

<b>Neutral Citation No:</b>	<b>Ref:</b> COL11833
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	<b>ICOS No:</b> 2019/89712/01
	<b>Delivered:</b> 05/07/2022

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN’S BENCH DIVISION  
(JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY JR87 (BY HER MOTHER AND  
NEXT FRIEND) AND HER FATHER (“G”) FOR JUDICIAL REVIEW**

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**Mr Ben Jaffey QC with Steven J McQuitty (instructed by Phoenix Law, Belfast) on behalf  
of the Applicants**

**Dr Tony McGleenan QC with Phillip McAteer (instructed by the Departmental Solicitors  
Office) for the First Respondent, the Department of Education**

**Mr Paul McLaughlin QC with Roisin McCartan (instructed by the Education Authority  
Solicitors) on behalf of the Second Respondent, the Education Authority**

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**COLTON J**

***Introduction***

[1] “Give me a child until he is seven years old” said Saint Ignatius Loyola “and I will show you the man.” The founder of the Jesuit Brotherhood pithily articulates the influence that teaching can have on the young in the formation of their adult beliefs.

[2] This is an application for judicial review by a child, JR87 (the first applicant) and her father G (the second applicant) in respect of the teaching arrangements for religious education (“RE”) and collective worship (“CW”) in controlled primary schools in Northern Ireland. The applicants specifically challenge:

- (a) A decision of the Board of Governors of a school (the second respondents) the child attended in Belfast from pre-school to primary 3 (“the school”) dated 21 June 2019 (“the impugned decision”); and
- (b) The following provisions of Northern Ireland legislation (“the impugned legislation”) which the applicants submit are incompatible with their rights

under the Human Rights Act 1998 and for which the Department of Education (the first respondents) are responsible ("the Department"):

- (i) Article 21(1), (2), (3), (3A), (4), (5) and (7) of the Education and Libraries (NI) Order 1986 ("the 1986 Order");
- (ii) Articles 5(1)(a), 11(1)(b) and 13(1)(a) and 13(3) of the Education (NI) Order 2006 ("the 2006 Order");
- (iii) The Education (Core Syllabus for Religious Education) Order (NI) 2007 ("the 2007 Order").

[3] I am obliged to counsel for their written and oral submissions. It is evident that all the legal representatives in this case carried out extensive research which resulted in well-marshalled and focused submissions.

### *Relief*

[4] The applicants seek the following relief against the Department and in respect of the impugned legislation:

- (i) An order of certiorari quashing the impugned legislation on the basis that the legislation is incompatible with, and in breach, of the applicants rights under article 2 of the First Protocol ECHR ("A2P1"), read with article 9 and is also in breach of their rights under articles 8, 9, 10 and 14 ECHR (within the ambit of A2P1 and/or article 8 and/or article 9 ECHR), alternatively a declaration that the legislation can be construed compatibly with Convention rights pursuant to section 3 of the Human Rights Act 1998, alternatively a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998;
- (ii) A declaration that the Department has acted ultra vires as in breach of article 44 of the 1986 Order, section 75 of the Northern Ireland Act 1998 and, in respect of the 2007 Order alone, in breach of section 24(1)(a) and (c) of the Northern Ireland Act 1998;
- (iii) A declaration that the core syllabus is unlawful as it is ultra vires and of no force or effect;
- (iv) Such further or other relief as the court deems necessary;
- (v) Damages and/or just satisfaction;
- (vi) Costs.

[5] The applicants seek the following relief against the Board of Governors of the school in respect of their impugned decision:

- (i) An order of certiorari quashing the impugned decision;

- (ii) A declaration that the impugned decision was in breach of section 6 of the Human Rights Act 1998 as in breach of the applicants' rights under A2P1, read with article 9, and is also in breach of their rights under articles 8, 9, 10 and 14 ECHR (within the ambit of A2P1 and/or article 8 and/or article 9 ECHR);
- (iii) A declaration that the impugned decision was ultra vires and of no force or effect, particularly as in breach of article 4 of the 2006 Order;
- (iv) Such further or other relief as the court deems necessary;
- (v) Damages and/or just satisfaction;
- (vi) Costs.

### *Factual background*

[6] JR87 is now 7 years old. The school she attended is a controlled, grant-aided primary school with a nursery. It teaches children only in years 1-3. She completed her pre-school year with the school followed by primary 1 to primary 3. She moved to a new (controlled) school in September 2021, commencing primary 4 where she is still subject to the same legislation and core syllabus for the teaching of RE.

[7] In May 2019 the child's parents sent a letter to the school querying the provision of RE and CW. They are a non-religious family and were concerned that by the time the child had commenced primary 2 she had absorbed and adopted a religious (specifically Christian) worldview which was not consistent with their own views and beliefs. By way of illustration the second applicant avers that in the absence of any religious exposure at home his daughter now believes that God made the world and she repeats and practices a prayer/grace that she was taught at school at snack-time. His concern is that his daughter is learning Christianity and not learning "about" Christianity in a school context that effectively assumes its absolute truth and which, whether intentionally or otherwise, encourages her to do the same.

[8] The school responded to this letter on 21 June 2019. This is the decision under challenge. The gist of the response was to say that the school would continue to provide CW and RE exactly as it had done and in accordance with the school's understanding of the impugned legislation. The school did set out the option of the child being excused from attendance at RE and CW. The parents do not accept this to be an appropriate alternative or lawful solution. It was also confirmed in the schools letter that all children at the school take part in RE and CW. The parents therefore held concerns around their child being singled out by not attending on the basis they are not Christians. Both parents are at pains to point out that they have no issues with the school other than the provision of RE teaching and CW. They are praiseworthy of the school and "are grateful for the nurturing and supportive environment provided by the staff at the school." Equally, they are at pains to point out that they are not against the teaching of RE. What the parents seek is education

(including religious provision) that is appropriately objective, critical and pluralistic, having regard to the age of their daughter.

[9] Given the school's reliance on the legislation the applicants sent a detailed pre action letter to both the school and the Department on 29 July 2019. The Department provided a substantive response denying that the legislation breaches any of the applicants' human rights. The Education Authority provided a response on behalf of the school outlining that the legislation (and not the school) should be the sole target of the claim. They also denied any breach of the applicants' human rights in any event.

[10] This matter ultimately proceeded to a leave hearing on 11 June 2021 during which leave was granted against both respondents.

### *Complaint to Curriculum Complaints Tribunal for Northern Ireland*

[11] During the initial stages of these judicial review proceedings it was agreed that the applicant would explore an alternative remedy in the form of a complaint to the Curriculum Complaints Tribunal. The proceedings were therefore adjourned to enable this to be done. Both the school and parents submitted written representations to the tribunal which met on 10 September 2020.

[12] Under the 2006 Order the function of such a tribunal is to hear and determine any complaint that, in relation to the duties or powers conferred upon a board of governors under a "relevant provision", the board has either:

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

[13] The list of "relevant provisions" is set out in article 25(2). It was submitted to the tribunal on the school's behalf that two of these provisions were applicable to the compliant:

- Any statutory provision relating to the curriculum for granted-aided schools (article 25(c)).
- Any statutory provision relating to collective worship in grant-aided schools (article 25(d)).

[14] The decision of the tribunal was conveyed to the parties by letter of 22 September 2020. The conclusion of the tribunal was set out in the final paragraph of the letter as follows:

"Accordingly, the tribunal finds that the Board of Governors of (the school) did not act unreasonably with

respect to the exercise of the powers conferred, or in the performance of the duties imposed on it by the statutory provisions relating to religious education and collective worship, as detailed above. The complaints are therefore unanimously dismissed.”

[15] In his submissions on behalf of the board of governors Mr McLaughlin submitted that the question of whether the teaching provided to the applicant gave rise to a breach of her Convention rights has already been considered and determined by the tribunal. He submits that the decision has not been challenged and it is not open to either the applicant or the court to look behind it.

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

### *The legislative framework*

[17] Article 21(1) of the 1986 Order provides for religious education and daily collective worship in an assembly:

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

[18] Article 21(2) provides:

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

[19] Pausing here the applicants point out that the meaning of article 21(2) is that RE and CW in Northern Ireland must be Christian (“based upon the Holy Scriptures”), but not denominational (ie not distinctive of Protestant or Catholic beliefs or forms of worship).

