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THE CHRISTIAN INSTITUTE

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the provisions of the Children's Wellbeing and Schools Bill concerning children of compulsory school age who are receiving their education otherwise than in school

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ADVICE

April 2025

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1. INTRODUCTION

1.1 I refer to the E-mails of 30 and 31 January 2025, 7 February 2025 and 4 March 2025 from my instructing solicitor, Sam Webster of The Christian Institute.

1.2 I have been asked by The Christian Institute to look at the Children's Wellbeing and Schools Bill. This is a substantial piece of proposed legislative reform which, at the time of writing, was making its way before (the Westminster) Parliament. The Bill was introduced as a Government Bill before the House of Commons on 17 December 2024. The Commons adjourned on 19 December 2024, returning on 6 January 2025, and the Bill received its Second Reading before the Commons on 8 January 2025. It went to the Committee stage from 21 January 2025. On 17 March 2025 it reached the report stage and on 18 March 2025 it received its Third Reading in the Commons.

1.3 In this advice I comment on the Bill as brought from the Commons to the House of Lords on 19 March 2025. The Bill is timetabled to receive its Second Reading in the House of Lords on 1 May 2025.

1.4 The provisions of this Bill extend, at least in part, to England and Wales, Scotland and Northern Ireland. There is a lot going on in this proposed legislation. This Bill seeks to amend and update the law in quite a number of areas. It is divided into two substantive parts: Part 1 of the Bill (Clauses 1-26) is concerned with issues around "Children's Social Care"; Part 2 of the Bill (Clauses 27-62) avowedly deals just with "Schools".

1.5 In Part 1 of the Bill there are clauses dealing with and reforming and amending the law in such areas as:

- Family group decision-making (Clause 1);
- Child protection and safeguarding (Clauses 2-4);

- Support for children in care, leaving care or in kinship care and carers (Clauses 5-9);
- Accommodation of children (Clauses 10-11);
- Regulation of children's homes, fostering agencies etc. (Clauses 12-18);
- Care workers, specifically the use of agency workers for children's social care work (Clauses 19-20);
- Corporate parenting (Clauses 21 – 25) and finally
- the employment of children in England (Clause 26).

1.6 And Part 2 of the Bill contains proposed new legal provision in respect of the following matters:

- Breakfast clubs etc. (Clauses 27-28);
- School uniforms (Clause 29);
- Homeschooled children (Clauses 30-35);
- Independent educational institutions (Clauses 36-43);
- Inspections of schools and colleges (Clause 44);
- Teacher misconduct (Clause 45);
- School teachers' qualifications and induction (Clause 46);
- Academies (Clauses 47-50);
- Teacher pay and conditions (Clauses 51-52);
- School places and admissions (Clauses 53-56); and
- Establishment of new schools (Clauses 57-62)

1.7 Because of the multiplicity of topics within the Bill, the *omnium gatherum* nature of this Bill, and the complexity of its drafting, there is a danger of losing sight of just what the Bill will do if passed in its entirety in its current form. Further the proposed reforms of the law it sets out - at least for some of the areas it covers - are not set out in the plainest style, or most immediately comprehensible form. Such drafting tends to obscure, rather than to illuminate, the intent behind the changes proposed by government in this Bill and/or their anticipated effect if passed into law by Parliament.

1.8 In any event, my advice is sought by The Christian Institute, at this stage, specifically in relation to those provisions of the Bill which concern children of compulsory school age who are receiving their education otherwise than in school (commonly referred to as children who are being "home educated").

2. THE LAW ON HOMESCHOOLING AS IT CURRENTLY STANDS

2.1 Section 7 of the Education Act 1996 places a duty on the parent of every child of compulsory school age to ensure, either by regular attendance at school *or otherwise*,

that their child receives full-time education suitable to their age, ability, and aptitude and to any special or (if in Wales additional) educational needs the child may have. The law thus envisages that this parental education duty can be fulfilled other than by sending the child to school e.g. by homeschooling arrangements. As has been noted:

> "[T]he responsibilities of parents .... extend well beyond ensuring the child's attendance at school. So it involves education in the broad sense, ... the general development of the child's physical, intellectual, emotional, social and behavioural abilities, all of which have to be encouraged by responsible parents, as part of his upbringing and education, and for this purpose, an appropriate level of supervision of the child to enhance his development ..." [1]

2.2 A parent can withdraw a child from a school that they attend in order to commence homeschooling. To do so they need to notify the school of their intention, and advise the authority that the child will be receiving education not in school. A school in England must then delete the child's name from the school roll and inform the local authority of this: see regulations 9(1)(f) and 13(4) of the School Attendance (Pupil Registration) (England) Regulations 2024/208.

2.3 Section 436A of the Education Act 1996 obliges a local authority, having regard to any statutory guidance from the Secretary of State, to make arrangements to allow it to establish (so far as it is possible to do so) the identities of children in their area who are of compulsory school age but– (a) are not registered pupils at a school, and (b) are ***not*** receiving suitable education otherwise than at a school. For these purposes "suitable education" is said to mean "efficient full-time education suitable to his age, ability and aptitude" and to any special educational (or in Wales additional learning) needs the child may have.

2.4 But as the law stands local authorities have neither the duty nor the powers to monitor or supervise for its suitability or efficiency any education which is being provided at home/not in school under arrangements made by parents. A local authority may make initial informal inquiries of parents. Parents are under no legal duty to respond to the local authority's initial or informal inquiries. However, if the parent does not respond and fails or refuses to provide requested information about the child's education, then this might result in the formal steps being taken by way of service on the parent of a Notice to Satisfy (NTS) under Section 437(1) of the Education Act 1996. [2] This is a formal

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[1] *In re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377 per Judge LJ at § 107

[2] *Goodred v Portsmouth City Council* [2021] EWHC 3057 (Admin) [2022] ELR 230 per Lane J at § 102:

> "I address the contention of the claimant that she is under no legal duty to respond to the initial or informal inquiries of the defendant. That is, of course, true; but, as I have already explained

notice served on the responsible parent(s) requiring them to provide evidence sufficient to satisfy the authority that the child is receiving a full-time and efficient education at home suitable to the child's needs.

2.5 And a local authority which has reason to believe that the homeschooling arrangements in place for a child are *not* resulting in the provision of a suitable education for that child may serve a school attendance order requiring that the child be registered as a pupil in a school named in the order. Failure to comply with such a school attendance order is a criminal offence.

2.6 Provision is made for the order to be varied by specifying a different school at which there is a place available for the child. And the school attendance order may be revoked if evidence is presented to the local authority showing that satisfactory arrangements have been made for suitable education to be provided at home, such that the child need no longer attend any school.

2.7 If the local authority refuses to revoke the order, the matter can be referred to the Secretary of State to settle the dispute.

2.8 If the court before which any prosecution is brought for non-compliance with the school attendance order is satisfied that the parents are in fact meeting their section 7 duty to provide efficient full-time suitable education for their school age child then the court can direct that the order no longer be in force and acquit them.

2.9 If the parents are convicted of the offence of failure to comply with a valid school attendance order then the local authority can apply for a parenting order which carries requirements as to counselling and other conditions designed to reduce the likelihood of a further offence.

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in dealing with ground 1, it does not follow that the parent risks no adverse consequences, if they fail to respond meaningfully at this initial stage. As § 6.5 of the Elective Home Education guidance for local authorities points out,

> 'If a parent does not respond, or responds, without providing any information about the child's education, then it will normally be justifiable for the authority to conclude that the child does not appear to be receiving suitable education and it should not hesitate to do so and take the necessary consequent step'

that is to say, serving an NTS notice."

