



Neutral Citation Number: [2015] EWHC 3404 (Admin)

Case No: CO/2167/2015

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/11/2015

**Before :**

**MR JUSTICE WARBY**

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**Between :**

**The Queen on the application of**

- (1) Jeremy Fox**
- (2) A (by his father and litigation friend JEREMY FOX)**
- (3) KATE BIELBY**
- (4) DAISY WELLSTED (by her mother and litigation friend KATE BIELBY)**
- (5) SANDRA REID**
- (6) B (acting by her mother and litigation friend SANDRA REID)**

**Claimants**

**- and -**

**Secretary of State for Education**

**Defendant**

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**David Wolfe QC (instructed by Maxwell Gillott) for the Claimant**  
**Gemma White (instructed by Government Legal Department) for the Defendant**

Hearing date: 10 November 2015  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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## MR JUSTICE WARBY

**Mr Justice Warby :**

### **INTRODUCTION**

1. This judicial review claim calls into question the lawfulness of the approach adopted by the defendant, the Secretary of State for Education, to the striking of a balance between the teaching at GCSE level of religious and non-religious world views.
2. The challenge is to a decision of 12 February 2015, to issue new GCSE Subject Content (“The Subject Content”) for Religious Studies (“RS”) with effect from the 2016 academic year, and specifically to the following assertion (“The Assertion”) at paragraph 2:

“By setting out the range of subject content and areas of study for GCSE specifications in religious studies, *the subject content is consistent with the requirements for the statutory provision of religious education in current legislation* as it applies to different types of school.”

(Emphasis added).

3. Originally, the challenge was led by the British Humanist Association (“BHA”), of which the first claimant is a past member. The BHA was refused permission to seek judicial review on the grounds that it lacked standing. However, it supports the claims of the six Claimants who remain.
4. The first, third and fifth of those Claimants (“the Parents”) are parents and litigation friends of the second, fourth and sixth claimants (“the Children”) respectively. The Parents all hold non-religious beliefs. The first Claimant, Mr Fox, describes himself as an agnostic humanist, and is a former member of the BHA. The Children are all at secondary school, all three of the schools concerned being academies. The second claimant is in year 8 and so will be starting on the GCSE curriculum in 2016. The fourth and sixth Claimants are in Year 7 and due to start on GCSEs in 2017. The Claimants’ case is that all of them may be affected by the decision under challenge.

### **THE CLAIM**

5. At the core of the Claimants’ case is the proposition that The Subject Content and The Assertion, in combination, give unlawful priority to the teaching of religious views as compared to non-religious views, including those of humanism. The Claimants’ case is that the state has a duty to ensure that any educational provision it makes for religious education (“RE”) treats religious and non-religious views on an equal footing, and in a non-partisan way; and that it has failed to discharge that obligation.
6. There is no challenge to the prescribed content of the RS GCSE. However, the Claimants contend that delivery of that content will not exhaust the state’s obligation to provide RE. The Subject Content and The Assertion unlawfully “permit or

encourage” those responsible for framing the specific curriculums which pupils will follow to think, wrongly, “that RE can be delivered to the relevant age group by nothing more than the RS GCSE curriculum”. Further and alternatively, it is said that The Assertion “risks misleading them into acting that way.” The challenge is grounded in human rights law, relying on the combined effect, via the Human Rights Act 1998, of Article 9 of the Convention (Freedom of thought, conscience and religion) and Article 2 of the First Protocol (“A2P1”) (Right to education).

7. The jurisdiction invoked is the undoubted power of the court to grant relief to cure errors of law made in departmental advice and guidance. It is submitted that this jurisdiction extends to cover advice or guidance which would lead to, or which permits or encourages, unlawful conduct; and advice or guidance which is materially misleading, whether by commission or omission. The authorities relied on by Mr Wolfe QC are *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL7, [1986] AC 112, *R (Tabbakh) v The Staffordshire and West Midlands Probation Trust et ors* [2014] EWCA Civ 827, [2014] 1 WLR 4620, and *R (Letts) v The Lord Chancellor* [2015] EWHC 402 (Admin).
8. Green J’s judgment in *Letts* contains at [114]-[119] a valuable synthesis, from which I draw the following:
  - (1) “If a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit nonstatutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi has jurisdiction to correct the error of law by an appropriate declaration”: *Gillick* 194 (Lord Bridge).
  - (2) “It is well established that a policy which, if followed, would lead to unlawful acts or decisions, or which permits or encourages such acts, will itself be unlawful”: *Tabbakh* [46] (Richards J, summarising one ground of Cranston J’s decision in that case, without disapproval: see *ibid.*, [48]); *Letts* [116]-[117].
  - (3) A policy, or guidance, may encourage unlawful acts by dint of being “not clear and unambiguous” and silent as to important circumstances, or “materially unclear or misleading”: *Letts* [119] citing *R(A) v Secretary of State for Health* [2009] EWCA Civ 225 [75], [78] (Ward LJ).
9. Ms White for the Defendant does not take issue with the claimant’s case as to the relevant principles. She makes three main points. First, she maintains that this claim is speculative, premature, and misdirected. The Subject Content provides a framework for the setting of RS GCSE specifications by Awarding Organisations (“AOs”). That process is not complete. Moreover, it is the local authority and school that decide what is actually taught by way of RE at any particular school. If the Parents or Children fear that their Convention rights will be breached by the way in which schools available to the Children decide to provide RE then they should bring a claim, with detailed supporting evidence, once that decision has been made. Secondly, the Defendant submits that The Assertion is not misleading or wrong in law. It is correct, because The Subject Content *is* consistent with the applicable law. Thirdly, it is said that the mere fact that the new RS GCSE is focused primarily on the study of religion

would not make it unlawful for a school to rely solely on such a GCSE for its RE provision at Key Stage 4.

## ISSUES

10. The claim gives rise to three main issues, which it will be convenient to address in this order:
  - (1) Should the challenge fail as speculative, premature, or misdirected, or for some combination of these reasons?
  - (2) If not, does The Assertion encourage those responsible for determining what is actually taught on GCSE courses in schools to believe, or to act on the basis, that taking an RS GCSE course containing the prescribed Subject Content would be enough to fulfil the statutory requirements for RE?
  - (3) If so, is The Assertion right or wrong? Would delivery of the prescribed Subject Content in fact fulfil the statutory requirements for RE set out in current legislation?