[20] Article 21(3) provides that – subject to paragraph 3A – in a controlled integrated school, a grant maintained integrated school or a voluntary school that the RE and CW required by article 21(1) shall be under the control of the Board of Governors of the school.

[21] Article 21(3A) provides that in a grant-aided school the religious education required shall include religious education in accordance with any core syllabus specified in article 11 of the 2006 Order. Thus while the Board of Governors in JR87’s school has day to day control over both collective worship and religious education they are required, by law, to provide religious education in accordance with the core syllabus.

[22] Article 11(1) of the 2006 Order provides that the Department may, by order, specify a core syllabus for the teaching of religious education in grant-aided schools, that is to say a syllabus which:

- (a) sets out certain core matters, skills and processes which are to be included in the teaching of religious education to pupils in such schools, but does not prevent or restrict the inclusion of any other matters, skill or process in that teaching; and
- (b) is such that the teaching in a controlled school of any of the matters, skills or processes set out in that syllabus would not contravene article 21(2) of the 1986 Order (ie, is non-denominational and based upon the Holy Scriptures).

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

[24] As will be seen later in this judgment the Department places emphasis on the fact that the Board of Governors is not limited to teach only the core syllabus. Rather they must, at a minimum, deliver that syllabus. Thus, while under article 11 the core syllabus sets out certain matters that must be included in the teaching of religious education, it does not prevent or restrict the inclusion of any other matter in that teaching. In response the applicants point to the overarching requirement that religious education in controlled schools must be based upon the Holy Scriptures in order to comply with article 21(2).

[25] Article 21(4) of the 1986 Order provides that religious education and collective worship, as required by article 21(1), shall be so arranged that (a) the school shall be open to pupils of all religious dominations for education other than religious

education and (b) no pupil shall be excluded directly or indirectly from the other advantages which the school affords.

[26] Article 21(5) makes provision for a parent to exclude his or her child:

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

[27] Article 21(7) provides that ministers of religion and other suitable persons, to whom the parents do not object, shall be granted reasonable access at convenient times to pupils in any grant-aided school for the purpose of giving religious education, whether as to tenets distinctive of a particular religious denomination or otherwise, or inspecting and examining the religious education given in the school. Education given by virtue of this paragraph may be in addition to that provided under paragraph (1). This provision gives local clergy the right – subject to parental veto – to come into schools to deliver denominational religious education. The aim appears to have been that the school itself will only provide non-denominational Christian RE and CW pursuant to article 21(2). Denominational RE and CW is provided by the clergy, albeit within the school setting.

[28] Article 21(9) provides that the Department shall make such regulations as it considers necessary for securing that the provisions of this article relating to religious education are complied with in all grant-aided schools.

[29] Article 44 of the 1986 Order provides:

“In the exercise and performances of all powers conferred or imposed on them by the Education Orders, the Department and Boards shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils shall be educated in accordance with the wishes of their parents.”

[30] Article 3 of the Education Reform (Northern Ireland) Order 1989 provides that it is the duty of the Department to promote the education of the people of Northern Ireland and to secure the effective execution (by relevant boards and other bodies, now the Education Authority) of the Department’s policy in relation to the provision of the education service.

[31] Article 4 of the 2006 Order provides for the following general duty regarding the school curriculum:

“(1) It is the duty of the board of governors and principal of every grant-aided school to exercise

their functions as respects that school (including, in particular, the functions conferred on them by this Power) with a view to securing that the curriculum for the school satisfies the requirements of this article.

- (2) The curriculum for a grant-aided school satisfies the requirements of this article if it is a balanced and broadly based curriculum which –
  - (a) promotes the spiritual, emotional, moral, cultural, intellectual and physical development of pupils at the school and thereby of society; and
  - (b) prepares such pupils for the opportunities, responsibilities and experiences of life by equipping them with appropriate knowledge, understanding and skills.”

[32] Article 5(1)(a) of the 2006 Order provides that the curriculum for every grant-aided school must include provision for religious education for all registered pupils in accordance with article 21 of the 1986 Order. Article 5(3) provides that:

“Nothing in those articles require particular matters to be included in the curriculum of a grant-aided school that has been taken to preclude the inclusion in that curriculum of any other matter.”

[33] Article 13(1)(a) of the 2006 Order provides:

- “(1) In relation to any granted-aided school or any school year, it shall be the duty of the board of governors to exercise its functions with a view to securing and the duty of the principal to secure –
  - (a) that religious education is given in accordance with the provisions of such education included in the school’s curriculum by virtue of article 5(1)(a).”

[34] The 2007 Order was made by the Department in exercise of the powers conferred on it by articles 11(1), (4) and 43(5) of the 2006 Order. The 2007 Order confirms that a draft of the core syllabus complied with the requirements of article 11(2) of the 2006 Order. The 2007 Order, by article 3, confirms that the contents of the



document entitled “Core syllabus for religious education” are specified as the core syllabus for the teaching of religious education in grant-aided schools.

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

“In order to meet their statutory requirements schools must provide learning opportunities in relation to the following:

(a) religious education - in accordance with the core syllabus drafted by the four main Christian Churches in Northern Ireland as specified by the Department of Education.”

### *The core syllabus for religious education*

[36] As set out above the 2007 Order gave effect to the current core syllabus which is at the heart of this challenge. It specifies a syllabus for every stage of primary and compulsory education, that is from foundation stage through to key stage 4. The school only teaches foundation stage (years 1 and 2) and half of key stage 1 (years 3 and 4).

[37] In the course of the hearing the parties sought to emphasise different aspects of the core syllabus. At this stage a summary of the key objectives is sufficient before further consideration of the detail later in the judgment.

[38] In both of the stages under consideration (although as will be seen later the Department emphasises that the syllabus at each key stage should not be read in isolation) schools must follow three learning objectives. The objectives are the same for each stage, with different content.

### *Learning objective 1: Revelation of God*

#### *Foundation stage*

[39] Pupils should begin to develop an awareness, knowledge, understanding and appreciation of the key Christian teachings about God, Father, Son and Holy Spirit, about Jesus Christ, and about the Bible; and begin to develop an ability to interpret and relate the Bible to life.

#### *Key stage 1*

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

## *Learning objective 2: the Christian Church*

### *Foundation stage*

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

### *Key stage 1*

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

## *Learning objective 3: morality*

### *Foundation stage*

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

### *Key stage 1*

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

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

### *Guidance*

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

### *The legal basis for the challenge*

[47] The starting point is A2P1 which has been described as the *lex specialis* on the issue.

[48] A2P1 ECHR provides:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to

education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

[49] Although the applicants argue that as a parent and a child they have similar but not identical rights and interests it will be seen that A2P1 and the Convention jurisprudence deal with the issue through the prism of parental rights. Given the child’s age, this is not a case in which she has developed particular religious or non-religious beliefs.

[50] Essentially the court is dealing with the second sentence in A2P1. Article A2P1 should also be read with article 9 ECHR which provides that:

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

[51] There is ample authority for the proposition that supporters of secularism and those who have non-religious beliefs hold views which have a level of cogency, seriousness, cohesion and importance to be embraced both by article 9 and A2P1. This was summarised by Lord Nicholls in *Williamson v Secretary of State for Education* [2005] UKHL 15 at paragraph 24:

“Article 9 embraces freedom of thought, conscience and religion. The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom. Thus, if its manifestation is to attract protection under article 9 a non-religious belief, as much as a religious belief, must satisfy the modest threshold requirements implicit in this article. In particular, for its manifestation to be protected by article 9 a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs. Article 9 is apt, therefore, to include a belief such as pacifism: *Arrowsmith v United Kingdom* (1978) 3 EHRR 218. The position is

much the same with regard to the respect guaranteed to a parent's 'religious and philosophical convictions' under article 2 of the First Protocol: see *Campbell and Cosans v United Kingdom* 4 EHRR 293."