3. PROVISIONS OF THIS BILL RELATING TO HOME EDUCATION

The position of Wales

3.1 Social care, health and education were devolved to Wales by the Government of Wales Act 2006 and remain so under the Wales Act 2017. Accordingly, whilst the law applies uniformly to both England and Wales in many respects, there are material differences between Welsh and English law notably in relation to provision for children in need and the duties of local authorities in relation to looked after children.

3.2 Whilst much similar ground is covered in the English and the Welsh provisions in relation to the duties of local authorities in relation to children, some distinctions stand out. These include the fact that purely English legislation rarely, if ever, makes any express reference to the 1989 United Nations Convention on the Rights of the Child ("UNCRC"). [3] By contrast in Wales legislation passed by Senedd [4] and regulations made by the Welsh

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[3] See *R (AB) v. Justice Secretary: re solitary confinement of young persons* [2021] UKSC 28 [2022] AC 487 for some discussion by the UK Supreme Court as to when reference may nonetheless properly be made to the provisions of the UNCRC which, although ratified by the United Kingdom in December 1991, has not been incorporated into domestic law in England. By contrast, in Scotland the rights and obligations set out in the UNCRC have been incorporated in Scots law rights, at least within those areas within the legislative competence of the Scottish Parliament (on which limits see *Re UNCRC Incorporation (Scotland) Bill* [2021] UKSC 42, 2022 SC (UKSC) 1)

[4] See for example: Section 7 of the Social Services and Wellbeing (Wales) Act 2014; and Section 64 of Curriculum and Assessment (Wales) Act 2021 which provides as follows:

> **64 Duty to promote knowledge and understanding of UN Conventions on the rights of children and persons with disabilities**
> (1) The head teacher and governing body of a maintained school or a maintained nursery school must promote knowledge and understanding of Part 1 of the UNCRC, and of the UNCRPD, among those who provide teaching and learning in respect of the school's curriculum.
>
> (2) A provider of funded non-maintained nursery education must promote knowledge and understanding of Part 1 of the UNCRC, and of the UNCRPD, among those who provide teaching and learning in respect of the curriculum for children for whom that education is provided.
>
> (3) The local authority, the management committee (if there is one) and the teacher in charge of a pupil referral unit must promote knowledge and understanding of Part 1 of the UNCRC, and of the UNCRPD, among those who provide teaching and learning in respect of the curriculum for the unit.
>
> (4) A local authority in Wales must promote knowledge and understanding of Part 1 of the UNCRC, and of the UNCRPD, among those who provide teaching and learning otherwise than at a pupil referral unit under arrangements made by the authority under section 19A of the Education Act 1996 (c. 56).
>
> (5) In this section—
> "UNCRC" ("*CCUHP*") means the United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; and Part 1 of the UNCRC is to be treated as having effect—
>
> (a) as set out for the time being in Part 1 of the Schedule to the Rights of Children and Young Persons (Wales) Measure 2011 (nawm 2), but

Ministers concerning children and education [5] regularly invoke the need for persons exercising functions under these provisions in relation to a child to have due regard to the UNCRC. [6] Indeed, by virtue of the Rights of Children and Young Persons (Wales)

(b) subject to any declaration or reservation as set out for the time being in Part 3 of that Schedule;

"UNCRPD" ("*CCUHPA*") means the United Nations Convention on the Rights of Persons with Disabilities and its optional protocol adopted on 13 December 2006 by General Assembly resolution A/RES/61/106 and opened for signature on 30 March 2007; and it is to be treated as having effect subject to any declaration or reservation made by the United Kingdom Government upon ratification, save where the declaration or reservation has subsequently been withdrawn."

[5] See for example Regulation 4 of The Independent School Standards (Wales) Regulations 2024

"Spiritual, moral, social and cultural development of pupils

4. The standard about the spiritual, moral, social and cultural development of pupils at the independent school is met if the proprietor—

(a) actively promotes the fundamental values of democracy and support for participation in the democratic process, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs,

(b) actively promotes knowledge and understanding of Part 1 of the Convention [meaning the United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989],

(c) ensures that principles are actively promoted which—

(i) enable pupils to develop their self-knowledge, self-esteem and self-confidence,

(ii) enable pupils to distinguish right from wrong and to respect the civil and criminal law,

(iii) encourage pupils to accept responsibility for their behaviour, show initiative and understand how they can contribute positively to the lives of those within the independent school's community, those living and working in the locality in which the independent school is situated and to society more widely,

(iv) encourage respect for other people, paying particular regard to the protected characteristics set out in the 2010 Act,

(v) provide pupils with a broad general knowledge of public institutions and services in Wales and the United Kingdom more widely,

(vi) assist pupils to acquire an appreciation of and respect for their own and other cultures in a way that promotes further tolerance and harmony between different cultural traditions,

(vii) encourage pupils to respect the fundamental values of democracy and support for participation in the democratic process, the rule of law, individual liberty and mutual respect and tolerance of those with different faiths and beliefs,

(d) precludes the promotion of partisan political views in the teaching of any subject in the independent school, and

(e) takes such steps as are reasonably practicable to ensure that where political issues are brought to the attention of pupils—

(i) while they are in attendance at the independent school,

(ii) while they are taking part in extra-curricular activities which are provided or organised by or on behalf of the independent school, or

(iii) in any promotion at the independent school including through the distribution of promotional material, of extra-curricular activities taking place at the independent school or elsewhere,

they are offered a balanced presentation of opposing views."

[6] See, for example, Regulation 22 of the Children's Commissioner for Wales Regulations 2001

Measure 2011, the Welsh Ministers are subject to a duty to have regard to the UNCRC, including its Operational Protocols, when exercising their functions. And Article 29 UNCRC makes the following provision

> "1. States Parties agree that the education of the child shall be directed to:
>
> (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
>
> (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
>
> (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
>
> (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
>
> (e) The development of respect for the natural environment.
>
> 2. No part of the present article or article 28 UNCRC [7] shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."

3.3 In any event the Welsh Government and Senedd are agreeable to the provisions concerning homeschooling regulation also being extended into Wales. Thus, although the Bill as originally introduced before the House of Commons made provision only in

[7] Article 28 UNCRC provides as follows:

> "1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
>
> (a) Make primary education compulsory and available free to all;
>
> (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
>
> (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
>
> (d) Make educational and vocational information and guidance available and accessible to all children;
>
> (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
>
> 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
>
> 3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries."

respect of England, the Bill has in the course of proceedings before the Commons been amended so that its proposed new homeschooling regulation apply equally in Wales.

Local authority consent for withdrawal of certain children from school

3.4 Clause 30 seeks to insert a new Section 434A provision into the Education Act 1996 immediately after the existing section 434. This proposed provision introduces the principle that a local authority has a *veto* against any child being withdrawn from school by the child's parents without local authority consent, at least where the child is of compulsory school age, is registered at a school, and is subject to an enquiry under Section 47 of the Children Act 1989 and/or is already on a child protection plan made under subsection 47(8) of that Act to safeguard or promote the child's welfare where the local authority has concluded, after inquiry, that the child is suffering, or is likely to suffer, significant harm (within the meaning of section 31(9) and (10) of that Act).

3.5 The local authority also has veto against parents withdrawing, without local authority consent, any child with special educational needs who is at a special school maintained by a local authority, special academy or non-maintained special school, or at an independent school which is specially organised to make special educational provision for pupils with special educational needs where the child became a registered pupil at that school under arrangements made by the local authority.