## THE LEGAL FRAMEWORK

### *The education statutes*

11. All state-funded schools in England are required to provide religious education (“RE”) for all registered pupils at the school. For maintained schools (a term that includes Community, Voluntary Controlled and Foundation schools), this requirement is imposed directly by statutory provisions. These are mainly to be found in the Education Act 1996, the Schools Standards and Framework Act 1998, and the Education Act 2002.
12. Part 6 of the 2002 Act contains requirements as to the curriculum of a maintained school. Section 78(1) requires the provision of a “balanced and broadly based curriculum” which:
  - “(a) promotes the spiritual, moral, cultural, social, mental and physical development of pupils and of society, and
  - (b) prepares pupils for the opportunities, responsibilities and experiences of later life”.
13. Section 80 provides for a “basic curriculum for every maintained school in England”, containing three mandatory elements: religious education (“RE”), sex education, and the National Curriculum. So far as RE is concerned, the requirement is this:
  - “(1) The curriculum for every maintained school in England shall comprise a basic curriculum which includes—
    - (a) provision for religious education for all registered pupils at the school ...”

14. A duty to secure that RE is given in accordance with s 80(1)(a) is cast on head teachers by s 69(1) of the 1998 Act, which also obliges the local authority (“LA”) and governing body to exercise their functions so as to secure that objective. In schools other than those with a religious character provision made under s 80(1)(a) must be in accordance with an “agreed syllabus”: s 375(2) and Schedule 31 of the 1996 Act and Schedule 19 of the 1998 Act. The agreed syllabus is, therefore, the key document in determining what is taught in RE in such a school.
15. The mechanisms for creating an agreed syllabus are laid down by s 390 and Schedule 31 to the 1996 Act. The LA must adopt the syllabus. The responsibility for producing it is allocated to an occasional body which the LA must establish, called an Agreed Syllabus Conference (“ASC”). LAs are also required to establish a permanent body known as a SACRE (Standing Advisory Council on Religious Education). The role of a SACRE will be evident from its name. It includes, for instance, advising an LA and, through the LA, schools on how an existing agreed syllabus can be interpreted so as to fit in with a broad, balanced and coherent curriculum. It also includes, however, power to require an LA to review that syllabus.
16. An ASC must be made up of four committees, the members of which are drawn from the LA; teacher associations; the Church of England; and “Christian denominations and such other religions and religious denominations as, in the opinion of the [LA], will appropriately reflect the principal religious traditions of the area”. The membership requirements of a SACRE are similar and may overlap with the membership of an ASC.
17. The content of an agreed syllabus for RE is not, however, wholly under the control of LAs, ASCs, SACREs and individual schools. Their freedom of action is constrained in at least two important ways. First, s 375(3) of the 1996 Act contains mandatory provision directly applicable to every agreed syllabus, as follows:

“Every agreed syllabus shall reflect the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practice of the other principal religions represented in Great Britain.”
18. Secondly, syllabus content is subject to Ministerial control. The content of teaching at Key Stage 4 will inevitably be influenced by the specifications produced by the Awarding Organisations (“AOs”). It is only these bodies that can confer an accredited qualification. So students will ordinarily be taught with a view to obtaining a GCSE qualification awarded by one of these bodies - presently Pearson, AQA, WJEC and OCR. There are choices to be made by local decision-makers, and these include choices between what is offered by different AOs. No doubt there will be options within what is offered by any given AO. But what is taught by a school at Key Stage 4 will inevitably be driven by the specifications of one AO or another.
19. The function of accrediting those specifications is performed by the independent regulator, Ofqual. For that purpose Ofqual sets Conditions of Recognition. It is by this somewhat circuitous route that The Subject Content enters the picture. It does so because, as explained in the statement of Ms Becher, Assistant Director at the DfE: “All GCSE ... qualifications thus far have conditions which require adherence to the content published by the [DfE].” Put another way, the content of what is taught at

Key Stage 4 will normally match that of an accredited GCSE qualification specified by an AO; and the specification must in turn conform with the Subject Content prescribed by the Secretary of State.

20. A child can be excused from all or part of the RE provided by a school if the parent so requests. This unqualified right is provided for by s 71 of the 1998 Act. Section 71 also contains a qualified right to withdraw a child from school for the purpose of enabling the child to receive RE elsewhere, during school hours.
21. This, then, is in outline the relevant regime for maintained schools. State-funded schools that are not maintained schools, including Academy schools such as those attended by each of the Children, are not subject to these statutory provisions. However, it is common ground that for present purposes their position is not distinguishable. With some exceptions which are not material, these categories of school are required via their funding agreements with the DfE to provide RE “in accordance with the requirements for agreed syllabuses”. There is no dispute, either, that students in these schools can be excused RE to the same extent and on the same terms as students in maintained schools.

### Human Rights law

22. One aspect of the legislative content of domestic education law is the law of human rights. By virtue of s 3 of the Human Rights Act 1998 (“HRA”), legislation relating to RE provision must be interpreted and applied compatibly with the “Convention rights” of school children and their parents. By s 6(1) of the HRA, it would be unlawful for the defendant to act in a way which is incompatible with those rights. Section 7 of the HRA gives a right of action to a “victim” of an act which is contrary to s 6. The centrality of human rights law to the Claimants’ challenge calls for a careful examination of the jurisprudence.
23. The rights contained in Article 9 and A2P1 are “Convention rights” within the meaning of the HRA. The relevant provisions of Article 9 are:

*“Freedom of thought, conscience and religion*

#### **Article 9**

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.”

24. A2P1 has been described as the “lex specialis” for Article 9 in the education context: *Lautsi v Italy* (2012) 54 EHRR 3 [59]. A2P1 provides as follows:

*“Right to education*

#### **Article 2**

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.”

25. The implications of these provisions for the State’s obligations with regard to the content of religious education in schools are illustrated by four decisions of the European Court of Human Rights: *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, *Folgero v Norway* (2008) 46 EHRR 47, *Zengin v Turkey* (2008) 46 EHRR 44 and, most recently, *Lautsi* (above).
26. In *Kjeldsen* the applicants complained of the imposition of sex education in state primary schools, relying on Article 9 and A2P1. The application was dismissed by the Commission and the Court. Mr Wolfe draws attention, however, to the careful analysis of A2P1 in paragraphs [50]-[52] of the court’s judgment, which recognises the right of a parents to ensure teaching in accordance with their convictions as an “adjunct” to the fundamental right to education set out in the first sentence of the Article.

“50. ... the second sentence of Article 2 must be read together with the first which enshrines the right of everyone to education. It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions...

The second sentence of Article 2 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.

...

52. As is shown by its very structure, Article 2 constitutes a whole that is dominated by its first sentence. By binding themselves not to “deny the right to education”, the Contracting States guarantee to anyone within their jurisdiction “a right of access to educational institutions existing at a given time” and “the possibility of drawing”, by “official recognition of the studies which he has completed”, “profit from the education received” (judgment of 23 July 1968 on the merits of the “*Belgian Linguistic*” case, Series A, no. 6, pp. 30–32, §§ 3–5).<sup>[7]</sup>

The right set out in the second sentence of Article 2 is an adjunct of this fundamental right to education (paragraph 50 above). It is in the discharge of a natural duty towards their children—parents being primarily responsible for the “education and teaching” of their children—that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility

closely linked to the enjoyment and the exercise of the right to education.”