[52] In relation to the parents' convictions these are described by G in his affidavit as follows:

"38. As I have noted, we are not a religious family and JR87 is not being raised as a Christian, or indeed, within any other faith tradition. We are, as a family, broadly speaking, humanist in our outlook. I do not, for example, believe in any omnipotent creator God nor do I believe in a supernatural realm beyond this world. I believe that this is the one life we have and that we are obliged to therefore try and make the best of it, guided by reason and compassion, which I consider to be universal human qualities found in all cultures and within and without all the majority religions, philosophies and beliefs of the world. I do not consider humanity to be inherently sinful. I consider the Bible to be made up of fascinating and culturally important texts, but I read and understand those texts as entirely human literature, rather than any kind of revealed truth from God. It follows that I do not accept – as true – the doctrinal claims of Christianity. I find certain aspects of Christian morality and ethics in Northern Ireland to be disturbing, such as the longstanding and continued discrimination by the main churches against LGBT people in Northern Ireland and I do not want my daughter to be taught that such intolerant and potentially harmful beliefs are true, rather than based on an assumption that the Bible is the infallible 'word of God.'"

The court considers that the parents' convictions in this case are embraced by both Article 9 and A2P1.

[53] The focus on the convictions of the parents' doubtless reflects the fact that they are primarily responsible for the education and teaching of their children. It is in the discharge of this duty that parents may require the State to respect their convictions. In this regard the ECtHR has also been conscious, in this specific context, of the risk of religious education creating a conflict of values between parents and their children. Thus, in *Yalcin & Ors v Turkey* (Application No 21163/11) the court said at paragraph 72:

“In this connection the Court reiterates the Contracting Parties’ positive obligation under the second sentence of article 2 of Protocol No 1, which gives parents the right to demand from the State respect for their religious and philosophical convictions in the teaching of religion (see *Hasan and Eylem Zengin*, cited above, para 71). Where a Contracting State includes religious instruction in the curriculum for study, it is then necessary, in so far as possible, to avoid a situation where pupils face a conflict between the religious instruction given by the school and the religious or philosophical convictions of their parents.”

[54] In similar vein in the case of *Folgero v Norway* [2008] 46 EHRR 47 which is discussed in detail below, when analysing the curriculum under challenge the court said at paragraph 94:

“... It can be assumed that participation in at least some of the activities concerned, especially in the case of young children, would be capable of affecting pupils’ minds in a manner giving rise to an issue under article 2 of Protocol No 1.”

[55] In relation to the overlap or link between A2P1 and article 9 of the Convention the position has been set out by the ECtHR in the case of *Lautsi v Italy* [2012] 54 EHRR 3 as follows:

**“(a) General principles**

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

60. Nevertheless, that provision should be read in the light not only of the first sentence of the same article, but also, in particular, of article 9 of the Convention, which guarantees freedom of thought, conscience and religion,

including the freedom not to belong to a religion, and which imposes on Contracting States a 'duty of neutrality and impartiality'.

In that connection, it should be pointed out that States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs."

[56] There is extensive Convention jurisprudence on the application of A2P1 to religious education. The general principles have been set out in *Folgero v Norway* [2008] 46 EHRR 47.

[57] In that case the applicants were parents of children at a primary school who challenged the authority's refusal to grant their children full exemption from a subject in the school curriculum named KRL. The object of the course was to "help give pupils a Christian and moral upbringing ..." The course involved instruction in Christianity, religion and philosophy. In order to be granted exemption from those parts of the teaching to which they objected it was necessary for the parents to submit a written note which should contain reasons setting out what they considered amounted to practice of another religion or adherence to another philosophy of life to which they objected.

[58] At paragraph 84 the court set out the general principles in relation to the interpretation of A2P1 as follows:

*"1. General principles*

84. As to the general interpretation of Art 2 of Protocol No 1, the Court has in its case-law enounced the following major principles:

- (a) The two sentences of Art 2 of Protocol No 1 must be interpreted not only in the light of each other but also, in particular, of Arts 8, 9 and 10 of the Convention.
- (b) It is on to the fundamental right to education that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between State and private teaching. The second sentence of Art 2 of Protocol No 1 aims in short at safeguarding the possibility of pluralism in

education, which possibility is essential for the preservation of the 'democratic society' as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.

- (c) Art 2 of Protocol No 1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme. That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the 'functions' assumed by the State. The verb 'respect' means more than 'acknowledge' or 'take into account'. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. The term 'conviction', taken on its own, is not synonymous with the words 'opinions' and 'ideas.' It denotes views that attain a certain level of cogency, seriousness, cohesion and importance.
- (d) Art 2 of Protocol No 1 constitutes a whole that is dominated by its first sentence. By binding themselves not to 'deny the right to education', the Contracting States guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time and the possibility of drawing, by official recognition of the studies which he has completed, profit from the education received.
- (e) It is in the discharge of a natural duty towards their children - parents being primarily responsible for the 'education and teaching' of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.
- (f) Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which

ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

- (g) However, the setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era. In particular, the second sentence of Art 2 of Protocol No 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.
- (h) The second sentence of Art 2 of Protocol No 1 implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded (*ibid.*).
- (i) In order to examine the disputed legislation under Art 2 of Protocol No 1, interpreted as above, one must, while avoiding any evaluation of the legislation's expediency, have regard to the material situation that it sought and still seeks to meet. Certainly, abuses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism."

[59] In the course of the hearing the court was referred by the parties to other cases in which A2P1 was considered including *Lautsi v Italy* [2012] 54 EHRR 3; *Yalcin & Ors v Turkey* (Application No 21163/11); *Kjeldsen & Ors v Denmark* [1976] 1 EHRR 711; *Papageorgiou v Greece* [2020] 70 EHRR 36; *Perovy v Russia* (Application No 4742909); *Zengin v Turkey* [2008] 46 EHRR 44 and a decision in the Administrative Court in England and Wales namely *Fox & Ors v Secretary of State for Education* [2015] EUC



3404 (Admin). These cases do not add anything of significance to the principles set out in the *Folgero* case but are instructive as to how the courts applied the principles in the context of the particular facts being considered by them.

[60] The court considers that the key principles which emerge from the case law in relation to A2 P1 read with article 9 and which should be applied to this case are as follows:

- (i) The setting of the curriculum in state funded schools falls within the competence of the contracting state.
- (ii) In setting the curriculum the state enjoys a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.
- (iii) Compliance involves questions of expediency, available resources and local conditions which vary considerably in respect of which the state enjoys considerable latitude and in respect of which it is not for the courts to rule.
- (iv) Parents cannot require the state to provide a particular form of teaching or instruction.
- (v) A2 P1 and article 9 do not prevent states from setting a curriculum which includes the teaching and instruction of religion.
- (vi) In setting a curriculum for the teaching of religion the state may legitimately give priority to imparting knowledge of one religion above another where that religion is predominant or adhered to by a majority of its citizens.
- (vii) If a state does set a curriculum for the teaching of religious education in order to comply with A2 P1 and article 9 it must respect parents' convictions be they religious or non-religious. This is a positive obligation.
- (viii) In fulfilling the function assumed by it in setting a curriculum for the teaching and instruction of religious education it must take care that the information or knowledge included is conveyed in an objective, critical and pluralist manner. It must accord equal respect to different religious convictions and to nonreligious beliefs. That is the limit which must not be exceeded.
- (ix) In considering whether the state has exceeded the limit referred to above the court should take into account the possibility and extent to which parents can exempt children from religious education.

[61] In short, recognising the broad margin of appreciation and latitude open to the state A2P1 and article 9 seek to protect pluralism and to prevent indoctrination or proselytising, in the delivery of RE.

*Further analysis of the curriculum and collective worship*

[62] The development of the core syllabus for RE is explained in the affidavit of Sam Dempster, the Acting Principal Officer in the Curriculum and Assessment Team in the Department of Education. Article 11(2) of the 2006 Order provides that the syllabus must be prepared by a drafting group representative of “persons having an interest in the teaching or religious education in grant-aided schools.”

[63] A core syllabus was first introduced in 1993 having been prepared by representatives of the four main churches in Northern Ireland.