3.6 In exercising this veto, the local authority must refuse its consent to the parent's application to withdraw their child from school if the local authority considers either that it would be in the child's best interests to receive education by regular attendance at school, or that no suitable arrangements have been made for the education of the child otherwise than at school.

3.7 Parents aggrieved at a decision of the local authority (whether to grant or refuse consent) will be able to refer the question to the Secretary of State (or Welsh Ministers in Wales), who may uphold the decision of the local authority to grant consent, or where consent is denied, give such direction determining the question as the Secretary of State or Welsh Ministers considers appropriate, or in either case refer the question back to the local authority to determine.

Duty to register homeschooled children

3.8 Clause 31 introduces provisions (to become new Sections 436B to 436G of the Education Act 1996) concerning the compulsory registration, with the local authority, of children who are not in school, but are receiving home education.

Register of children who are homeschooled

3.9 The proposed new Section 436B to the 1996 Act will oblige a local authority in England and Wales to maintain a register of children who are homeschooled. These are defined as children of compulsory school age who live in the authority's area but: either who are *not* registered pupils or students at a relevant school; [8] or, if so registered, they attend a relevant school either on a part-time basis, or on the basis that the proprietor of the school at which they are registered has agreed or arranged for the child to be absent for some or all of the time when the child would otherwise normally be expected to attend the relevant school, on the basis that the child will receive education otherwise than at that or any other relevant school.

Content and maintenance of registers

3.10 The new section 436B register of homeschooled children *may* (per proposed new Section 436C to the 1996 Act) contain "any other information the local authority considers appropriate", but *must* contain at least the following information

(1) name, date of birth and home address of the child registered as "not in school);
(2) the name and home address of each parent of the registered child;
(3) the name of each parent who is providing education to that child;
(4) the amount of time that the child spends receiving education from each parent of the child;
(5) the names and addresses of any individuals (other than parents) and organisations involved in providing that education;
(6) a description of the type of each such education provider (other than parents);
(7) the postal address of each place where any non-parental education is provided to a "not in school child";
(8) if that education is provided virtually, the website or email address of the non-parent education provider.

[8] The proposed new Section 436B(7) specifies that "relevant school" for these purposes means—
(a) a school maintained by a local authority,
(b) a non-maintained special school (within the meaning given by section 337A [of the Education Act 1996)],
(c) an Academy school or alternative provision Academy,
(d) an institution within the further education sector that provides secondary education suitable to the requirements of children who have attained the age of 14 years,
(e) an independent educational institution within the meaning of section 92(1) of the Education and Skills Act 2008, that is registered under section 95 of that Act (register of independent educational institutions),
(f) a school that is included in the register of independent schools in Wales (kept under section 158 of the Education Act 2002), or
(g) a school within the meaning of section 135(1) of the Education (Scotland) Act 1980.

(9) the total amount of time that the child spends receiving that education from the non-parent education provider; and

(10) the amount of time the child spends receiving that education without any parent of the child being actively involved in the tuition or supervision of the child.

3.11 To the extent that the local authority already has the information or can reasonably obtain it, the proposed new section 436B register of homeschooled children *must* also contain such information about, or in connection with, the following matters in respect of a child registered in it as may be prescribed—

(i) the child's protected characteristics (within the meaning of the Equality Act 2010);

(ii) whether the child has any special educational needs (England) or additional learning needs (Wales), including whether the local authority maintains an EHC plan (England) or individual development plan (Wales) for the child;

(iii) any enquiries being made or that have been made by a local authority under section 47 of the Children Act 1989 (local authority's duty to investigate)

(iv) any actions that are being taken or have been taken by the authority or any other local authority following, or in connection with, enquiries under that section;

(v) whether the child is or has ever been a "child in need" for the purposes of Part 3 of the Children Act 1989 (see section 17(10) of that Act)

(vi) if the child is or has ever been a "child in need", any actions that a local authority is taking or has taken in relation to the child under that Part

(vii) any services that a local authority is providing or has provided to the child qua "child in need" in the exercise of functions conferred on the authority by section 17 of the Children Act 1989;

(viii) whether the child has ever been assessed as having needs for care and support for the purposes of Part 4 of the Social Services and Well-being (Wales) Act 2014 (see section 32(1) of that Act)

(ix) if the child is or has ever been assessed as having needs for care and support, any actions that a local authority is taking or has taken in relation to the child under that Part (or Part 4 or 5 of the Children Act 1989)

(x) any services that a local authority is providing or has provided to the child in the exercise of functions conferred on the authority by or under that Part (or Part 4 or 5 of the Children Act 1989);

(xi) whether the child is or has ever been "looked after" by a local authority (within the meaning of section 22 of the Children Act 1989);

(xii) whether the child is or has ever been "looked after" by a local authority (within the meaning of section 74 of the Social Services and Well-being (Wales) Act 2014;

(xiii) the reasons why the child has been ***not*** registered as a pupil or student registered at a relevant school. [9] This includes any information provided by a parent of the child as to those reasons or, in a case where a parent has not provided that information, the fact that they have not done so.

(xiv) if so registered, the reasons why, despite being so registered: the child attends a relevant school only on a part-time basis; or (insofar as agreed or arranged by the proprietors of the relevant school) the child is absent for some or all of the time when a child would otherwise normally be expected to attend the school. Again this includes any information provided by a parent of the child as to those reasons for such part time, or partial, attendance at school. Where a parent has ***not*** provided that information, the fact that they have ***not*** done so will also be recorded.

(xv) whether, under arrangements made under the existing section 436A of the Education Act 1996, the child has been identified as a child who is of compulsory school age but who is not a registered pupil at a school and is not receiving suitable education otherwise than at a school;

(xvi) the school or institution within the further education sector or the type of school or institution (if any) that the child attends or has attended in the past;

(xvii) whether support is being provided in relation to the child under the proposed new section 436G of the Education Act 1996 and, if so, the nature of the support being provided;

(xviii) any actions that have been taken by a local authority in relation to the child under sections 436I to 436Q (school attendance orders);

(xix) any other information about the child's characteristics, circumstances, needs or interactions with a local authority or educational institutions that the Secretary of State considers or the Welsh Ministers consider (as the case may be) should be included in the register for the purposes of promoting or safeguarding the education or welfare of children.

3.12 The information on the proposed Register is apparently only to be made partially available to the public, with a view to preventing either immediate or "jigsaw" (i.e. by piecing things together from other already published information [10]) identification of any

[9] *Ibid.*

[10] See *Attorney General v BBC* [2022] EWHC 1189 (QB) per Chamberlain J at §§ 24-25:

registered child on it, or of their parents. To this end a proposed new subsection 436C(5) of the Education Act 1996 will be enacted to the effect that

> "no information from a register under section 436B may be published, or made accessible to the public, in a form – (a) which includes the name or address of a child who is eligible to be registered under that section or of a parent of such a child, or (b) *from which the identity of such a child or parent can be deduced*, whether from the information itself or from that information taken together with any other published information".

Parents' duties to provide information to local authorities in connection with the Register of homeschooled children

3.13 A proposed new Section 436D of the Education Act 1996 will set out the duties of parents of homeschooled children to provide information to local authorities concerning their children for the purposes of the Section 436B Register. Such parents will be obliged, within 15 days beginning with the date on which the child becomes eligible for registration by the local authority both to inform the local authority that their child is eligible for registration, and to provide the authority with all and any of the information listed in paragraph 3.10 above. Once their child is on the register their parent must:

- comply with any local authority request (again within 15 days of the request) for any (more) of this paragraph 3.10 specified information that the parent has; and
- advise the authority, within 15 days of the parent becoming aware, of any change to any of this information which is required to be included in the register under section 436C(1).

