by local authorities. Ms Taylor addresses some of these at paragraphs 76-85 of her first witness statement. Some of those are widely available, not just to the Charedi community; some are more specifically focussed on Jewish communities. Those measures to alleviate deprivation are relevant to the impact on the Claimants of not having a free school meal.

Conclusion on Ground 1

131. In conclusion, I reject the claim that the refusal to extend UIFSM to the Claimants is contrary to article 14. The *Thlimmenos* principle is not engaged in this case. If I am wrong about that, the Defendant has proved that the discriminatory treatment is objectively justified.

Postscript on Ground 1

132. I have addressed the questions identified by the parties in the Agreed List of Issues. The answers to those questions are sufficient to dispose of Ground 1. Before leaving Ground 1, I note two further points. They were not in the Agreed List of Issues and do not form part of my reasoning for dismissing the claim; however, they may warrant closer analysis in future *Thlimmenos* claims:
- i) Whether the alleged discriminatory treatment was "on grounds of" one of the protected statuses;
 - ii) The identification and characteristics of the comparator group, and the question of whether the Claimants' circumstances are "relevantly different" to the comparator group.
133. Many of the cases I was referred to do not address these two essential ingredients of a *Thlimmenos* claim in any detail.
134. In a direct discrimination claim, the grounds question requires consideration of the reason for the defendant's actions. In an indirect discrimination claim, a careful focus on the circumstances of the claimants and a comparator group is necessary, as is each group's ability to comply with the particular rule or policy under challenge. The English cases dealing with *Thlimmenos* are complicated by the fact that there are varying approaches as to whether the *Thlimmenos* principle is merely a species of indirect discrimination (e.g. *Drexler*) or a separate category of discrimination, sitting between direct and indirect discrimination (per *SC*).
135. As to the grounds question, in *A Elias* LJ said that even if the *Thlimmenos* principle was engaged there were three further conditions, one of which was whether the relevant discrimination was on one of the prescribed grounds (paragraph 38). As to that condition, he said this at paragraph 50:

The critical factor which it is alleged demands the different treatment of women in Northern Ireland is the state of the law which is not caught by article 14. This does raise a point of some interest, however. It assumes that when applying the *Thlimmenos* principle, the factor or factors which are relied on in order to establish that the claimant is in a significantly different situation must be one of the article 14 prescribed grounds. Logically there is no reason why that should necessarily be so. However, given that the basic concept

of direct discrimination itself is so linked, it is in my judgement likely that the Strasbourg court would subject the *Thlimmenos* principle to the same limitation.

136. I see much force in Elias LJ's analysis.

137. As to the comparator question, where the alleged unlawful treatment is a failure to treat differently people whose circumstances are "relevantly different", identification of the circumstances of the comparator group are likely to be complex. In this case, for example, the Claimants say they are in a "relevantly different" position to other private school pupils, so that they should not be treated in the same way. What constitutes a relevant difference for these purposes? And what is the relationship between that difference and the grounds for treatment?

i) There are two matters that the Claimants say distinguish them from the comparator group. First, that they are deprived in comparison to other groups of private school pupils. Second, that they have no choice but to attend private schools.

ii) There is clear evidence in this case, and in the *VAT Case*, demonstrating the deprivation of the Charedi community. I accept that the Charedi community is in a different financially position to most other families who use private schools. However, deprivation is not itself an aspect of race or religion. The simple fact that Charedi children are treated differently to other private school pupils does not indicate discriminatory treatment on grounds of race or religion.

iii) It may be possible to argue that the Charedi community is deprived because of its religion. There is some evidence of that in *Z*; but the evidence in that case arose in a very different context, and the point was not examined in any detail in this case.

iv) As to the question of choice: if I had accepted that the Claimants had no choice but to attend an independent school, then the relevant comparator for *Thlimmenos* purposes would be private school children who do have the choice to attend state schools. As to this there was simply no evidence as to the composition of the comparator group. As I have indicated in dealing with justification, it is likely that there are many others in the comparator group who may also claim to have no choice but to send their children to private schools. If the comparator group comprises others who are in the same position as the Claimants, then that undermines the claim that the Claimants have been treated in the same way as a relevantly different comparator.

138. It was not necessary in this case to reach definitive conclusions on these issues. I make these points simply to illustrate that both the grounds of treatment and the identification of comparators merit careful analysis in cases of this kind.

Ground 2: Public Sector Equality Duty

139. The issues under this ground are:

i) Did the Defendant discharge the PSED in exercising its function in relation to UIFSM?

ii) If the Defendant failed to discharge the PSED, should the Court refuse relief in relation to Ground 2 pursuant to section 31(2A) of the Senior Courts Act 1981?

PSED: Legal framework

140. Section 149(1) of the Equality Act 2010 provides:

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."