27. Ms White focuses on two passages in paragraph [53] (the emphasis is hers):

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

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

28. The first of the emphasised passages highlights the need to allow the state considerable latitude in determining the “setting and planning of the curriculum”. That is clearly appropriate, and translates into a domestic legal setting. The driving factors are the fact-sensitive nature of the exercise including, for example, the need to tailor provision to the available resources and to the cultural characteristics of the population to which the educational provision is being delivered. Mr Wolfe accepts that questions of “expediency” will inevitably and legitimately affect the detail of curriculum and syllabus provision at a local level. It seems to me that he is right, however, to take the stance that this is not the main issue in the present claim.
29. The second emphasised passage is relied on by Mr Wolfe for what it says about the duty of the state to “take care” and, in particular, its reference to pluralism. The need to safeguard the possibility of pluralism is, he submits, the key point in this case. Ms White cites the same passage for what it says about the limit to the duty to take care. However, she accepts that the state’s room for manoeuvre is not as great as the final sentence of this passage might suggest: the boundary is clearly crossed if the state

pursues an “aim of indoctrination”, but it may be crossed by conduct falling short of that extreme. She does not identify quite where the lesser threshold lies, but in my judgment the later cases provide the answer and show that the concession is rightly made.

30. *Folgero v Norway* (2008) 46 EHRR 47 concerned a change in the Norwegian primary school curriculum in 1997, by which a subject called KRL – covering Christianity, religion and philosophy - became mandatory. Only partial withdrawal was permissible; attendance at religious instruction was compulsory. The applicants were members of the Norwegian Humanist Association. The Court upheld their complaint that the state’s refusal to grant their children full exemption was a violation of A2P1. This was a decision of the Grand Chamber, and the case is valuable both for its statement of the general principles in this area, and for its analysis of why the particular legislative provisions under scrutiny fell foul of those principles.
31. The applicable principles summarised by the Court at para [84] included those cited above from *Kjeldsen*. However, the Court’s approach to the limits beyond which the state must not stray is illuminating.
- (1) As Mr Wolfe points out, the Grand Chamber treated the requirement to safeguard the possibility of pluralism (*Kjeldsen* [50], *Folgero* [84(b)]) as separate and distinct from the prohibition on indoctrination (*Kjeldsen* [53], *Folgero* [84(h)]).
  - (2) At [85] the court identified the question to be determined in this way, using the language of *Kjeldsen* [53]:

“whether the respondent state ... had taken care that information or knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner or whether it had pursued an aim of indoctrination not respecting the applicant parents’ religious and philosophical convictions and thereby had transgressed the limit implied by Article 2 of Protocol 1.”
  - (3) If that might appear on its face to be a binary, either/or question, para [102] indicates otherwise. It is in that paragraph that the Court stated its overall conclusion, in this way:

“102 Against this background, notwithstanding the many laudable legislative purposes stated in connection with the introduction of the KRL subject in the ordinary primary and lower secondary schools, it does not appear that the respondent State took sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner for the purposes of Art.2 of Protocol No.1.

Accordingly, the Court finds that the refusal to grant the applicant parents full exemption from the KRL subject for

their children gave rise to a violation of Art.2 of Protocol No.1.”

- (4) There is no finding here or elsewhere in the judgment that the state had “pursued an aim of indoctrination”. On the contrary. At [88]-[89] the Court had expressly identified the intentions which the state sought to implement through the legislation concerned, and held not only that these were “consonant with the principles of pluralism and objectivity” embodied in A2P1, but also that they were reflected in the legislation as enacted.
- (5) The conclusion to be drawn is that the requirements of A2P1 will be infringed by the state if it fails in its duty to take care that the educational provision it makes is conveyed in an objective, critical and (importantly for the present case) pluralistic manner, even if it does not go so far as – in the ordinary sense of the phrase - to “pursue the aim of indoctrination”. That conclusion is required, it seems to me, both by the way in which the Court’s conclusion is expressed and in order to give real meaning to the duty of care delineated by the court in these cases. It is also a conclusion consistent with the Court’s approach in *Zengin*, which I consider below.
32. Against that background, the following principles, also identified by the Grand Chamber at para [84], are particularly worthy of note. They identify a positive duty on the part of the state to ensure respect for parents’ convictions, which includes ensuring a fair balance between majority and minority rights and interests.

“(c) Article 2 of Protocol No.1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire state education programme. ... 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.”

...

(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 ...

33. A fair balance allows the state to accord appropriate weight to majority views, but does not permit it to treat the views of minorities in a way that is significantly different at the qualitative level. These points are illustrated by the Court’s application of the principles to the facts of *Folgero*. Norway was an overwhelmingly Christian society, with a state religion. Hence, at [89] the Court rejected any suggestion that the fact that the curriculum was heavily weighted towards imparting knowledge of Christianity, as opposed to other religions or philosophies, could be regarded of itself as establishing a breach of A2P1:

“In view of the place occupied by Christianity in the national history and tradition of the respondent State, this must be regarded as falling within the respondent State’s margin of appreciation in planning and setting the curriculum.”

34. However, by detailed analysis of the curriculum provisions the Court identified an “imbalance” in the state’s approach, such that “not only quantitative but even qualitative differences applied to the teaching of Christianity as compared to that of other religions and philosophies”: [95]. It is of interest to note one of the disparities of approach identified by the Court at [93]: pupils were required to “learn the fundamentals of the Christian faith”, but only to “study the main features of” Islam, Judaism, Hinduism and Buddhism, and merely to “know about” secular orientation, the development of humanist traditions, and so on. The court went on to consider whether the partial exemption provisions could be said to have brought that imbalance to “a level acceptable under A2P1”. It concluded at [100] that this could not be said, because of the heavy burden the exemption system could impose on parents, “with a risk of undue exposure of private life”.
35. In *Zengin v Turkey* (2008) 46 EHRR 44, decided four months after *Folgero*, the applicants were a father and daughter. They were adherents of Alevism, a belief system generally considered to be one of the branches of Islam, but which rejects the sharia and the *sunna*. As the Court described it at [9]: “Alevism ... defend freedom of religion, human rights, women’s rights, humanism, democracy, rationalism, modernism, universalism, tolerance and secularism.” The issue was again the compulsory teaching of “religious culture and ethics”, from which the father sought but was refused exemption for his daughter. The Court’s approach was similar to that adopted in *Folgero*. The Court found that the state’s intentions were compatible with the principles of pluralism and objectivity enshrined in A2P1. It found that, whilst the syllabus and textbooks gave greater priority to knowledge of Islam than to that of other religions and philosophies, the fact that Islam was the majority religion practised in Turkey meant that this “of itself cannot be viewed as a departure from the principles of pluralism and objectivity which would amount to indoctrination.” The court went on, however, to assess “whether the information or knowledge in the syllabus is disseminated in an objective, critical and pluralist manner”, and found at [70] that it failed the tests of objectivity and pluralism. It went on to consider whether the provisions for opting out of these classes were sufficient to ensure respect for the applicants’ convictions and at [76] concluded, for reasons similar to those adopted in *Folgero*, that they were deficient in this respect.
36. Mr Wolfe invites me to draw from this case a principle requiring the state to afford equal treatment to all religious and all non-religious views – a principle which he submits is of particular importance given that the state, in the performance of its educational functions, is seeking to mould pupils. He relies on these passages (the emphasis is mine):
- “54. ... in a pluralist, democratic society, *the State’s duty of impartiality and neutrality towards various religions, faiths and beliefs* is incompatible with any assessment by the state of the legitimacy of religious beliefs or the ways in which those beliefs are expressed.