"24 The court must be alert to the possibility of 'jigsaw' identification. One piece of information may on its own seem innocuous, but when taken together with other information known to a particular malign actor, it may lead to the identification of an individual with greater or lesser confidence. The threat of jigsaw identification is a familiar feature of arguments against disclosure in closed material proceedings in the national security context. It is regularly deployed as a basis for refusing to disclose information known only from covert sources. But, although the court must be alive to the threat of jigsaw identification, it must also be astute not to allow the threat to justify a blanket prohibition on disclosure of any piece of the jigsaw.

25 In *A Local Authority v A Mother* [2020] EWHC 1162 (Fam) [2020] 2 FLR 652, Hayden J said this at § 18:

> 'The potential for jigsaw identification, by which is meant diverse pieces of information in the public domain, which when pieced together reveal the identity of an individual, can sometimes be too loosely asserted and the risk overstated… [J]igsaws come with varying complexities. A 500-piece puzzle of Schloss Neuschwanstein is a very different proposition to a 12-piece puzzle of Peppa Pig. By this I mean that while some information in the public domain may be pieced together by those determined to do so, the risk may be relatively remote.'"

These parents are also required to inform the authority if their child ceases to be eligible to be registered by that authority under section 436B, again within 15 days beginning with the date on which the child ceases to be eligible for registration by the local authority.

3.14 These duties of parents to inform the local authority in relation to their children do *not* to apply in relation to any of their children who are receiving full-time education by any one or more of the following means:

- arrangements made by the local authority under section 19 of the Education Act 1996 (in the case of England) or section 19A (in the case of Wales);
- arrangements made by the proprietor of a relevant school at which the child is a registered pupil;
- in the case of England, arrangements made by the local authority under section 61 of the Children and Families Act 2014 (special educational provision otherwise than in schools, post-16 institutions etc);
- in the case of Wales, arrangements made by the local authority under section 53 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (additional learning provision otherwise than in schools);
- attendance at a relevant school.

Education providers' duties to provide information to local authorities in connection with the Register of homeschooled children

3.15 Where a local authority in England (or in Wales) reasonably believes that a person is providing for "more than the prescribed amount of time" out-of-school education to a child who is, or is eligible to be, registered in the homeschooled children register without any parent of the child being actively involved in the tuition or supervision of the child then the proposed new Section 436E of the Education Act 1996 will allow the authority by notice to require the suspected education provider, within 15 days of the date of service of this notice:

(a) to confirm whether or not the person is (or, at any time in the preceding three months, has been) providing out-of-school to any child who is eligible to be registered on the homeschooled children register any programme or course of education, or any other kind of structured education

and

(b) to provide the authority with the following information in relation to *any* child (whether or not that child lives in the authority's area) to whom they are providing such education (or to whom they have provided such education during that 3 month period) —

(i) the child's name, date of birth and home address,

(ii) the total amount of time that they provide such education to the child, and

(iii) the amount of time that they provide such education to the child without any parent of the child being actively involved in the tuition or supervision of the child.

3.16 A failure to comply with this notice, or to supply incorrect information to the local authority in response to it, opens up the suspect education provider to liability to pay to the authority a monetary penalty in the prescribed amount, all in accordance with the procedure set out in a proposed new Schedule 31A to the 1996 Act.

Provision of information in the local authorities' homeschooled children register to the Secretary of State

3.17 Under the proposed new Section 436F of Education Act 1996 the Secretary of State may direct a local authority (if in England) or the Welsh Ministers may direct a local authority (if in Wales) to provide the Secretary of State or, as the case may be, the Welsh Ministers with information of a prescribed description from their register (whether that is information relating to an individual child or aggregated information). The Secretary of State or Welsh Ministers may then provide information so received to another prescribed person if the Secretary of State or Welsh Ministers considers it appropriate to do so for the purposes of promoting or safeguarding the education or welfare of either the child to whom the information relates, or of any other person under the age of 18. And equally a local authority in England or Wales is able to provide information from their homeschooled children register which relates to a child, to a person listed in section 11(1) or 28(1) of the Children Act 2004 (arrangements to safeguard and promote welfare), to Ofsted, to His Majesty's Chief Inspector of Education and Training in Wales, or to the Welsh Ministers if the authority considers it appropriate to do so for the purposes of promoting or safeguarding the education or welfare of the child, or any other person under the age of 18.

3.18 Where a local authority in England or Wales becomes aware that a child registered in their homeschooled children register will move, or has moved, to the area of another local authority in England or Wales, the local authority is under a duty to provide the other local authority with all the information relating to the child which is required by virtue of section 436C(1) or (2) and which the authority have collated and entered into the register. And the local authority is permitted also to provide the other local authority with any

other information relating to the child which the authority had decided was "appropriate information" for it to include on its homeschooled children register.

3.19 Where a Scottish local authority or, in Northern Ireland, a Health and Social Care Trust or the Education Authority established under the Education Act (Northern Ireland) 2014, makes a request for information from an English or Welsh local authority's homeschooled children register, the local authority in England or Wales receiving the request may provide the information requested, if that authority considers it "appropriate to do so for the purposes of promoting or safeguarding the education or welfare of – (a) the child to whom the information relates, (b) any other person under the age of 18."

Support for parents of homeschooled children

3.20 The proposed new Section 436G of the Education Act 1996 requires a local authority in England or Wales to provide support to a parent who requests it by securing the provision of such advice and information relating to the education of their homeschooled child which the local authority considers fit having regard to the parent's request. This may include both advice about the education of the child, and information about sources of assistance for the education of the child.

School attendance orders

3.21 Clause 32 seeks to amend current the law relating to school attendance orders in England and Wales. Clause 32(2) sets out the terms of proposed new Sections 436H through to 436S of the Education Act 1996. These deal with the following matters.

Preliminary notice for school attendance order (proposed new Section 436H) [11]

[11] The proposed new Section 436H is in the following terms:

"436H Preliminary notice for school attendance order

(1) A local authority must serve a preliminary notice on a child's parent in relation to a child for whom the authority is responsible if it appears to the authority that—
  (a) the child is of compulsory school age, and
  (b) either condition A or condition B is met.

(2) A local authority may serve a preliminary notice on a child's parent if it appears to the authority that either condition C or condition D is met.

(3) A "preliminary notice" means a notice requiring the child's parent on whom the notice is served to satisfy the local authority that—
  (a) the child is receiving suitable education, where condition A, C or D is relied on to serve the notice;
  (b) the child is receiving education that is in their best interests, where condition B is relied on to serve the notice.

3.22 Under this proposed new Section 436H:

(1) if it appears to the local authority that any child of school age *for whom the authority is responsible* is <u>*not*</u> receiving suitable education (whether by regular attendance at school or otherwise) then a "preliminary notice" may be served on the child's parent requiring that parent to allay the local authority's concerns and satisfy it that their child <u>*is*</u> receiving suitable education;

(2) if in relation to any child of school age *for whom the local authority is responsible*, the local authority has concluded (as a result of enquiries made in exercise of section 47 of the Children Act 1989) that (a) the child is suffering, or is likely to suffer, "significant harm" [12] (b) the child is not regularly attending school, and (c)

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(4) Condition A is that the child is not receiving suitable education, either by regular attendance at school or otherwise.