[64] Post the enactment of the Human Rights Act 1998 and section 75 of the Northern Ireland Act 1998 the core syllabus was reviewed. Mr Dempster avers in his affidavit:

“13. In 2002, the then Minister for Education asked the Leaders of the Four Main Churches to review the Core Syllabus in light of equality and human rights obligations (arising from section 75 of the Northern Ireland Act 1998) and the Human Rights Act 1998) and the increasing religious and cultural diversity in the Northern Ireland population. The churches were specifically asked to consider the inclusion of other world faiths as part of the core syllabus.

14. The churches submitted their Proposals for a Revised Core Syllabus for RE in January 2005. Following a full Equality Impact Assessment (EQIA) on these Proposals, including a three month public consultation, the then DE Minister formally accepted the Proposals in October 2006. Legislation was then made to give effect to the Revised Core Syllabus (the Education (Core Syllabus for Religious Education) Order (Northern Ireland) 2007). The ‘Core Syllabus for Religious Education’ published by The Stationery Office, sets out the statutory Learning Objectives for pupils in each key stage, and its introduction into schools began on a phased basis in line with the revised curriculum from September 2007. Schools must provide Religious Education in line with the syllabus which in the Foundation Stage includes the Revelation of God, the Christian Church and Morality. I have located a copy of the EQIA as prepared for consultation but have not been able to locate consultation responses, the Department’s response to consultation or any further version of the EQIA.”

[65] In the course of submissions the court has been referred to a vast range of background documentation including reports, academic research and journals.

[66] In the course of his submissions Mr Jaffey highlighted some of these documents which demonstrate concerns about the core curriculum for RE. In particular:

- (a) The Northern Ireland Council for Voluntary Action (an umbrella body for the voluntary and community section in NI) commented in response to the result of the Department's EQIA by saying that they considered that this gave rise to a potential breach of equality obligations. In response to the criticism that it was absurd to legislate for a "Christian RE model", the Department noted that this was (in their view) mandated by the prevailing legislation (article 21). The Department rejected the NICVA call to withdraw the proposals for the core syllabus saying, "the core syllabus provides a good core to build on while continuing to provide flexibility for schools to determine their provision, with reference to the guidance materials being prepared with the support of the advisory group."
- (b) The Equality Commission for Northern Ireland provided a response to the Department's proposals by letter of 7 June 2006. This document noted that members of non-Christian faiths and those from secular traditions may feel that they will be adversely affected by the introduction of the revised core syllabus due to its "almost exclusively Christian focus." The Commission also criticised the exclusively Christian make-up of the group that produced the draft syllabus saying, "The Commission feels strongly that representatives from non-Christian faiths should have been included in these working practices." The Commission also noted that c.9% of pupils were not from either a Protestant or Catholic Christian background representing a "significant proportion of the pupil population whose needs will not be catered for in the revised proposals for the new RE core syllabus, which almost exclusively refers to and teaches about Catholic and Protestant church faiths."
- (c) The Northern Ireland Council for Ethnic Minorities (NICEM) also engaged with the Department prior to implementation of the revised core syllabus. NICEM expressed the view that they were extremely unhappy with the entire process by which the syllabus was reviewed, to the extent that they had refused to formally take part in the consultation as they considered it fundamentally flawed. NICEM stated:

"The content of the proposals are clearly single-religion, with little attention given to world religions other than Christianity. Even when such references are included they are done so from the perspective of the Christian religion which pervades every aspect of the proposals, and references made within the proposals to world religions other than Christianity are ineffective, inappropriate and patronising in their manner."

[67] It is clear that the Department is alive to the potential legal implications of the obligation on schools to teach the core syllabus on RE. At the time the core syllabus was introduced in 2007 the examiner of statutory rules raised concerns about its content. The essential concern was that it appeared to be an unusually narrow exercise of a statutory power and one which may be of doubtful vires under section 24 of the Northern Ireland Act 1998, thereby giving rise to a possible devolution issue under schedule 10 to that Act. The examiner's report says:

"7. It seems fair to say that the syllabus while nondenominational (in what might be described as wider Christian terms) is exclusively or predominantly Christian until key stage 3 (11-14). The Department of Education paper "Results of Equality Impact Assessment" (November 2006), analysing responses to the Department's Equality Impact Assessment (March 2006 - which seems to have been the mechanism for consultation on the churches' proposal) - is perhaps instructive:

#### **`Potential Impacts of the Proposals**

5.3 The churches, Education and Library Board, RE advisors, CCMS, some involved in teacher training, the Caleb Foundation and most schools, teachers and parents responding welcomed the proposals and believed they could be beneficial and help to promote good relations.

5.4 The Inter-Faith Forum, the Bahai Council, NICIE, Equality/Human Rights groups, some schools, a minority of parents and some involved in teacher training thought the proposals could have adverse impacts on the grounds of Age, Religion and Race and do not go far enough in terms of the provision made for religions other than Christianity. They also suggested the proposals could be in breach of section 75 [of the Northern Ireland Act 1998], the Human Rights Act [1998], the UN Convention on the Rights of the Child, the UNESCO Convention on Discrimination in Education and the Race Relations (Northern Ireland) Order 1997.'

8. The Department was clearly aware of concerns about the proposals and suggested various measures that would 'mitigate any potential adverse impact'. Ultimately it pointed to the right of parents to withdraw their child from all or part of religious education lessons

...

9. It is not my function to consider the policy or merits of the Department, and I am certainly not in any way qualified to pronounce on theology. Nor is it my function to declare that the Order is incompatible with the Convention rights (say, Article 9 on Freedom of Religions and Rights of Belief and Article 2 of the First Protocol on the Right to Education) or that it discriminates against a person or class of person on the ground of religious belief or political opinion; that is ultimately a matter for the courts. But I can express doubts. The Department has told me that it was 'very mindful of the ECHR' in specifying the syllabus, but from what I can see, it seems that the Department did not refer the syllabus back to the drafting group to consider further revision in light of the representations. I can and do take notice of the fact that Northern Ireland, while predominantly Christian according to the tenets of one denomination or another, is becoming a multi-cultural society, and plainly the Department must take that into account when exercising its statutory powers; that is clearly underpinned by provisions such as sections 24 and 75 of the Northern Ireland Act 1998. Article 11(2)(a) of the Education (Northern Ireland) Order 2006 requires that the draft syllabus be prepared by 'a group of persons ... appearing to the Department to be persons having an interest in the teaching of religious education in grantaided schools' - in effect almost all schools in Northern Ireland. The Department have avowedly interpreted that as meaning the Roman Catholic Church, and the Transferors from what would be described as the former Protestant schools. With respect, that seems to be an unusually narrow view, even in 2002 where the syllabus incorporated by reference in the order, has its origins."

[68] I have already referred to the learning objectives contained in the core syllabus. In the course of the hearing the parties drew attention to the details of the syllabus to include the various sub-headings of topics in respect of which teachers should provide opportunities for learning for pupils.

[69] Mr Jaffey submits that unsurprisingly, given that the syllabus has been drafted by the four main churches, it prioritises and promotes the Christian faith. There is no reference to any other faiths, let alone non-believers, until key stage 3, which is at secondary level. At that stage a learning objective 4 is introduced under the heading World Religions. Under this heading "pupils should be given an introduction to two world religions other than Christianity in order to develop knowledge of and sensitivity towards the religious beliefs, practices and lifestyles of people from other religions in Northern Ireland.

[70] Dr McGleenan pointed to the fact that the syllabus was drafted in such a way that pupils should be taught “about” God, “about” Jesus Christ, and “about” the Bible.

[71] What teachers are asked to do, he says, is to provide opportunities for pupils to know that “for” Christians, the Bible is the word of God etc. Thus he argues the teaching of the syllabus does not involve proselytising but rather teaches the pupils about Christian values and promotes an understanding of those values.

[72] The court should be careful to avoid an overly factual analysis of what is provided in the syllabus. However it seems to the court that on any analysis the teaching of the syllabus can only have the effect of promoting Christianity and encouraging its practice. By way of example students are taught to look at and explore the content and structure of the Bible; that the Bible is the word of God; that God is the creator of all things. Pupils should read prayers from the Bible and other sources. They should recognise that prayer and worship can be associated with special events and places; they should experience worship and prayer in a variety of ways and compose prayers to mark special events.