55. Such an interpretation of the second sentence of Art.2 of Protocol No.1 is consistent at one and the same time with the first sentence of the same provision, with Arts 8–10 of the Convention and with the general spirit of the Convention itself, an instrument designed to maintain and promote the ideals and values of a democratic society. This is particularly true in that *teaching is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils as well as their personal independence.*”

37. In *Lautsi*, the issue was whether the applicants’ A2P1 rights were infringed by the state’s adherence to the practice, instigated by royal decrees of 1924 and 1928, of fixing a crucifix to the walls of state schools. The Grand Chamber disagreed with the Chamber’s conclusion that the practice would have a “significant impact” on the child applicants, and held that the decision to allow it did not exceed the state’s margin of appreciation in such matters. In so doing, the Court reiterated at [61] that the margin of appreciation enjoyed by contracting states is a wide one, explaining that:

“... the requirements of the notion of “respect”, which also appears in art.8 of the Convention, vary considerably from case to case, given the diversity of practices followed and the situations obtaining in the contracting states. As a result, the contracting states enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. In the context of art.2 of Protocol No.1 that concept implies in particular that this provision cannot be interpreted to mean that parents can require the state to provide a particular form of teaching.”

38. All of this is naturally relied on by the Defendant. However, whilst the Claimants do assert their right to have the state show due respect for their convictions, they do not go so far as to claim they can dictate the form of teaching provided. What is controversial about *Lautsi* is the Claimants’ reliance on the decision as authority that the state has a duty of neutrality and impartiality in this context. Mr Wolfe relies on para [60] where the Court expressly referred to a “duty of neutrality and impartiality” imposed on states by Article 9, and went on to point out that “states have a responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs.” In context, this can legitimately be read as an affirmation of the rights of Catholic believers, rather than those of the applicants in the case. Nonetheless, it seems to me that Mr Wolfe is entitled to rely on it as a relevant statement of principle, which builds on what was said in *Zengin*. The Claimants are also entitled, in my judgment, to draw support for this submission from passages in the speeches of Lord Nicholls and Baroness Hale in *Williamson v Secretary of State for Education* [2004] UKHL 15, [2005] AC 246 [24] and [75], which emphasise the equal treatment which Article 9 requires. The gist of the point is well made by Lord Nicholls:

“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 equal footing for the purposes of this guaranteed freedom....

...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.”

39. 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,<sup>1</sup> 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.

## **THE FACTS**

### The 2010 Guidance

40. In 2010 the DfE issued *Religious education in English schools: Non-statutory guidance 2010* (“the 2010 Guidance”). This remains current. Its purpose is “to support the provision of high-quality religious education (RE) in maintained schools in England” by providing, among other things, “clear non-statutory guidance about RE in the curriculum”. The document is aimed at people involved in specifying syllabus content, at all levels. The addressees thus included LAs and ASCs. Section 4 is headed “Guidance on providing high-quality RE”. Under the heading “Breadth and depth in the agreed syllabus” the following is said:

“Breadth and depth in RE for all pupils can be achieved if the following are taken into account:

- Pupils should develop understanding of concepts and mastery of skills to make sense of religion and belief, at an appropriate level of challenge for their age.

...

- Building on the statutory requirements, it is recommended that there should be a wide ranging

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<sup>1</sup> That the beliefs are worthy of respect in a democratic society and not incompatible with human dignity: *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293.

study of religion and belief across the key stages as a whole.”

Two features of this passage are worth noting. First, that reference is made to “religion and belief” (emphasis added). Secondly, that the recommendation is for wide ranging study “across the key stages as a whole”. As is common knowledge, the “key stages” are stages of the educational process between the ages of 5 and 16. There are four key stages, defined in s 82(1) of the 2002 Act. This case is concerned with Key Stage 4.

### The 2013 Framework

41. Reference has also been made in argument to aspects of a report called *Curriculum Framework for Religious Education in England* (“the 2013 Framework”). This is a document produced by the Religious Education Council of England and Wales. This is a charitable body with no statutory role, but which has taken on itself the role of creating such a framework. Mr Wolfe has cited substantial parts of the document, from which it is convenient to quote some extracts. The then Secretary of State, Michael Gove, wrote a Foreword which included the following:

“All children need to acquire core knowledge and understanding of the beliefs and practices of the religions and worldviews which not only shape their history and culture but which guide their own development. The modern world needs young people who are sufficiently confident in their own beliefs and values that they can respect the religious and cultural differences of others, and contribute to a cohesive and compassionate society.”

42. The phrase “religions and worldviews” is used extensively within the 2013 Framework itself, for example in the section headed “Purpose of study” at p11, where this is said:

#### **“Purpose of study**

Religious education contributes dynamically to children and young people’s education in schools by provoking challenging questions about meaning and purpose in life, beliefs about God, ultimate reality, issues of right and wrong and what it means to be human” In RE they learn about and from religions and worldviews in local, national and global contexts, to discover, explore and consider different answers to these questions.

...

#### **Aims**

The curriculum for RE aims to ensure that all pupils:

- A. Know about and understand a range of religions and worldviews so that they can**

- describe, explain and analyse beliefs and practices, recognising the diversity which exists within and between communities and amongst individuals; ...”

43. A footnote to this passage explains:

“The phrase ‘religions and worldviews’ is used in this document to refer to Christianity, other principal religions represented in Britain, smaller religious communities and non-religious worldviews such as Humanism. The phrase is meant to be inclusive, and its precise meaning depends on the context in which it occurs, eg in terms of belief, practice or identity.”

### The Consultation Response

44. Between 7 November and 29 December 2014 the DfE consulted on its proposals for the content of GCSEs and A/AS levels in religious studies. The DfE’s consultation response (“the Consultation Response”) was published in February 2015, simultaneously with The Subject Content. As Mr Wolfe points out, the section headed “Government response to religious studies GCSE” adopts an approach which is distinctly different from the one reflected in the Framework. He also seeks to contrast the approach adopted in the Response with that of the 2010 Guidance.