(5) Condition B is that—
(a) the local authority or another local authority is—
(i) conducting enquiries in respect of the child under section 47 of the Children Act 1989 (duty to investigate), or
(ii) taking action under section 47(8) of that Act to safeguard or promote the child's welfare, in a case
where the enquiries mentioned in sub-paragraph (i) have led the local authority to conclude that the child is suffering, or is likely to suffer, significant harm (within the meaning of section 31(9) and (10) of that Act),
(b) the child is not regularly attending school, and
(c) it would be in the child's best interests to receive education by regular attendance at school.

(6) Condition C is that—
(a) the child is eligible to be registered by the local authority under section 436B,
(b) the authority has asked the child's parent for information under section 436D(1), and
(c) the child's parent has not provided that information before the end of the relevant period (as defined in section 436D(4)(a)), or has provided incorrect information.

(7) Condition D is that the child's parent is under a duty to provide information to the local authority under section 436D(2) in relation to the child and
(a) has not provided the information before the end of the relevant period (as defined in section 436D(4)), or
(b) has provided incorrect information.

(8) A preliminary notice must—
(a) state which of conditions A to D are relied on to serve the notice,
(b) be served without delay, and in any event before the end of the period of five days beginning with the day on which it appears to the local authority that the requirements of subsection (1) or (2) are met, and
(c) specify the period within which the person must respond to the notice, which must be not less than 15 days beginning with the day on which the notice is served."

[12] Section 39(9) and (10) of the Children Act 1989 respectively relevantly specify that
- "'harm' means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another"

and

it would be in the child's best interests to receive education by regular attendance at school, then a "preliminary notice" may be served on the child's parent requiring that parent to allay the local authority's concerns and satisfy it that their child is receiving education that is in the child's best interests;

(3) if it appears to the local authority that there has been a failure on the part of the parent of any child of school age who is (eligible to be) registered on the local authority's homeschooled register to comply with the authority's request timeously to provide the authority with all and any of the information on their child as listed in Section 436C(1), [13] then a "preliminary notice" may be served on the child's parent requiring that parent to ***satisfy*** the authority that their child ***is*** receiving suitable education.

School attendance orders (proposed new Section 436I) [14]

- "where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child."

[13] The information which is specified in the proposed new Section 436C(1) is the following:
(1) The name, date of birth and home address of the child registered as homeschooled/homeschooled;
(2) the name and home address of each parent of the registered homeschooled child,
(3) the name of each parent who is providing education to that homeschooled child,
(4) the amount of time that the child spends receiving education from each parent of the homeschooled child,
(5) the names and addresses of any individuals (other than parents) and organisations involved in providing that education to the homeschooled child,
(6) a description of the type of each such education provider (other than parents)
(7) the postal address of each place where any "non-parental" education is provided to the homeschooled child,
(8) if that education is provided virtually, the website or email address of the non-parent education provider
(9) the total amount of time the homeschooled child, spends receiving that education from of the non-parent education provider; and
(10) the amount of time that the homeschooled child spends receiving that education without any parent of the child being actively involved in the tuition or supervision of the child.

[14] The proposed new Section 436I is in the following terms:
"436I School attendance orders
(1) A local authority must serve an order under this section on a child's parent if—
(a) the authority has served a preliminary notice on the child's parent under section 436H,
(b) the child's parent fails to satisfy the local authority, within the period specified in the notice, that—
(i) the child is receiving suitable education, in a case where condition A, C or D is cited in the notice,
(ii) it is in the best interests of the child to receive education otherwise than by regular attendance at school, in a case where condition B is cited in the notice, and
(c) in the opinion of the authority it is expedient that the child should attend school.

(2) But a local authority must ***not*** serve an order under this section on a child's parent if—
(a) either—

3.23 In determining whether any homeschooled child is receiving suitable education (or in the case of a child at risk of significant harm for whom the local authority is responsible that that child is receiving education that is in the child's best interests) the local authority must consider all of the settings where the child is being educated, where the child lives, how the child is being educated and what the child is learning. To assist it in its

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(i) condition B was the only condition cited in the preliminary notice served under section 436H in relation to the child, or
(ii) condition B and another condition were cited in that preliminary notice, but the child's parent has satisfied the local authority that the child is receiving suitable education,
(b) the local authority is no longer conducting enquiries or taking action in respect of the child as mentioned in section 436H(5)(a), and
(c) the local authority is not aware of any other enquiries being made under section 47 of the Children Act 1989 or of any other action being taken under section 47(8) of that Act in respect of the child.

(3) For the purpose of determining whether an order must be served under this section in respect of a child, the local authority—
(a) must consider all of the settings where the child is being educated and where the child lives,
(b) must consider how the child is being educated and what the child is learning, so far as is relevant in the particular case, and
(c) may request the child's parent on whom the preliminary notice has been served under section 436H to allow the local authority to visit the child inside any of the homes in which the child lives.

(4) If a request under subsection (3)(c) is refused by the person to whom it is made, the local authority must consider that to be a relevant factor in deciding whether the child's parent has failed to satisfy the local authority as mentioned in subsection (1)(b)(i) or (ii).

(5) An order under this section (a "school attendance order") is an order requiring the person on whom it is served to cause the child to become a registered pupil at a school named in the order.

(6) A school attendance order under this section—
(a) must be served without delay, and in any event before the end of the period of five days beginning with the day on which the authority determines which school is to be named in the order, and
(b) must be in the prescribed form.

(7) A school attendance order under this section continues in force (subject to any amendment made by the local authority) for so long as the child is of compulsory school age, unless—
(a) it is revoked by the authority, or
(b) a direction is made in respect of it under section 436Q(6) or 447(5).

(8) Where a maintained school is named in a school attendance order under this section—
(a) the local authority must without delay, and in any event before the end of the period of five days referred to in subsection (6)(a) inform the governing body and the head teacher, and
(b) the governing body and the local authority must admit the child to the school.

(9) Where an Academy school or alternative provision Academy is named in a school attendance order under this section—
(a) the local authority must without delay, and in any event before the end of the period of five days referred to in subsection (6)(a) inform the proprietor and the principal, and
(b) the proprietor must admit the child to the school.

(10) Subsections (8) and (9) do not affect any power to exclude from a school a pupil who is already a registered pupil there.

assessment the local authority may request a home visit. If such a home visit request is refused, then that can be taken into account by the local authority in reaching a decision as to whether or not the parent has duly satisfied the authority as to the homeschooling education being provided being "suitable" (or, where relevant, in the best interests of the child).

3.24 If the parent has failed to satisfy the local authority that their child is indeed receiving suitable education (or, in the case of a child at risk of significant harm for whom the local authority is responsible, that that child is receiving education that is in the child's best interests) then the local authority must serve a school attendance order on the parent of a homeschooled child naming the school of which the child has to become, while still of compulsory school age, a registered pupil.

School attendance order for child with an EHC plan in England (proposed new Section 436J) [15]

3.25 Special provision is made in relation to those of school-age (whether a child for whom the authority is responsible and who have special educational needs, or a child resident in the authority's area who has a disability) in respect of whom the local authority maintains an Education, Health and Care ("EHC") plan under and in terms of the Children and

[15] The proposed new Section 436J is in the following terms:

"Section 436J School attendance order for child with EHC plan (England)

(1) Subsections (2) and (3) apply where a local authority in England is required to serve a school attendance order under section 436I in respect of a child for whom the authority maintains an EHC plan.

(2) Where the EHC plan specifies the name of a school, that school must be named in the order.

(3) Where the EHC plan does not specify the name of a school—
(a) the authority must amend the plan so that it specifies the name of a school, and
(b) that school must then be named in the order.