[73] By way of further example if one looks at the statements of attainments for key stage 1 it is required that pupils should be able to talk about the use of the Bible in church and elsewhere; read from the Bible and service of worship; dramatise a Bible reading; talk about what God has made, people, flowers, birds, animals; recognise that God cares for his creation and people; make up a prayer expressing thanks for God’s care and provenance; participate in a harvest thanksgiving service; make up a prayer thanking God for the gift of Jesus; make up a prayer expressing repentance; say The Lord’s Prayer; sing the song “Abba, Father”; make up a prayer which addresses God as Father; participate in an Easter service and be able to write a prayer giving thanks to God for Easter. These are only examples.

[74] In short, a fair analysis of the syllabus leads to the conclusion that under the curriculum RE is not conveyed in an objective, critical and pluralist manner.

### *Collective worship*

[75] In terms of collective worship G’s understanding is as per paragraph 20 of his affidavit:

“The school has confirmed that church ministers (or their church children’s workers) primarily visit P2 and P3 assemblies. The impression is given that this is a regular occurrence. This address, according to the school, is always and only ever based on Christian teachings (from the Bible) and will be linked to the core syllabus. This address is, in effect, a Christian sermon. ... one of the particular undesirable features of the current legal settlement is that collective worship and RE are

exclusively Christian and are linked so as to mutually reinforce each other in a way that moves from teaching/education into proselytising and *de facto* indoctrination of children.”

[76] He goes on to say at paragraph 21:

“Collective worship - in JR87’s school - involves hearing Christian clergy give regular sermons, singing hymns (which are to promote Christian ideas/theology), saying and singing prayers (which again will promote Christian ideas/theology) and celebrating the major Christian festivals, all in the context of an exclusively Christian religious education.”

[77] In her affidavit the principal of the school points out that collective worship predominantly takes place in the school assembly programme. In primary 1 children meet for a Friday afternoon assembly. It usually includes a story, which can be Bible or values based, and the children may also learn/sing a song. Assembly concludes with a presentation of awards to individual children.

[78] From January to June the children from primary 1 also join and participate in the Wednesday morning assembly along with primary 2 and primary 3 children.

[79] In primary 2 and primary 3 assembly takes place three times each week on Tuesdays, Wednesdays and Friday mornings. On Tuesday the children learn songs which are Bible based or linked to specific school events. On Wednesday morning the children practice songs taught on Tuesday. Assembly includes acknowledgement of children who have received certificate awards or participated in special events outside school.

[80] On Friday morning the children will sing a song and this is followed by a visitor’s address/presentation or a story activity led by the principal. Assembly concludes with star awards.

[81] In relation to visits from church ministers the principal avers:

“33. With regards to church ministers/clergy assessing school assemblies, again this draws its origins from the legislation which provides for inspection in grantedaided schools (except nursery schools) by ‘ministers of religion and other suitable persons, including teachers of the school, to whom parents do not object.’ [Article 21(7) of the 1986 Order]. In controlled schools, this role has traditionally been carried out by clergy of three denominations that constitute the Transferor Representatives’ Council (Church of Ireland, Methodist Church in Ireland and the Presbyterian Church in

Ireland). Largely, clergy now prefer to take part in school assemblies rather than formally inspect religious education and this is the case at (the school).

34. When invited, ministers or one of the churches' children's leaders attend the Friday morning assembly at (the school). These have included ministers and priests from the Presbyterian Church, the Methodist Church and the Church of Ireland, as well as the children's workers from the Scripture Union. Their addresses during assemblies are based on Christian teachings, ie they are Bible based, are linked to the core syllabus and are age appropriate. ... Often the church leaders will approach what they say by explaining that they are a Christian, and that is what they, as a Christian believe. The church leaders take a gentle and age appropriate approach and will deliver a short message to the children."

[82] On a factual basis the principal points out that during primary 1 the only contact JR87 had with a religious minister was when a Reverend was invited to the Christmas performance and he spoke for a few minutes at the end. Because of the restrictions imposed during the Covid pandemic the opportunity to have collective worship in the school in the usual way had been significantly reduced and as a result her involvement in collective worship at the school has been limited.

[83] It appears from the evidence that the only external persons invited to attend assembly are exclusively Christian. So far as they extend beyond the Transferor Church Representatives (the main churches) it has only extended to representatives from Evangelical Christian organisations namely the Scripture Union and CFC Belfast both of which have a specific mission to proselytise. As is the case with the RE curriculum the court concludes that CW is not conveyed in an objective, critical and pluralist manner. Furthermore, the lack of pluralism identified in each aspect is reinforced by the combination of RE and CW under the current arrangements.

### *Is there a breach of A2P1?*

[84] In assessing whether there has been a failure to respect the rights of JR87's parents under A2P1 in conjunction with Article 9 there are further matters to be taken into account.

[85] In particular, Dr McGleenan focuses on two issues. Firstly, he points out that the syllabus is the legal minimum required and there is sufficient flexibility within the curriculum as a whole. Article 11 of the 2006 Order allows for the inclusion of additional matters in the curriculum. In this regard he points to the fact that the core syllabus is supported by non-statutory guidance for teachers and pupils which has been developed by the Council for the Curriculum Examinations and Assessment (CCEA). In addition, the syllabus must also be read in conjunction with the legal requirements of the Personal Development and Mutual Understanding (PDMU) area



of learning within the Northern Ireland curriculum. At foundation stage it requires teachers to provide opportunities for the exploration of similarities and differences between groups of people. Secondly, he refers to the provisions of Article 21(5) which provides that JR87 can be excused from attendance at religious education or collective worship or from both at the request of a parent.

*The non-statutory guidance/personal development and mutual understanding*

[86] The development and introduction of the non-statutory guidance is dealt with comprehensively in the affidavit of Sam Dempster under the heading “Religious Education Advisory Committee.” The relevant passages are as follows:

“41. To support teachers in schools in the delivery of RE, and the recognition of concerns expressed by religious minority and inter-faith groups during the consultation process of the EQIA on the Core Syllabus, a CCEA-led RE Advisory Group was set up and a seconded teacher was appointed to CCEA to work in partnership with the Group. This was one of a number of mitigations identified including:

- alternative forms of provision for pupils from minority backgrounds;
- making greater provision outside the Core Syllabus for world religions;
- extend the coverage of world religions in the Core Syllabus; and
- an inclusive approach to producing resources for the RE Core Syllabus.

42. The non-statutory guidance (religious education in primary schools) highlights that many teachers, including those in church schools, may have concerns about how or whether to try to include children from minority religious (or non-religious) backgrounds in RE. These may make some teachers, especially those without specialist knowledge or qualifications, very cautious about how they teach RE. This could be a particular concern for primary school teachers who normally have to teach all areas of the curriculum to their class. The guidance therefore encourages teachers towards a professional and inclusive approach to RE, whatever their personal beliefs may be, and to raise issues for discussion (internal part 1.2). Similarly the guidance notes that in a multicultural society it would be important for primary age children to

learn about differences in Christianity and to begin to explore other forms of religious expression. The Core Syllabus provides for a more formal systematic teaching of world religions at key stage 3, but there are many opportunities for beginning that process in an incidental or thematic way in primary school (internal page 7). The guidance further notes the contribution of the Advisory Group whose membership is discussed below. I refer to a copy of the non-statutory guidance for primary schools as it appears at pages 76 to 180 of the bundle.

43. The Advisory Group's members comprised a wide range of professionals and are representative of religious minorities and inter-faith groups and therefore had a much more secular feel to the group that had developed the syllabus. The group's remit is to provide guidance and support materials for teachers, including specific materials on world religions for new areas of the Core Syllabus at key stage 3, and to raise the awareness of RE by mapping the Learning Objectives across the curriculum as a whole.

44. The Religious Education Advisory Committee was established in 2006. It was co-chaired by CCEA and there are two Transferor Representative Members – essentially representatives of the Protestant churches. The primary role of the committee was to develop guidance materials and resources in support of the revised RE Core Syllabus.

...

45. The original work of the committee is reflected in the non-statutory guidance as appears at pages 76 to 180 of the bundle. As a result most of the representatives of the Catholic church withdrew from the group some time ago. There also had been calls from a number of groups, such as the NI Humanists, to be represented. Meetings of the committee have been intermittent in recent years.