45. Two notable features of the Consultation Response are evident from page 23. The first reflects an increase in the religious content of the GCSE:

“We welcome respondents’ broad support for the requirement to study two religions. We do not feel this is discriminatory to any particular faith group ... The new GCSE ... also does not have to determine the whole of the teaching at KS4 in faith schools.”

This is characterised by Mr Wolfe as an “unashamed” indication that the new qualification is to be about the study of religion. The Consultation Response focuses here on equity between religious faiths, treating non-believers as “subordinate”, he submits.

46. The second notable feature of the Consultation Response: its exclusion of the “systematic” study of non-religious beliefs. This was said on page 23:

“After careful consideration, we have decided not to include the optional systematic study of non-religious beliefs alongside religious beliefs in the subject content. We believe this would not be a suitable addition to the content, given the nature and purpose of a qualification in religious studies. Students already have the opportunity to learn about non-religious world views, such as humanism and atheism, alongside religious beliefs, and we have emphasised this opportunity in the content.”

The Subject Content

47. The Introduction explains the role of The Subject Content in the overall scheme of RE, and makes the controversial Assertion:

“1. GCSE subject content sets out the knowledge, understanding and skills common to all GCSE specifications in a given subject. It provides the framework within which awarding organisations create the detail of their specifications, so ensuring progression from Key Stage 3 and the possibilities for progression to GCE A level.

2. By setting out the range of subject content and areas of study for GCSE specifications in religious studies, the subject content is consistent with the requirements for the statutory provision for religious education in current legislation as it applies to different types of school.”

48. Paragraphs 5 to 9 set out the prescribed “Programme of Study”:

“5. Specifications may offer alternative routes through the qualification, drawing from the content set out below in order to provide students with one or more of the following programmes of study:

- Study of religion: the beliefs and teachings and practices (topics a and b from Part One) in relation to two religions (making up 50% of the overall qualification weighting, shared equally between the two religions); AND either:
  - a study of four themes from Part Two adopting a textual approach (50% of the qualification), OR
  - a study of four themes from Part Two adopting the approach of religious, philosophical and ethical studies in the modern world (50% of the qualification), OR
  - a study of four themes from Part Two adopting a textual approach for two of those themes and the approach of religious, philosophical and ethical studies in the modern world for two themes (50% of the qualification)

OR

- study all four topics from Part One in relation to a primary religion (50% of the overall qualification weighting); AND beliefs and teachings and practices (topics a and b from Part One) in relation to a second religion (25% of the qualification); AND either:
  - two themes from Part Two, adopting a textual approach (25% of the qualification), OR
  - two themes from Part Two, adopting the approach of religious, philosophical and ethical studies in the modern world (25% of the qualification)

6. Throughout all of the programmes of study, specifications should include the study of common and divergent views within traditions in the way beliefs and teachings are understood and expressed.

7. Specifications may offer students the ability to study the themes within Part 2 in relation to differing perspectives. The differing perspectives may be provided in the following ways:

- Different perspectives from within one particular religion studied in part 1 e.g. a Baptist perspective and an Anglican perspective on a theme
- Different perspectives between different religions e.g. a Buddhist perspective and a Hindu perspective on a theme

8. In addition, all specifications must require students to demonstrate knowledge and understanding of the fact that:

- the religious traditions of Great Britain are, in the main, Christian
- religious traditions in Great Britain are diverse and include the following religions: Christianity, Buddhism, Hinduism, Islam, Judaism and Sikhism, as well as other religions and non-religious beliefs, such as atheism and humanism

9. Awarding organisations can develop, combine or cross reference the required content in any way appropriate to the specification, as long as the overall criteria are met.”

49. The prescribed Programme of Study therefore has two parts. Part One is exclusively concerned with the ‘Study of Religions’. AOs are required, when devising an RS GCSE specification, to devote either 50% or 75% (by qualification weighting) of their programme to the study of two religions. The religions that can be studied under Part One are the six listed in paragraph 8 and ‘Christianity (Catholic Christianity)’. The remainder of a GCSE specification, either 25% or 50%, must be devoted to study falling under Part Two. That Part involves the study of two or four ‘themes’. The themes can be studied via one or both of two different ‘approaches’: a ‘textual studies’ approach, or a ‘religious, philosophical and ethical studies in the modern world’ approach. Paragraph 7 provides a further option: AOs may specify that themes should be studied using different ‘perspectives’. Whatever choices are made from the available options, the specification must require students to demonstrate knowledge and understanding of the two ‘facts’ identified in paragraph 8. The first of these will be easily recognised as reflecting the statutory requirement in s 375(3) of the 1996 Act (para [17] above).

50. The two or four themes to be studied for Part Two can be chosen from a list of ten:

“a. accounts in texts of key events in the lives of founders or important religious figures, their significance and influence, including on life in the 21st century. How varied interpretations of the meaning of such texts may give rise to diversity within traditions (textual study only)

b. the significance, importance and influence of religious texts as a source for religious law making and codes for living in the 21st century. How varied interpretations of the meaning of these sources may give rise to diversity within traditions (textual study only)

c. the significance, importance and influence of stories and/or parables that communicate religious, moral and spiritual truths. How varied interpretations of the meaning of such texts may give rise to diversity within traditions (textual study only)

d. relationships and families, religious teachings about the nature and purpose of families in the 21st century, sex, marriage, cohabitation and divorce. Issues related to the nature and purpose of families; roles of men and women; equality; gender prejudice and discrimination. How varied interpretations of sources and/or of teachings may give rise to diversity within traditions (textual study or religious, philosophical and ethical studies in the modern world)

e. religious views of the world, including their relationship to scientific views; beliefs about death and an afterlife; explanations of the origins and value of the universe and of human life. How varied interpretations of sources and/or of teachings may give rise to diversity within traditions (textual study or religious, philosophical and ethical studies in the modern world)

f. the existence of God, gods and ultimate reality, and ways in which God, gods or ultimate reality might be understood; through revelation, visions, miracles or enlightenment. How varied interpretations of sources or of teachings may give rise to diversity within traditions (textual study or religious, philosophical and ethical studies in the modern world)

g. religion, peace and conflict; violence, war, pacifism, terrorism, just war theory, holy war; the role of religion and belief in 21st century conflict and peace making; the concepts of justice, forgiveness and reconciliation (religious, philosophical and ethical studies in the modern world only)

h. crime and punishment; causes of crime, aims of punishment, the concepts of forgiveness, retribution, deterrence, reformation; the death penalty, treatment of criminals; good, evil and suffering (religious, philosophical and ethical studies in the modern world only)

i. dialogue within and between religions and non-religious beliefs; how those with religious and non-religious beliefs respond to critiques of their beliefs including the study of a range of attitudes towards those with different religious views –

inclusivist, exclusivist and pluralist approaches (religious, philosophical and ethical studies in the modern world only)

j. religion, human rights and social justice; issues of equality and freedom of religion or belief; prejudice and discrimination in religion and belief; human rights; wealth and poverty; racial prejudice and discrimination (religious, philosophical and ethical studies in the modern world only)".