(4) An amendment to an EHC plan required to be made under subsection (3)(a) is to be treated as if it were an amendment made following a review under section 44 of the Children and Families Act 2014, and that section and regulations made under it apply accordingly.

(5) Where—
(a) a school attendance order is in force in respect of a child for whom the local authority maintain an EHC plan, and
(b) the name of the school specified in the plan is changed,
the local authority must amend the order accordingly.

(6) Where a school attendance order is in force in respect of a child who subsequently becomes a child for whom the local authority maintain an EHC plan which specifies the name of a school, the local authority must ensure that school is named in the order."

Families Act 2014. The school named in any school attendance orders which might be made under the proposed new Section 436I powers has to match the school (to be) named in the EHC plan or the individual development plan.

School attendance order for child with individual development plan in Wales (proposed new Section 436K) [16]

3.26 Parallel provision which is intended to replicate in Wales the proposed Section 436J provisions for England is made in a proposed new Section 436K in respect of a child for whom an individual development plan is maintained in which a particular school is named. That school must be named in the order.

School nomination notice for school attendance order (proposed new Section 436L) [17]

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[16] The proposed new Section 436K is in the following terms:

"Section 436K School attendance order for child with individual development plan (Wales)

(1) Where a local authority in Wales is required to serve a school attendance order under section 436I in respect of a child for whom an individual development plan is maintained in which a particular school is named, that school must be named in the order.

(2) Where—
(a) a school attendance order is in force in respect of a child for whom an individual development plan is maintained in which a particular school is named, and
(b) the name of the school specified in the plan is changed,
the local authority must amend the order accordingly.

(3) Where a school attendance order is in force in respect of a child who subsequently becomes a child for whom an individual development plan is maintained in which a particular school is named, the local authority must ensure that school is named in the order."

[17] The proposed new Section 436L is in the following terms:

"Section 436L School nomination notice for school attendance order

(1) Before a local authority serves a school attendance order under section 436(I) on a person in respect of a child, other than a child for whom the authority maintains an EHC plan or a child for whom an individual development plan is maintained in which a particular school is named, the authority must serve a notice on the person under this section (a "school nomination notice").

(2) A school nomination notice is a notice in writing—
(a) informing the person of the local authority's intention to serve the order,
(b) specifying the school which the authority intends to name in the order and, if the authority considers it fit, one or more other schools which it regards as suitable alternatives, and
(c) stating the effect of subsections (3) to (6).
For periods within which the school nomination notice must be served, see section 436N(6) and (7).

(3) If the school nomination notice specifies one or more alternative schools and the person selects one of them before the end of the period of 15 days beginning with the day on which the notice is served, the school selected by the person must be named in the order.

(4) If—
(a) within the period mentioned in subsection (3) the person—

3.27 The proposed new Section 436L provides for some element of parental choice (at least in respect of children with no EHC plan) as regards the school they would be agreeable to sending their heretofore homeschooled child to become a registered pupil. The parent upon whom a school attendance order is to be served is able to select a school from among any alternatives which the local authority's school *nomination* notice may specify.

3.28 Further, if the parent advises the local authority that they have applied to and their child has been accepted to be a registered pupil at (1) an "Academy school" or (2) an "alternative provision Academy" or (3) a school maintained by another local authority or (4) a fee paying school the fees for which are covered by the authority under section 517 of the Education Act 1996 [18] or (5) any other kind of school suitable to the child's age,

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(i) applies for the child to be admitted to a school which is an Academy school or alternative provision Academy and notifies the local authority which served the notice of the application, or
(ii) applies for the child to be admitted to a school maintained by a local authority and, where that authority is not the local authority which served the notice, notifies the latter authority of the application, and

(b) the child is offered a place at the school as a result of the application,

that school must be named in the school attendance order.

(5) If—
(a) within the period mentioned in subsection (3) the person applies to the local authority by whom the notice was served for education to be provided at a school which is not a school maintained by a local authority, an Academy school or alternative provision Academy, and
(b) the child is offered a place at the school under arrangements made by the authority under which the fees payable in respect of the education provided at the school are to be paid by them under section 517,

that school must be named in the school attendance order.

(6) If, within the period mentioned in subsection (3)—
(a) the person—
(i) applies for the child to be admitted to a school which is not maintained by a local authority, an Academy school or an alternative provision Academy and in respect of which no application is made under subsection (5), and
(ii) notifies the local authority by whom the notice was served of the application,
(b) the child is offered a place at the school as a result of the application, and
(c) the school is suitable to the child's age, ability and aptitude and to any special educational needs the child may have,

that school must be named in the school attendance order."

[18] Section 517 of the Education Act 1996 currently provides as follows:

"517.— Payment of fees at schools *not* maintained by a local authority

(1) Where, in pursuance of arrangements made under section 18 or Part 3 of the Children and Families Act 2014 (children and young people in England with special educational needs or disabilities), primary or secondary education is provided for a pupil at a school not maintained by them or another local authority, the local authority by whom the arrangements are made shall—
(a) if subsection (2), (3) or (4) applies, pay the whole of the fees payable in respect of the education provided in pursuance of the arrangements; and
(b) if board and lodging are provided for the pupil at the school and subsection (5) applies, pay the whole of the fees payable in respect of the board and lodging.

(2) This subsection applies where—

ability and aptitude and to any special educational needs the child may have, then that is the school which is to be named in the school attendance order issued by the local authority.

School nomination notice: restrictions (proposed new Section 436M); [19]

(a) the pupil fills a place in the school which the proprietor of the school has put at the disposal of the authority; and
(b) the school is one in respect of which grants are made by the Secretary of State under section 485.

(3) This subsection applies where the authority are satisfied that, by reason of a shortage of places in every school maintained by them or another local authority to which the pupil could be sent with reasonable convenience, education suitable—
(a) to his age, ability and aptitude, and
(b) to any special educational needs he may have,
cannot be provided by them for him except at a school not maintained by them or another local authority.

(4) This subsection applies where (in a case in which neither subsection (2) nor subsection (3) applies) the authority are satisfied—
(a) that the pupil has special educational needs, and
(b) that it is expedient in his interests that the required special educational provision should be made for him at a school not maintained by them or another local authority.

(5) This subsection applies where the authority are satisfied that education suitable—
(a) to the pupil's age, ability and aptitude, and
(b) to any special educational needs he may have,
cannot be provided by them for him at any school unless board and lodging are also provided for him (either at school or elsewhere)

(6) As from such day as the Secretary of State may by order appoint this section shall have effect with the following modifications—
(a) in subsections (1) and (3), for "not maintained by them or another local authority" substitute "which is neither a maintained nor a grant-maintained school";
(b) in subsection (3) for "every school maintained by them or another local authority" substitute "every maintained or grant-maintained school";
(c) in subsections (3) and (5), for "provided by them" substitute "provided";
(d) omit subsection (4) and the reference to it in subsection (1)

(7) An order under subsection (6) may appoint different days for different provisions and for different purposes.

(8) In this section as it applies where a local authority in Wales makes arrangements under section 18 for primary or secondary education to be provided for a pupil at a school not maintained by a local authority—
(a) references to special educational needs are to be interpreted as references to additional learning needs, and
(b) references to special educational provision are to be interpreted as references to additional learning provision.

(9) Subsection (5) does not apply where board and lodging is secured for a pupil under Part 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018."

[19] The proposed new Section 436M is in the following terms:
"436M School nomination notice: restrictions
(1) A local authority may not specify a school in a school nomination notice if the child is permanently excluded from it.