46. In June 2018, some remaining members of the committee began lobbying for a revised role in advising the Department on RE policy expressing concerns about the neglect of RE in a busy curriculum. Notably, the committee wished to see the RE Core Syllabus be updated, particularly in the light of demographic and social changes in Northern Ireland. This was outside the committee's original remit. ...

47. The committee also believed it should have had a role providing ongoing advice and support to RE teachers. It emphasised the need to establish stronger education and professional credentials for RE teachers in Northern Ireland, particularly the need for a more consistent approach to quality control and inspection.  
..."

[87] The affidavit goes on to explain that the Religious Education Advisory Committee was being stood down. The current position is that CCEA continues to have a statutory role to advise the Department on the curriculum, publish and disseminate information relating to the curriculum and produce teaching materials for use in connection with the curriculum for granted-aided schools.

[88] The 'New Decade New Approach' agreement between the political parties in Northern Ireland prior to the restoration of the previous Assembly called for a comprehensive review of the education system in Northern Ireland. As a consequence the Minister of Education announced a panel to take forward this work on 27 September 2021. One of the panel's key tasks will be to review the curriculum in Northern Ireland which has been in place since 2007. The work of this panel has commenced and is ongoing.

[89] Turning to the non-statutory guidance, its purpose is stated in the introduction to be "to help teachers to relate their teaching of RE more clearly to the objectives and approaches of the Northern Ireland curriculum."

[90] The introduction acknowledges that RE at primary level focusses particularly on the beliefs, practices and teachings of the Christian faith. This however should be balanced with the growing need of children to develop broad inter-cultural competencies in their awareness and understanding of religion.

[91] The introduction goes on to say:

"While the core syllabus for primary school is concerned mainly with Christianity, it also states that primary children should 'be aware of and have respect for differing cultures and faiths' (Core Syllabus for RE, foundation stage, learning objective 3; morality, key stage 2). Such an approach is encouraged by the Department of Education (DE) and is already the policy and practice of a growing number of primary schools. Thus, these guidelines relate to both the core syllabus and to topics 'beyond the core' that schools are encouraged to teach.

The examples of activities have also been broadened to include a range of world religions to more fully reflect the religious diversity which children experience in society, in the media and increasingly in the classrooms of

Northern Ireland. This approach is designed to support, develop and improve the use of the core syllabus in Northern Ireland's primary school."

[92] The guidelines recognise that in recent decades society has become much more culturally and religiously plural in Northern Ireland. The document encourages learning about and learning from religion.

[93] The guidance also points to the links between religious education and other areas of learning within the school curriculum. In this regard there is a particular focus on personal development and mutual understanding ("PDMU") as a new area of learning within the Northern Ireland curriculum. This requires teachers to provide opportunities for the exploration of cultural similarities and differences including religious diversity. There are significant overlapping areas between RE and PDMU.

[94] In terms of the overlap between RE and the PDMU curriculum the principal of the school refers to page 78 of the non-statutory guidance where it is stated that "RE and PDMU can work best as partners in values education, supporting and complementing each other."

[95] She points out that the PDMU learning includes topics such as: children's identity and self-esteem; their place within the world; their family and their school; their relationships and interactions with others; mutual respect and kindness; and children and people from other backgrounds and of other identities. Within the PDMU curriculum, children of the school are provided with opportunities to begin "to recognise similarities and differences in families and the wider community for example, gender, race, disability, ethnic/cultural background" (foundation stage) and appreciate "ways we are similar and different, for example, age, culture, disability, gender, hobbies, race, religions, sporting interests, abilities and work."

[96] In addition, to the non-statutory guidelines the Department has published a guide for governors to support the delivery of its policy "Every school a good school." The guide contains a chapter dealing with the provision of RE and CW in all grant-aided schools. It confirms the duties of boards of governors to provide both religious education and collective worship in accordance with the statutory framework and states:

"The programme for religious education must be in line with the core syllabus for religious education specified by DE, which can be accessed in the Curriculum Assessment page of the DE website. Schools are then free to build upon this in a way that best suits the needs of their pupils and the ethos of the school ..."

[97] There can be no doubt that the guidelines demonstrate an awareness of the types of criticism identified by the applicants in terms of the core syllabus. Guidelines seek to guide teachers away from any risk of religious instruction or

indoctrination. However, these efforts ultimately flounder on the mandatory obligation to teach the core curriculum which by statute requires that religious education must be based upon the Holy Scriptures. The guidelines, whilst helpful, do not take away from the court's analysis of what the core curriculum and CW requires.

[98] It is no answer that the core curriculum is a minimum requirement if it has the effect of failing to provide religious education in an objective, critical and pluralist manner.

[99] This concern is reinforced by two pieces of evidence. Firstly it is noted that in the affidavit from the principal of the school it is averred at paragraph 29:

"29. In reality the amount of time available during a school day to be spent on formal RE lessons is significantly reduced in recent years because there is a much greater emphasis on the core syllabus of literacy and numeracy than may have been the case in the past. Most parents wish their children to spend most time focussing upon key curriculum areas such as literacy and numeracy. ..."

[100] Secondly, it is noted according to paragraph 37 of Mr Dempster's affidavit that:

"However, paragraph (7) of Article 102 excludes RE from the inspection process unless the school's board of governors agree to allow it. Instead, Article 21(7) of the 1986 Order provides that ministers of religion and other suitable persons, including teachers of the school, to whom the parents do not object are granted reasonable access for 'inspecting and examining religious education given in the school.' RE in schools is therefore not inspected or evaluated and the Department therefore has no knowledge of the practice in individual schools and whether they provide additional opportunities for pupils to learn about other religions and none."

[101] This is a damning admission and in the court's view emphasises the need for a reappraisal of the core curriculum in so far as it relates to RE and the provision by schools of CW.

### *The possibility of exclusion*

[102] An important feature of the A2P1 regime is the extent to which national law permits parents to withdraw their children from religious education. In *Zengin v Turkey* [2008] 46 EHRR 44, the ECtHR confirmed that when considering the

provisions governing religious education in schools “the arrangements for exemption are also a factor to be taken into account.”

[103] The respondents place particular emphasis on Article 21(5) of the 1986 Order which provides for an unfettered right of withdrawal for both collective worship and religious education.

[104] This right is supplemented by the provisions of Article 21(4) and the requirement that RE and CW shall be so arranged that “no pupil shall be excluded directly or indirectly from the other advantages which the school affords.” There is also an express statutory requirement that the pupils not attending CW or RE are to be inconvenienced as little as possible under Regulation 21(3) of the Primary Schools’ Regulations 1973 which provides:

“(3) The time or times during which religious instruction is given or collective worship is held in a school shall be so arranged as to cause as little inconvenience as possible to any pupils attending the school who, in pursuance of paragraph (5) of Article 16 of the Order, have been excused from attendance at such religious instruction or collective worship.”

[105] In addition, it will be recalled that Article 21(7) provides that Ministers of Religion and other suitable persons “to whom the parents do not object” shall be granted reasonable access to pupils for the purposes of giving religious education.

[106] It is argued on behalf of the respondents that these provisions provide an answer to the applicant’s challenge. Before returning to the authorities it is useful to set out the evidence of the parties in relation to the question of JR87’s withdrawal from RE and CW.

[107] In his grounding affidavit G avers in relation to the issue of withdrawal as follows:

“24. I appreciate that we could have sought to exclude (JR87) from collective worship and religious education/activities in school. I believe that (JR87) should not have to be excluded from any aspect of her education/school life, simply because the law mandates exclusive Christian worship and RE in her school. In my view, that legal settlement is wrong and is contrary to my rights and (JR87’s) rights under the European Convention. Religion should be taught to children in a way that is objective, critical and pluralistic. Children should be able to consider and explore the teaching and practices of a wide variety of religious and nonreligious traditions and philosophies. I believe

that (JR87) should be taught and have experience of as many different religions and philosophies as possible during her primary education. Exclusion is not the answer and does not respect my belief (shared by my wife) that religious education and experiences should be provided to our daughter in a way that is objective, critical and pluralistic and which should include teaching/experience of nonreligious world views as well. The current system purports to “respect” those beliefs by saying that our child can be excluded from an aspect of her education. Having to consider even exclusion is just a particularly clear manifestation of the problem with the current legal settlement.