51. As shown by the words in brackets at the end of each paragraph, some of these themes can be studied whichever of the two 'approaches' is adopted. Others can only be studied using one of those approaches. The nature of the two approaches is explained in paragraphs 14 and 18:

**"Textual studies**

14. If following a textual studies approach, all students must investigate primary religious texts from one or both of the religions they have studied for Part One: Study of Religions.

...

**Religious, philosophical and ethical studies in the modern world**

18. If the approach to thematic studies is through religious, philosophical and ethical studies in the modern world approach, students must be required to include a study of different philosophical and ethical arguments and their impact and influence in the modern world. They should demonstrate the depth of their understanding of religion through the application of teachings from religions, beliefs and through specific references to sources of wisdom and authority including scripture and/or sacred texts as appropriate. These texts might include, for example: the Bible; Qur'an; Torah; The Pali Canon; Vedas; or Guru Granth Sahib. Other sources of wisdom and authority might include, for example: St Augustine of Hippo; Maimonides; Archbishop Thomas Cranmer; The historical Buddha; Gautama/Shakyamuni; Shankara; or Guru Nanak). Further examples of sources of wisdom and authority can be found in the annexes to this document."

*The Equality Analysis*

52. Simultaneously with the Response and The Subject Content, the DfE published "*RS GCSE and A level subject content: equality analysis*" ("the Equality Analysis"). This summarised the approach of the new GCSE Subject Content in this way:

**"Increased religious content across GCSE and A level**

The religious content in the new GCSE and A level has been increased. The new GCSE requires students to have an understanding of the beliefs, teachings and sources of wisdom/authority of two religions, and to study religious texts

or engage in a debate about philosophy and ethics which is grounded in their understanding of one or two religions...

53. Noting that 23 respondents (8%) thought the increased religious content and consequent reduced focus on philosophy and ethics would have a negative impact, the Equality Analysis explained the Defendant's thinking in this way (at pages 8-9 under the heading "Impact):

"While statistics show that philosophy and ethics are certainly the most popular areas of study both at GCSE and particularly at A level, many current Religious Studies specifications have been roundly criticised by Ofqual, Ofsted and religious groups for the way in which they reward students for engaging in topical debates with virtually no understanding of religious teachings, beliefs or texts. Research shows that exclusive focus on these areas has led to students having a distorted, simplistic and superficial understanding of religion and religious beliefs and undermines the integrity of the subject as a whole.

...

Students will still be able to spend up to half of their time engaging with philosophical and ethical issues at GCSE."

54. Dealing separately with "Non-religious beliefs" the Equality Analysis said this:

**"Impact**

The main concern raised by those who thought there would be a negative impact was the perceived omission of non-religious worldviews including humanism and atheism...

A majority of those who were concerned about the lack of scope to study non-religious worldviews called for students to be able to systematically study a non-religious worldview such as humanism and atheism...

The revised GCSE and A level content will be inclusive of a wide range of religious beliefs as well as non-religious beliefs. At GCSE all students will be expected to learn about non-religious beliefs as part of the main, mandatory content, which is a significant improvement from the current RS GCSE content criteria which does not require this..."

55. The Defendant's reasoning is explained in the Conclusion:

"We carefully considered responses urging that the qualification should give students greater opportunity to study non-religious beliefs. Students already have the opportunity to learn about non-religious worldviews alongside religious beliefs, such as humanism and atheism, in the content.

However, as these are qualifications in Religious Studies, it is right that the content primarily focuses on developing students' understanding of different religious beliefs. This is to stop current practice whereby students are rewarded for engaging in topical debates with virtually no understanding of religious teachings, beliefs or texts. A simultaneous focus on humanism would necessarily detract from an in-depth treatment of religion and thus on the overall rigour and standard of the RS qualification. Introducing a systematic study of humanism at GCSE and A level could potentially lead to the development of qualifications that are predominantly, or even solely, focused on the study of humanism at the expense of religion..."

## DISCUSSION

*The First Issue: should the challenge fail as speculative, premature, or misdirected, or for some combination of these reasons?*

56. It is undoubtedly true that the ultimate decisions about syllabus content are made at the local level, by the ASCs and individual schools. At the present time, as explained by the defendant, no draft specification has been accredited by Ofqual. As is apparently commonplace, it has sent the drafts back to AOs who are in the process of revising and resubmitting them. Once they are accredited, it will be for individual schools to make their selection from amongst the GCSE specifications on offer from AOs. The specified GCSEs themselves will doubtless contain options. The point at which the detail of what will be taught to the claimant Children is determined is therefore some distance in the future (further off for the fourth and sixth than for the second). The detail cannot now be predicted with any confidence. Moreover, the content of the agreed syllabus that is delivered at the schools attended by the children may well be influenced by the particular nature of that school, and that is, to some extent at least, a matter of choice for the Parents. It may be said that a parent such as the third claimant, who chooses to send their child to a school with a religious character, cannot complain if that school chooses syllabus content that reflects that character. A reasonable response might be to enrol the child at a different school.
57. The Defendant's objections have some attraction, therefore. But in my judgment it would be wrong to reject the claim at the threshold on these grounds. Delegation of decision-making there may be, but it is not and plainly could not be said that those who frame the programmes of study and the syllabuses based upon them have *carte blanche*. Since compliance with The Subject Content is mandatory for AOs the document inevitably governs the options that can be devised by them and offered to schools. Although decisions on syllabus content are, as Mr Wolfe puts it, "downstream" of The Subject Content, the quality of the syllabus waters from which the Children will drink cannot fall outside a certain range, the outer limits of that range being defined at source by the Secretary of State.
58. The cases show that the state has a duty to oversee the implementation at the local and practical level of the requirements of A2P1, taking "the utmost care". As the European Court explained in *Kjeldsen* at [54] and reiterated at *Folgero* [84(i)] and *Zengin* [53]:

“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. Having, consistently with that duty, assumed the task of prescribing the content to be taught in RS GCSE the Defendant cannot, it seems to me, absolve herself of responsibility for outcomes that flow from her decisions. Put another way, it is not premature or speculative to bring this challenge at this stage, because the Defendant's prescriptions for RS subject content are highly likely to flow through to the final detail of what gets taught at GCSE. It is, indeed, beneficial to good administration for the issues to be confronted now, when the critical choices have not yet been made. As Ward LJ put it in *If the challenge succeeds the Defendant will have options including, for example, the issue of supplementary guidance, as occurred in *Dimmock v Secretary of State for Education and Skills* [2007] EWHC 2288 (Admin), [2008] ELR 98.*
60. I do not accept the Defendant's submission that the present uncertainty as to what the agreed syllabus content will turn out to be means that these Claimants cannot now claim the status of actual or potential “victims” of unlawful conduct, within the meaning of s 7 HRA. The test is whether the claimants can establish that they “run the risk of being directly affected by the measure of which complaint is made”: *R (Taylor) v Lancashire County Council* [2005] EWCA Civ 284 [39]. Ms White submits that this test is not satisfied. This is not taken as a technical point on the standing of these individual Claimants. The Secretary of State recognises that if there were merit in the arguments advanced they would potentially affect greater numbers of parents and children. The submission made is that claims based on Convention rights cannot be examined without a sufficient evidential foundation; and that in this case there is no proper evidential foundation for any claim that there is a risk of Convention rights being breached. I reject that submission. As noted above, there is sufficient evidence to show that the Claimants are at risk of being directly affected by the measure under challenge. Whether the effect would amount to a violation of their Convention rights is a separate question.
61. I add that the statutory rights to withdraw a child from RE, on which the Defendant relies, cannot undermine the conclusion at this stage that there is a risk of direct effect. The Claimants assert a right to equal treatment in state education provision. A situation which drove them not to exercise that right would represent a direct effect. Equally, although as will be seen I agree with the Defendant that much of the statistical evidence on which the claimants rely is inadmissible expert evidence, there is enough evidence to enable the court to form a view about the alleged violations – with one exception.

*The Second Issue: Does The Assertion encourage the reader to adopt an approach which collapses RE into RS, or mislead them into doing so?*

62. This is another way of stating the issue identified at para [10(2)] above. It draws on Mr Wolfe's characterisation of his client's case. By “collapsing RE into RS” he means of course an approach which treats the delivery of The Subject Content for RS

as exhausting the state's A2P1 obligations with regard to RE. In framing the issue I have used the term "encourage" and not the term "permit". It seems to me unreal and artificial to apply the latter term to The Subject Content, which is prescriptive rather than permissive. The question of whether The Assertion is materially misleading needs separate consideration, when it comes to the third issue.

63. The Secretary of State's position on this issue is that she was "concerned in developing the Subject Content to provide for a GCSE which would be consistent with statutory obligations in relation to religious education and was aware that some schools rely upon the RS GCSE to discharge those statutory obligations." Ms White submits that The Assertion "reflects this position" but "does not, however, encourage schools to adopt any particular approach." This is a somewhat subtle and elusive stance to adopt in respect of a question which seems to me to be relatively straightforward.
64. My own answer to the question is clear: the Assertion does, in its context, encourage the reader to conclude that an RS GCSE specified in accordance with The Subject Content would satisfy the state's obligations to provide RE at this level. The references in The Assertion to "the requirements for" the "statutory provision" in "current legislation" can safely be put on one side. The reader will, rightly, treat these as merely references to the relevant legal obligations, whatever the precise character of those obligations. The ordinary sense of the Assertion is that the Subject Content is "consistent with" the legal obligations for providing RE.
65. In some contexts the words "consistent with" can be given a narrow reading, so as to mean "not incompatible with". Adopting that approach, The Assertion could be read as saying only that it is possible to devise a GCSE which both fits the prescription in The Subject Content and would fulfil all the relevant legal obligations. That, however, is not an approach or an interpretation advocated by the Secretary of State. Nor would it be a realistic interpretation of these words in their context. The context includes not only the immediately surrounding words of this document but also the Consultation Response and the Equality Analysis. It also includes the 2010 Guidance, which indicates to the reader that the DfE intends that all legally required RE should be covered by the GCSE RS syllabus.
66. The ordinary and natural meaning of The Assertion in this context is that a GCSE specified in accordance with The Subject Content will satisfy the state's legal obligations for RE. That is likely to be influential. The defendant herself recognises that "some schools" rely on the RS GCSE for that purpose. The Claimants have adduced evidence from Alan Brine, Ofsted's National Adviser for RE from 2007 to his retirement in 2014, which lends strong support to the view that many schools will accept that approach.

*The Third Issue: Would delivery of the prescribed Subject Content satisfy the state's legal obligations for RE?*

67. This, in my judgment, is the real question raised by this claim. This simplified way of stating the question reflects what I have said above about the superfluity of the references in The Assertion to "statutory requirements" in "current legislation". This question encompasses the issue of whether The Assertion is materially misleading. In addressing the question, I am mindful of the words of caution contained in the

speeches of Lords Bridge and Templeman in *Gillick*. They warned of the dangers of the Court straying into issues having a moral, social or political dimension which fail to raise a clear issue of law. But in my judgment this question does raise an issue of law, and one that is sufficiently precise to allow a clear answer.

68. It is important to be precise about the nature of the question. Among Ms White's submissions are these propositions: "The Claimants' position that it *would necessarily* be unlawful for any school to adopt an RS GCSE as their curriculum for key stage 4 ... is unsustainable"; that "In order to make good their challenge to paragraph 2 of the Subject Content the claimants would need to establish that schools *could not* lawfully adopt a new RS GCSE as their RE curriculum for key stage 4"; and that "education can clearly be provided in conformity with the beliefs ... set out by the Claimants." The emphasis is mine. I have no doubt that an RS GCSE specification consistent with The Subject Content *could* satisfy the state's legal obligations. The question, however, is whether it is true to say that such a specification *will* satisfy those obligations. The answer to that question is no; and it follows that in my judgment The Assertion is materially misleading.
69. It is common ground, and I have no doubt, that it would be compatible not only with UK legislation but also with human rights law for an agreed syllabus produced by an ASC in England to give a greater priority to Christianity than to all other religions, and all other non-religious world views. Such a syllabus would comply with the statutory obligation to "reflect the fact that the religious traditions in Great Britain are in the main Christian". As *Folgero* and *Zengin* show, it is not in itself inconsistent with A2P1 for RE to lay emphasis on a religion which holds a particularly prominent place in the history and demography of the state, as Christianity does in the UK. The defendant refers in this connection to the 2011 census data, showing that 59.3% of Respondents answered the question "What is your religion?" by saying "Christian".
70. In fact, as Ms White fairly points out, Part One of the Subject Content does not promote Christianity above all other religions. It requires study of two religions, without prescribing which of the seven available religions can be chosen for this purpose. That clearly involves a greater degree of pluralism than would be achieved by simply prioritising Christianity. It cannot be and is not argued that there is anything in The Subject Content that pursues an aim of indoctrination, and no case is advanced that the Subject Content prescribes a programme of study that is not critical. It has been suggested that there is a lack of objectivity, but I reject that complaint.
71. It is also true that, as Ms White submits, The Subject Content "does in any event provide for the study of non-religious beliefs." That provision is made in Part Two and this, as Ms White further submits, "provides considerable scope for AOs to develop specifications which include the study of non-religious beliefs." An AO could, for example, develop a specification which followed the first of the alternative routes set out in paragraph 5 of The Subject Content, and prescribed or allowed 50% of the qualification to be devoted to the study of four themes adopting the approach of religious, philosophical and ethical studies in the modern world. If themes g, h, i and j were chosen, the Part Two programme would have a substantial non-religious content.
72. However, Part Two also provides "considerable scope" for AOs to develop specifications which include no study of any non-religious beliefs, or very limited

study of such beliefs. A specification could be devised which followed the second of the alternative routes identified in paragraph 5 (in which at least 75% of the qualification derives from study of two religions) and which, so far as the remaining 25% is concerned, made available only the first option, namely study of “two themes from Part Two, adopting a textual approach.” The themes available for selection using the textual approach are a to f. Review of those themes shows that three (a, b and c) are devoted wholly or mainly to the examination of religious texts. Themes d, e and f each appear to have a strong religious content.