3.29 The proposed new Section 436M sets out a number of restrictions on the school nomination process. The local authority may only nominate a school which is a reasonable distance from the home of the child and may *not* nominate: any school from which the child has been permanently excluded; any maintained school or Academy school where the child's attendance would prejudice the provision of efficient education or the efficient use of resources because of the school's need to stay within statutory limits on either class size or the permitted number of pupils at the school in the child's age group.

School nomination notice: procedure (proposed new Section 436N) [20]

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(2) A local authority may not specify a maintained school or Academy school in a school nomination notice if the admission of the child would, because of the need to take measures to avoid failing to comply with any duty applicable to the school in relation to class sizes, prejudice the provision of efficient education or the efficient use of resources.

(3) A local authority may not specify a maintained school or Academy school in a school nomination notice if, were the child concerned admitted to the school in accordance with a school attendance order resulting from the notice, the number of pupils at the school in the child's age group would exceed the relevant number.

(4) The relevant number is—
(a) in the case of a maintained school, the number determined in accordance with section 88C or 89 of the School Standards and Framework Act 1998 as the number of pupils in the child's age group which it is intended to admit to the school in the school year in which the child would be admitted, or
(b) in the case of an Academy school, the number determined in accordance with the Academy arrangements relating to the school or any enactment as the number of such pupils.

(5) Subsection (3) does not prevent a local authority from specifying a maintained school where the authority is responsible for determining the arrangements for the admission of pupils to the school.

(6) Subsection (3) also does not prevent a local authority from specifying a maintained school or Academy school if—
(a) in the opinion of the authority the school is a reasonable distance from the home of the child, and
(b) there is no maintained school or Academy school in their area which—
(i) the authority could specify (apart from subsection (3)), and
(ii) is in the opinion of the authority a reasonable distance from the home of the child."

[20] The proposed new Section 436N is in the following terms:
"436N School nomination notice: procedure
(1) Before deciding to specify a maintained school, Academy school or alternative provision Academy in a school nomination notice a local authority must consult—
(a) in the case of a maintained school—
(i) the governing body, and
(ii) if another local authority is responsible for determining the arrangements for the admission of pupils to the school, that authority, or
(b) in the case of an Academy school or alternative provision Academy, the proprietor.

(2) Where a local authority decides to specify a maintained school, Academy school or alternative provision Academy in a school nomination notice the authority must, before serving the notice, serve notice in writing of their decision on—

(a) in the case of a maintained school—

(i) the governing body,

(ii) the head teacher, and

(iii) if another local authority is responsible for determining the arrangements for the admission of pupils to the school, that authority, or

(b) in the case of an Academy school or alternative provision Academy—

(i) the proprietor, and

(ii) the principal.

(3) A notice under subsection (2) must be served without delay, and in any event before the end of the period of 15 days beginning with the expiry of the period specified in the notice under section 436H.

(4) A person on whom a notice is served under subsection (2)(a)(i) or (iii) or (b)(i) may apply to the Secretary of State in relation to a school in England, or to the Welsh Ministers in relation to a school in Wales, for a direction under this section and, if they do so, must inform the local authority which served the notice.

(5) An application under subsection (4) must be made—

(a) if the notice is served on a school day, before the end of the period of 10 school days beginning with the day on which the notice is served, or

(b) if the notice is served on a day that is not a school day, before the end of the period of 10 school days beginning with the first school day following the day on which the notice is served.

(6) If the local authority which served a notice under subsection (2) is not informed of an application under subsection (4) within the period specified in subsection (5), the authority must serve the school nomination notice without delay, and in any event before the end of the period of five days beginning with the day after the day on which the period specified in subsection (5) ended.

(7) Where the Secretary of State gives a direction under this section in relation to a school in England or the Welsh Ministers give a direction under this section in relation to a school in Wales—

(a) the school or schools to be specified in the school nomination notice are to be determined in accordance with the direction, and

(b) the school nomination notice must be served without delay, and in any event before the end of the period of five days beginning with the day after that on which the direction is given.

(8) If a local authority in England serves a notice under subsection (2) specifying a school in Wales and an application for a direction is made to the Welsh Ministers under subsection (4) in relation to that notice, the direction under this section may only—

(a) confirm that a school specified in the notice under subsection (2) should be specified in the school nomination notice, or

(b) refer the question of which school or schools should be specified in the school nomination notice back to the local authority to determine.

(9) If a local authority in Wales serves a notice under subsection (2) specifying a school in England, and an application for a direction is made to the Secretary of State under subsection (4) in relation to that notice, the direction under this section may only—

(a) confirm that a school specified in the notice under subsection (2) should be specified in the school nomination notice, or

(b) refer the question of which school or schools should be specified in the school nomination notice back to the local authority to determine."

3.30 The procedures to be followed by the local authority when proposing to specify any particular school on an intended school attendance order is set out in the proposed new Section 436N. These procedures include duties of prior consultation with the relevant governing authorities of the school which may be subject to such nomination.

Amendment of school attendance order (proposed new Section 436O); [21]

3.31 A proposed new Section 436O set outs a procedure under which the local authority, other than in relation to children in England with an EHC plan or a child in Wales for whom an individual development plan is maintained in which a particular school is named, is obliged to amend any school attendance order where the child has been accepted as a

[21] The proposed new Section 436O is in the following terms:

"Section 436O Amendment of school attendance order

(1) This section applies where a school attendance order under section 436I is in force in respect of a child, other than a child for whom the local authority maintains an EHC plan or a child for whom an individual development plan is maintained in which a particular school is named.

(2) If at any time—
  (a) the person on whom the order is served applies for the child to be admitted—
    (i) to a school maintained by a local authority, an Academy school or an alternative provision Academy, and
    (ii) which is different from the school named in the order,
  (b) the child is offered a place at the school as a result of the application, and
  (c) the person requests the authority that served the order to amend the order by substituting that school for the one currently named,

the authority must comply with the request.

(3) If at any time—
  (a) the person on whom the order is served applies to the authority for the child to be admitted—
    (i) to a school not maintained by a local authority, an Academy school or an alternative provision Academy, and
    (ii) which is different from the school named in the order,
  (b) the child is offered a place at the school under arrangements made by the authority under which the fees payable in respect of the education provided at the school are to be paid by the authority under section 517, and
  (c) the person requests the authority to amend the order by substituting that school for the one currently named,

the authority must comply with the request.

(4) If at any time—
  (a) the person on whom the order is served applies for the child to be admitted—
    (i) to a school not maintained by a local authority, an Academy school or an alternative provision Academy,
    (ii) which is different from the school named in the order, and
    (iii) in respect of which no application is made under subsection (3),
  (b) the child is offered a place at the school as a result of the application,
  (c) the school is suitable to the child's age, ability and aptitude and to any special educational needs the child may have, and
  (d) the person requests the authority to amend the order by substituting that school for the one currently named,

the authority must comply with the request."

registered pupil at a different school from that specific in the school attendance order as originally issued and served on the parent of the formerly homeschooled child.

Revocation of school attendance order on request (proposed new Section 436P); [22]

[22] The proposed new Section 436P is in the following terms:

"436P Revocation of school attendance order

(1) This section applies where a school attendance order made by a local authority under section 436I is in force in respect of a child.

(2) The local authority must revoke the order if—

(a) the order was served following a preliminary notice under section 436H in which the only condition cited was condition B,

(b) the local authority is no longer conducting enquiries or taking action in respect of the child as mentioned in section 436H(5)(a), and

(c) the local authority is not aware of any other enquiries being made under section 47 of the Children Act 1989 or of any other action being taken under section 47(8) of that Act in respect of the child.