25. Furthermore, as noted above, if (JR87) were to be excluded then she would be the only child in the school to be so excluded. This would undoubtedly have the effect of singling (JR87) out from her peers. I would be concerned that (JR87) might be bullied or isolated as a result. There is also a risk that (JR87) herself might be confused or upset about this and may feel that she was being punished by such an exclusion. In addition, in a small school community such an exclusion will also be unlikely to go unnoticed by school staff and other parents, via their children. Thus, exclusion would likely have the result of repeatedly ‘outing’ our family (school year by school year) as a nonChristian family to the wider school community. Again, this is not something that we would wish or feel comfortable with. Exclusion is characterised by the school and Department, as, in essence a voluntary choice open to parents as of right. There would be nothing voluntary about it in our case. I do not accept that if (JR87) were to be excluded that this would represent a truly voluntary parental choice. I say that because (JR87) would only be excluded because the religious education and experiences provided by the school do not comply with her human rights under the European Convention.”

Earlier in G’s affidavit he avers:

- “16. I should also say that the decision to raise our concerns with the school was not an easy decision to take. We did not want to cause offence or create

any kind of problem for JR87 in her school. We did not feel comfortable having to disclose our personal views and beliefs to our daughter's school, and to people who are effectively strangers to us, but felt we really had no choice but to do so, in order to raise the issues that are of concern to us. We are conscious that, in Northern Ireland, in particular, this kind of issue can be controversial, and we did not want to be seen by the school as difficult or awkward parents."

[108] The school points out that when this matter was raised by JR87's parents it offered them a meeting to discuss alternative arrangements. No such meeting took place as the parties engaged in correspondence about whether or not the meeting would be "without prejudice" and whether or not the applicant's legal representatives could attend. The court has seen the correspondence which was exchanged in the course of the ongoing litigation on this issue. In the course of the proceedings the school also provided outline details of the type of alternative educational arrangements it might have been able to provide in lieu of RE teaching or attendance at CW. In summary, these proposals would have involved JR87 being engaged in alternative activities under the supervision of a classroom assistant. The school emphasised that it remained willing to approach the issue with flexibility and an open mind.

[109] It is unfortunate that a meeting did not take place but, in any event, this does not resolve the issue to be decided by the court as JR87's parents say that the ability for JR87 to withdraw is no answer to the complaint, as a matter of principle.

[110] A key plank of the respondent's answer to the applicant's complaint is the unqualified right of parents to withdraw their children from either RE or CW. The possibility of exclusion has been recognised in the Strasbourg jurisprudence as an important factor in assessing whether there has been a breach of the Convention. Some of the leading cases to which the court has referred dealt with an analysis of the right to withdraw. Dr McGleenan rightly points out that in those cases that right was qualified.

[111] In *Folgero* before an exemption could be granted the parents had to submit a written note which required identification of that part of the curriculum which for their own religion or philosophy of life they considered as amounting to the practice of another religion or adherence to another philosophy of life. Even if such a note was provided this did not necessarily mean that the pupil concerned would be exempted from the part of the curriculum in question. In those circumstances the court found that the system of partial exemption was capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life and that the potential for conflict was likely to deter them from making such requests. The court held that this could hardly be considered consonant with the right to respect for their convictions for the purposes of A2P1 as interpreted in the light of articles 8 and 9 of the Convention.



[112] In *Papageorgiou* in order for children to be exempt from school religious education courses parents had to submit a “solemn declaration” in writing to the school principal stating that “the student is not an orthodox Christian and therefore relies on grounds of religious conscience.” Again in that case the court found that the system of exemption of children from the religious education course was capable of placing an undue burden on parents with the risk of exposure of sensitive aspects of their private life and that the potential for conflict was likely to deter them from making such a request, especially if they lived in a small and religiously compact society, where the risk of stigmatisation is much higher than in large cities.

[113] In *Zengin* the right of exemption was only available to members of two specific minority faiths (but not the applicant’s). It could be extended following formal request but this required the parents to make a prior declaration of their own faith.

[114] In all of these instances the court found that the exemption arrangements were insufficient to mitigate or balance courses which, as the court finds in this case, were insufficiently objective, critical or pluralistic.

[115] Dr McGleenan argues that it was the qualified nature of the exemptions in those cases which resulted in the findings of a breach of A2P1. That is to be contrasted with the circumstances of this case where the right of withdrawal is unqualified. In developing this argument he reminds the court of the well-established *Ullah* principle whereby the Supreme Court warns against domestic courts stepping beyond the present boundaries of the Strasbourg jurisprudence – see *R(On the Application of AB) (Appellant) v Secretary of State for Justice (Respondent)* [2021] UKSC 28.

[116] However, the applicant responds that the principles set out in the cases to which the court has referred clearly support the applicant’s position as set out in G’s affidavit and the court can find a breach of A2P1 on the basis of the existing Strasbourg jurisprudence. Thus, returning to *Papageorgiou* the court said at para 87:

“87. The court considers that the current system of exemption of children from the religious education course is capable of placing an undue burden on parents with a risk of exposure of sensitive aspects of their private life and the potential for conflict is likely to deter them from making such a request, especially if they live in a small and religiously compact society, as is the case with the islands of Sifnos and Milos where the risk of stigmatisation is much higher than in big cities. The applicant parents asserted that they were actually deterred from making such a request not only for fear of revealing that they were not Orthodox Christians in an environment in which the great majority of

the population owe allegiance to one particular religion, but also because, as they pointed out, there was no other course offered to exempted students and they were made to lose school hours just for their declared beliefs.

88. Although the first two applicants in application No. 4760/18 and the first applicant in application No. 6140/18 were under no obligation to disclose their religious convictions, requiring them to submit a solemn declaration amounted to forcing them to adopt behaviour from which it might be inferred that they themselves and their children hold - or do not hold - any specific religious beliefs.
89. In the above-mentioned cases the court stated that the freedom to manifest one's beliefs also contained a negative aspect, namely the individual's right not to manifest his or her religion or religious beliefs and not to be obliged to act in such a way as to enable conclusions to be drawn as to whether he or she held - or did not hold - such beliefs. The state authorities did not have the right to intervene in this sphere of individual conscience and to ascertain individual religious beliefs or oblige them to reveal their beliefs concerning spiritual matters."

[117] These passages have to be seen in the context of exemption provisions which required an obligation to submit a solemn declaration, which can be distinguished from the right to withdraw from RE and CW in Northern Ireland. Nonetheless, the applicants maintain, as a matter of principle, that the risk of disclosure of individual beliefs of the parents, the risk of stigmatisation of JR87 and the risk that parents will be deterred from making a request for withdrawal are all very much alive in this jurisdiction.

[118] The judgment of Warby J in the case of *Regina (Fox and others) v Secretary of State for Education* [2015] EWHC 3404 (Admin) provides a useful analysis of this issue. The background to that case is that following the consultation process on proposals for the content of, inter alia, GCSEs in religious studies at Key Stage 4, the defendant published a new GCSE subject content. The purpose of the subject content was to provide the framework for the setting of religious studies GCSE specifications by the relevant awarding bodies. The prescribed programme of study was formed with two parts; Part 1 was exclusively concerned with the study of religion and Part 2 involved the study of two or four "themes" which could include the study of both religious and nonreligious beliefs. The introduction to the subject content, inter alia, asserted that the scope of the subject content was consistent with

the requirements for the statutory provisions of religious education in schools (“the assertion”). The claimants were school aged children, their parents and litigation friends. Each of the parents held non-religious beliefs. The claimants sought judicial review of the Secretary of State’s decision to issue the subject content on the ground, inter alia, that delivery of that content, which gave unlawful priority to the teaching of religious views over non-religious views, would not necessarily exhaust the state’s obligation to provide religious education, and that the subject content and the assertion unlawfully permitted or encouraged those responsible for framing the specific curriculums to think wrongly.