73. If one or more specifications of the kind I have hypothesised were devised, it could be chosen by a school. This leads to the question of whether delivery of education according to such a specification *would* fulfil the state’s obligations. If not, The Assertion contains a false or misleading statement of the legal position. As I have made clear, that is my conclusion. I have not found the 2013 Framework of help in this context. The fact that the then Secretary of State wrote a Foreword to the document, referring in the way he did to religions and worldviews does not lend the document any formal status. Comparison between the 2013 Framework and the documents of February 2015 does indicate that there has been a shift of perspective at the DfE over that period. But the merits of such a shift are not a matter fit for adjudication by the court. I have focussed on the applicable law.
74. The Strasbourg jurisprudence shows that the duty of impartiality and neutrality owed by the state do not require equal air-time to be given to all shades of belief or conviction. An RE syllabus can quite properly reflect the relative importance of different viewpoints within the relevant society. The same would seem to follow for a region or locality. The duty might therefore be described as one of “due” impartiality. No criticism can be or is made therefore of s 375(3) of the 1996 Act. In addition, of course, a generous latitude must be allowed to the decision-maker as to how that works out in practical terms. But the complete exclusion of any study of non-religious beliefs for the whole of Key Stage 4, for which the Subject Content would allow, would not in my judgment be compatible with A2P1.
75. It is not of itself unlawful to permit an RS GCSE to be created which is wholly devoted to the study of religion. That is not the claimants’ case. But The Assertion tells its readers that such a GCSE will fulfil the entirety of the state’s RE duties. As already noted, this is a proposition that is likely in practice to be accepted and acted upon by ASCs and schools. The Assertion thus represents a breach of the duty to take care that information or knowledge included in the curriculum is conveyed in a pluralistic manner.
76. That conclusion can be analysed as a finding that the Assertion involves a breach of s 6 HRA, or as a finding that the Defendant has made an error of law in her interpretation of the education statutes. It may not matter greatly, but in my view the latter is the better analysis. In accordance with s 3 HRA, ss 78 and 80 of the 2002 Act are to be interpreted as incorporating the duty of care recognised by the European Court.
77. In reaching this conclusion I have not found it necessary to rely on the evidence adduced by the Claimants, the admissibility of which is disputed. This takes the analysis of the relative significance of Christianity and other religious and non-religious views in British society several stages beyond the broad results represented

by the 2011 Census. It is objected to as irrelevant and as expert evidence for which no permission has been granted, or even sought. I agree with the latter objection, and I do not consider it an answer that the evidence is responsive to the Defendant's reliance on aspects of *Folgero* and *Zengin*. But the 2011 Census, coupled with common knowledge, provides a sufficient basis for concluding that a specification such as I have described above would give priority to the study of religions (including some with a relatively very small following and no significant role in the tradition of the country) over all non-religious world views (which have a significant following and role in the tradition of the country). According to the Census 25.1% answered the question "What is your religion?" by saying they had none, and 7.2% did not say what religion they held. The five non-Christian religions represented in the Subject Content yielded responses of 4.8% for Muslim down to 0.4% for Buddhist.

78. I have not overlooked Ms White's submission that the two years of Key stage 4 should not be considered in isolation, but within the context of the RE curriculum as a whole. I accept the point, but it is obvious that GCSE is a vitally important stage in the development of a young person's character and understanding of the world. I do not consider it could be said that a complete or almost total failure to provide information about non-religious beliefs at this stage could be made up for by instruction given at earlier stages. Nor do I overlook Ms White's final point: that if it turns out that the schools attended by the Children adopt a GCSE specification as the entirety of RE provision at Key stage 4, and the Parents do not want this form of RE for their children, they have the unqualified right to have their Children excused from that education. This point fails on the ground identified above: it would deprive the Parents and Children of rights they enjoy, which the state is bound to deliver.
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.
80. Mr Wolfe's submissions raise a further point. The Subject Content treats the study of religious views under Part One, and such study of non-religious views as may be undertaken under Part Two, in a qualitatively different way. Ms White seeks to present the second part of paragraph 8 of The Subject Content as imposing a requirement on AOs to develop RS specifications "that reflect the diversity of beliefs". But Mr Wolfe is right to point out that this does not call for any instruction on or study of the content of beliefs. Paragraph 8 part two does no more than require students to demonstrate knowledge and understanding of *the fact that* religious traditions in Great Britain are diverse, and include specified religions as well as non-religious beliefs such as humanism. As brought out clearly in the Consultation Response and Equality Analysis, the Defendant has decided that there must be "systematic study" of two religions, but no option for systematic study of any non-religious worldviews. That may well be a legitimate approach to the content of an RS GCSE. It is not challenged as such. It is however debatable whether it can accurately be presented as "consistent with" the legal obligations for the teaching of RE. But I take this point no further, because in this respect I accept Ms White's submission: there is enough available admissible evidence to allow a safe conclusion. Perhaps for

that reason, this aspect of the case received relatively slight attention in Counsel's submissions.

## CONCLUSIONS

81. In my judgment The Assertion contains a false and misleading statement of law, which encourages others to act unlawfully. In its ordinary and natural meaning The Assertion tells its readers that delivery of RS GCSE content consistent with The Subject Content *will* fulfil the state's legal obligations as to RE. That is likely to lead those responsible for RE syllabus content to rely exclusively on GCSEs specified in accordance with the Subject Content. That *could* be enough to meet the state's RE obligations but, contrary to the Assertion, it will not necessarily be so. GCSE specifications could be compliant with The Subject Content and yet fall short of delivering the RE obligations. In that event, the state would need to afford some additional educational provision or fail in its duties. The relief to be granted to reflect these conclusions will be a matter for discussion with Counsel.
82. I should make clear, for the avoidance of doubt, that the above conclusions have been arrived at with reference to the position of schools or academies which do not have a religious character. Schedule 19 of the 1998 Act makes different provision as to RE in schools that do have a religious character (see paras 3 and 4). The model funding agreement for academies contains different provision for those with and those without a religious character. I have not found it necessary to address in this judgment the hypothetical question of whether the Assertion might be true and lawful if and in so far as it relates to schools or academies with a religious character.