141. The principles relating to the exercise of the PSED are set out in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] EqLR 60, per McCombe LJ para 26. The Claimants draw particular attention to the following points:

- i) The duty must be fulfilled before and at the time when a particular policy is being considered; and
- ii) General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.

142. The PSED must be discharged prior to the decision being made. However, compliance with the PSED does not necessarily require a formal impact assessment to be undertaken: *R (Sheak v Lambeth BC)* [2021] EWHC 1745 (Admin).

143. An after the event equalities assessment may be relevant to the question of relief, when the Court considers s.31(2A) of the Senior Courts Act 1981.

144. Section 31(2A) provides:

The High Court—

- (a) must refuse to grant relief on an application for judicial review, and
- (b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

145. In *R (Bradbury) v Brecon Beacons National Park Authority* [2025] EWCA Civ 489; [2025] 4 WLR 58 Lewis LJ said:

In relation to section 31(2A), the court is concerned with evaluating the significance of the error on the decision-making process. It is considering the decision that the public body has reached and assessing the impact of the error on that decision in order to ascertain if it is highly likely that the outcome (the decision) would not have been substantially different even if the decision-maker had not made that error. It is not for the court to try and predict what the public authority might have done if it had not made the error. If the court cannot tell how the decision-maker would have approached matters, or what decision it would have reached, if it had not made the error in question, the requirements of section 31(2A) are unlikely to be satisfied.

Did the Defendant discharge the PSED?

146. I accept the Defendant's submissions that there was no breach of the PSED in this case. The Defendant concedes that the determination of the Conditions of Grant was the exercise of a function to which the PSED applies. However:

i) The Conditions of Grant were in accordance with a long-settled policy, in place since 2014. I reject the Claimants' submission that a full equality impact assessment needed to be carried out each year a grant is made to fund UIFSM. The challenge is, in reality, a challenge to the Defendant's refusal to change its long-settled policy.

ii) The Defendant gave specific consideration to the request made by the Claimants to change the policy. That request expressly raised religious discrimination issues. In considering the request, it is plain that the Defendant considered the equality issues raised by the Claimants. The arguments were considered and rejected. In my judgment, the Ministerial Submission did more than have regard to "general issues of equality" in the sense that phrase was used in *Bracking*.

iii) Annex B of the Ministerial Submission made express reference to the PSED. In circumstances where the decision under consideration was expressly about the equalities position of the Claimants' group, further detailed consideration of the elements of the PSED would have added nothing material to the matters the Defendant did consider.

Section 31(2A)

147. If I am wrong in my conclusion that there was no breach of the PSED, it is in my view highly likely that the same decision would have been reached in any event. Indeed, in my judgment it is plain and obvious that it would.
148. The Defendant relies on the EIA carried out in September 2025. The Claimants argue that the EIA is materially deficient, because, like the Ministerial Submission, it failed to recognise that Charedi children have no choice but to attend private schools. I have rejected that argument under Ground 1. The Defendant's position, both in the Ministerial Submission and the EIA is consistent and cogent.
149. The Claimants also argue that the EIA contains material which, if available to the Defendant in June 2025 may have led to a different decision being made. Essentially, the Claimants argues for caution in respect of a retrospective justification: a decision not to change an existing policy is of a very different nature to a decision taken when the scope of the UIFSM grant remained undetermined. I accept that proposition in principle. I accept that the Court should be cautious of what was in *Bracking* described as a rear-guard action following a concluded decision.
150. However, that principle has no application to the facts of this case. In this case, there was no real difference in the situation between June 2025 and September 2025. In June 2025 the conditions of the UIFSM grant were not "undetermined" in the sense that there was a fresh policy that had not been formed. The Conditions of Grant reflect the settled policy in place since 2014. In June 2025 the Defendant decided not to change the policy to include Charedi schools. It looked at the matter further in September 2025, only three months later, in the light of the Claimants pre-action letter. For reasons I have explained in relation to Ground 1 there were powerful reasons to continue to provide UIFSM only to state-funded schools. I have no doubt that if the EIA had been carried out in June 2025 the same conclusion would have been reached.

Ground 3

151. As I have already indicated, I allowed the Claimants' application to amend Ground 3. The issues are therefore:
- i) Did the Defendant act unlawfully because it took into account its view that Charedi parents have a choice as to whether to send their children to private schools?
 - ii) Did the Defendant act irrationally in considering that Charedi parents have such a choice?
152. Given my conclusions on Ground 1, this ground can be addressed very briefly. I have set out my conclusions on the choice issue above. The Defendant was entitled to regard Charedi parents as exercising a choice and entitled to have regard to that choice in making her decision about the request to extend UIFSM. There was no flaw in the Defendant's reasoning. It was not irrational of the Defendant to have taken that view.
153. More generally, for the same reasons which I have outlined in respect of justification under Ground 1, it cannot be said that the decision not to extend UIFSM was irrational.

Conclusion

154. I dismiss the application for judicial review on all grounds.