[119] Warby J reviewed the relevant domestic and Strasbourg authorities and allowed the claim, finding a breach of Article 9 and A2P1 to the Convention. However, he recognised that the state could legitimately give priority to imparting knowledge of one religion above others where that religion was practiced or adhered to by a majority in society but that the state had to accord equal respect to different religious convictions, and non-religious beliefs, provided that those beliefs were worthy of respect in a democratic society and were not incompatible with human dignity. He reiterated the central theme of the applicants in this case that the state had a duty to take care that information or knowledge included in the curriculum was conveyed in a pluralistic manner.

[120] At para 39 Warby J summarises the human rights jurisprudence as set out in this judgment in the following way:

“Taken overall, the human rights jurisprudence establishes the following points of relevance to this claim. In carrying out its educational functions the state owes parents a positive duty to respect their religious and philosophical convictions; the state has considerable latitude in deciding exactly how that duty should be performed, having regard among other things to available resources, local conditions and, in particular, the preponderance in its society of particular religious views, and their place in the tradition of the country; thus, the state may legitimately give priority to imparting knowledge of one religion above others, where that religion is practised or adhered to by a majority in society; but the state has a duty to take care that information or knowledge included in the curriculum is conveyed in a pluralistic manner; subject to certain threshold requirements, immaterial here, the state must accord equal respect to different religious convictions, and to non-religious beliefs; it is not entitled to discriminate between religions and beliefs on a qualitative basis; its duties must be performed from a standpoint of neutrality and impartiality as regards the quality and validity of parents’ convictions.”

[121] On the question of exclusion he says at paragraph 79:

“79. This is not to say that the state is obliged to provide a particular form of teaching, dictated by the parents. It is to say that an opt-out is not an adequate substitute for the provision of an educational programme which accords the parents their right to respect for their convictions. The need to withdraw a child would be a manifestation of the lack of pluralism in question.”

[122] The court considers that the concerns raised by the parents in relation to exclusion are valid. Whilst an unfettered right to exclusion is available it is not a sufficient answer to the lack of pluralism identified by the court. It runs the risk of placing undue burdens on parents. There is a danger that parents will be deterred from seeking exclusion for a child. Importantly, it also runs the risk of stigmatisation of their children. As Warby J said “the need to withdraw a child would be a manifestation of the lack of pluralism in question.”

[123] The court therefore concludes that the impugned legislation is in breach of both applicants’ rights under Article 2 of the First Protocol ECHR read with Article 9 ECHR. I say both applicants because whilst the case has been considered primarily through the prism of the rights of the parents, it seems to the court that it is arguable when the first sentence of A2P1 is read with Article 9, JR87’s right to education must be in a form which respects her rights to believe or not to believe. She has not, however, been denied a right to an education and a declaration based on this argument goes beyond existing Strasbourg jurisprudence. More importantly, in the context of this case, the rights of both applicants should be interpreted in such a way as to avoid a conflict between the religious instruction given by the school to JR87 and the convictions of her parents. The court considers that this is consistent with the Strasbourg jurisprudence. Therefore, the court does not propose to make separate findings in relation to each of the applicants and concludes that both their rights have been breached.

[124] In light of that finding the court does not consider it appropriate to make any determination in relation to the allegation of a breach of Article 14 ECHR within the ambit of A2P1 and/or Article 8 and/or Article 9 ECHR. That is because in the area of religious education A2P1 is the *lex specialis* in relation to Article 9 of the Convention. This is the approach that the European courts have taken in relation to this specific issue.

[125] As set out in *Lautsi*:

“The court reiterates that in the area of education and teaching Article 2 of Protocol No.1 is in principle the *lex specialis* in relation to Article 9 of the Convention. That is, so at least where, as in the present case, the dispute concerns the obligation laid on Contracting States by the second sentence of Article 2 to respect, when exercising

the functions they assume in that area, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions (see *Folgero and others v Norway* ...) the complaint in question should therefore be examined mainly from the standpoint of the second sentence of Article 2 of Protocol No.1."

[126] The court went on to decline to separately examine the alleged breach of Article 14 in that case, explaining:

"81. ... Proceeding on the assumption that the applicant's wish to complain of discrimination regarding their enjoyment of the rights guaranteed by Article 9 of the Convention and Article 2 of Protocol No.1 on account of the fact that they were not adherents of the Catholic religion and that the second and third of them had been exposed to the sight of crucifixes in the classrooms of the State school they attended. The court does not see in those complaints any issue distinct from those it has already determined under Article 2 of Protocol No.1. There is accordingly no cause to examine this part of the application."

[127] The court adopts this reasoning and considers there is no requirement to examine the Article 14 argument which adds nothing to the issues which the court has answered in its determination in relation to A2P1 and Article 9.

[128] Equally, the court does not consider it appropriate to determine the applicant's claim under section 75 of the Northern Ireland Act 1998. Although, it is open to the court to consider an alleged breach of section 75 by way of judicial review, the overwhelming weight of authority establishes that the duties under the section should be enforced through the mechanisms provided by schedule 9 and paragraphs 10 and 11 of the Act by way of complaint to the Equality Commission. In particular, see *Re Neill's Application* [2006] NI 278; *Peifer v Castlederg High School and others* [2008] NICA 49 and *JR1's Application* [2011] NIQB 5. The applicants point to the decision of Maguire J in the case of *Toner* [2017] NIQB 49 which is the only case in which the courts have found a breach of a section 75 duty. That case turned on its own particular facts.

[129] In the context of this case the applicants focus on the Department's failure to create the monitoring process/mechanism it had expressly promised in its original EQIA document as the basis for an alleged breach of section 75. This is compounded by the Department's admission that they have "no knowledge" as to what individual schools are doing in this context. Thus, it is argued that the Department is failing to have "due regard" to the need to promote equality of opportunity between persons of different religious belief, political opinion etc.

[130] It is noted that this complaint is to an extent founded on criticisms raised by the Equality Commission itself during the initial EQIA exercise.

[131] In this regard the court notes that a review of the school curriculum in Northern Ireland is ongoing. The Department will be alive to its section 75 obligations when conducting the review.

[132] In relation to that review it is important to note that there is evidence to suggest that Northern Ireland is becoming an increasingly pluralistic population from the point of view of religious beliefs. Thus, departmental figures for 2020/2021 for the religion of pupils attending the controlled primary schools in Northern Ireland show that of 78,630 there were 48,896 Protestant pupils and 6,281 Catholic pupils along with 25,453 being registered as Other Christian/NonChristian/No Religion/Not Recorded. This equates to c32% of the pupil population as not falling within the traditional Christian binary in the controlled school sector. The most recent NILT survey data (2020) also shows the number of households proclaiming “No Religion” in Northern Ireland is now at 27% of the population.

[133] Although pleaded in the Order 53 Statement the applicants did not pursue arguments raised under Article 44 of the 1986 Order or section 24(1)(a) and (c) of the Northern Ireland Act 1998.

### *The School*

[134] The court does not propose to make any order with regard to the school. The unlawfulness established in this case flows from the obligation under Article 21(1) and (2) of the 1986 Order which requires RE and CW to be based upon the Holy Scriptures. This obligation is manifested via Article 21(3)A which provides that in grant aided schools the religious education required shall include religious education in accordance with the core syllabus specified under Article 11 of the 2006 Order, which the court has found to be unlawful.

[135] That is the mischief which needs to be addressed. The court does not consider it appropriate to make any order against the school.

[136] Ultimately, the court agrees with the decision of the curriculum Tribunal, which examined the applicants’ complaint, to the effect that the school did not act unreasonably with respect to the exercise of the powers conferred, or on the performance of the duties imposed on it by the statutory provisions relating to religious education and collective worship.

### *Remedy/Relief*

[137] The court recognises that it is dealing with a sensitive and nuanced area. It considers that the unlawfulness it has identified requires a reconsideration of the core curriculum and the impugned legislation in relation to the teaching of RE and the provision of CW. It notes that this matter is currently under review. The

outcome of any reconsideration and a review is not a matter for the courts but ultimately for the Department and the Northern Ireland Executive. In carrying out a reconsideration and review it should ensure that the arrangements for the teaching of RE and CW in Northern Ireland are compliant with the provisions of A2P1 and Article 9 of the Convention.

[138] The court will allow the parties to reflect on the judgment and will invite further submissions from counsel before making a final order.