(3) The person on whom the order is served may at any time request the local authority to revoke the order on the ground that arrangements have been made—

(a) for the child to receive suitable education otherwise than at a school, where the order was served—

(i) as a result of the person failing to satisfy the local authority that the child is receiving suitable education, or

(ii) as a result of the person failing to satisfy the local authority both that the child is receiving suitable education and that it is in the best interests of the child to receive education otherwise than by regular attendance at school, where subsection (2)(b) and (c) applies;

(b) for the child to receive education, otherwise than at a school, that is in their best interests, where the order was served as a result of the person failing to satisfy the local authority that it is in the best interests of the child to receive education otherwise than by regular attendance at school.

(4) The authority must comply with a request under subsection (3), unless the authority is of the opinion that the arrangements mentioned in subsection (3)(a) or (b), or both, as the case may be, have not been made for the child.

(5) If a person is aggrieved by a refusal of a local authority in England to comply with a request under subsection (3)—

(a) the person may refer the question to the Secretary of State, and

(b) the Secretary of State must give such direction determining the question as the Secretary of State considers appropriate.

(6) If a person is aggrieved by a refusal of a local authority in Wales to comply with a request under subsection (3)—

(a) the person may refer the question to the Welsh Ministers, and

(b) the Welsh Ministers must give such direction determining the question as the Welsh Ministers consider appropriate.

(7) Where the child is one for whom the local authority maintains an EHC plan—

(a) if the name of a school or other institution is specified in the EHC plan, subsection (3) does not apply;

(b) if the name of a school or other institution is not specified in the EHC plan, a direction under subsection (5)(b) may require the authority to make such amendments in the plan as the Secretary of State considers necessary or expedient in consequence of the determination.

3.32 A school attendance order may be revoked on the request of the parent on the basis that suitable arrangements for homeschooling have been put in place which should now properly satisfy the authority that the child is receiving suitable education otherwise than at a school (or, in the case of a child still considered to be at risk of significant harm and for whom the local authority is responsible, the child is receiving education, otherwise than at a school, that is in the child's best interests).

3.33 Where the local authority refuses to comply with a revocation request then the matter may be referred by the aggrieved party to the Secretary of State (in England) or the Welsh Ministers (in Wales), which must then give such direction determining the question as the Secretary of State or, as the case may be, the Welsh Ministers, consider appropriate.

Offence of failure to comply with school attendance order (proposed new Section 436Q) [23]

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(8) Where the child is one for whom the local authority maintains an individual development plan—

(a) if the name of a school or other institution is specified in the plan, subsection (3) does not apply;

(b) if the name of a school or other institution is not specified in the plan, a direction under subsection (6)(b) may require the authority to make such amendments in the plan as the Welsh Ministers consider necessary or expedient in consequence of the determination."

[23] The proposed new Section 436Q is in the following terms:

"**436Q Offence of failure to comply with school attendance order**

(1) If a person on whom a school attendance order under section 436I is served fails to comply with the requirements of the order, the person is guilty of an offence.

(2) Subsection (1) does not apply if—

(a) the person proves that arrangements have been made for the child to receive suitable education otherwise than at a school, where the order was served as a result of the person failing to satisfy the local authority that the child is receiving suitable education,

(b) the person proves that arrangements have been made for the child to receive education, otherwise than at a school, that is in their best interests, where the order was served as a result of the person failing to satisfy the local authority that it is in the best interests of the child to receive education otherwise than by regular attendance at school,

(c) section 436H(5)(a) is no longer met in respect of the child, where the order was served following a preliminary notice under section 436H which cited only condition B, or

(d) both—

(i) the person proves that arrangements have been made for the child to receive suitable education otherwise than at a school, and

(ii) section 436H(5)(a) is no longer met in respect of the child,

where the order was served following a preliminary notice under section 436H which cited condition B and another condition.

(3) The reference in subsection (1) to failure to comply with the requirements of a school attendance order includes causing a child to cease to be registered at the school named in the school attendance order.

(4) Subsection (3) does not apply in circumstances where—

(a) the school has, pursuant to section 436J, 436K or 436O, ceased to be the school named in the school attendance order, or

3.34 A parent's failure or refusal to comply with a school attendance order constitutes a criminal offence and puts the parent at risk of a criminal sanction of a fine or imprisonment for up to 51 weeks. It is a defence for the parent to establish before the court by evidence that, contrary to the local authority's basis for imposing the order, suitable homeschooling arrangements have been put in place for the child to receive suitable education otherwise than at a school (or, in the case of a child at risk of significant harm for whom the local authority is responsible, the child is receiving education, otherwise than at a school, that is in the child's best interests).

3.35 Clauses 32(3) [24] and 32(4) [25] of the Bill propose amendments to the Education Act 1996 consequential on these proposed changes to the school attendance order regime which

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(b) the school attendance order has been revoked pursuant to section 436P.

(5) A person who—
(a) fails to comply with the requirements of a school attendance order under section 436I by not causing a child to become a registered pupil at the school named in the order, and
(b) is convicted of an offence under this section in respect of the failure,
may be found guilty of an offence under this section again if the failure continues.

(6) If, in proceedings for an offence under this section, the person is acquitted, the court may direct that the school attendance order ceases to be in force.

(7) A direction under subsection (6) does not affect the duty of the local authority to take further action under section 436I if at any time the authority is of the opinion that, having regard to any change of circumstances, it is expedient to do so.

(8) A person who commits an offence under this section is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences or a fine not exceeding level 4 on the standard scale (or both).

(9) In subsection (8), "the maximum term for summary offences" means—
(a) if the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 comes into force, six months;
(b) if the offence is committed after that time, 51 weeks."

[24] Clause 32(3) of the Bill provides as follows
"In section 572 (service of notices and other documents), at the end insert—
'(4) This section does not preclude any notice or order under sections 436H to 436P (which relate to school attendance orders) from being served by any other effective method.'"

[25] Clause 32(4) of the Bill is in the following terms:
"In Schedule 1 (pupil referral units), for paragraph 14 substitute—
'14(1) Where a pupil referral unit is named in a school attendance order made by a local authority under section 436I—
(a) the local authority must without delay, and in any event within the period of five days referred to in section 436I(6)(a) inform the teacher in charge of the unit, and
(b) if another local authority is responsible for determining the arrangements for the admission of pupils in the unit, that authority must admit the child to the unit,
but paragraph (b) above does not affect any power to exclude from a unit a pupil who is already a registered pupil there.

deal respectively with services of notices and other documents, and the situation where a pupil referral unit is named in a school attendance order made by a local authority under section 436I.

Homeschooled children and attendance orders in England and Wales: data protection [26]

3.36 Clause 33 introduces new provision concerning data protection in relation to home schooled children and school attendance orders. This specifies that nothing in the proposed new duties or powers to process information under any of the proposed new sections 434A through to 436Q and Schedule 31A, and provisions or regulations made thereunder, requires or authorises the processing of information which would contravene

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(2) Section 436L(4) does not apply in relation to a pupil referral unit.

(3) A local authority —
(a) must, in a case where another local authority is responsible for the admission of pupils to a pupil referral unit, consult that authority before deciding to specify that unit in a school nomination notice under section 436L, and
(b) if the authority decides to specify the unit in the notice, must serve notice in writing of their decision on that authority.

(4) Section 436N(3) to (9) applies where notice is served on a local authority under sub-paragraph (3) above as it applies where notice is served under section 436N(2).

(5) The parent of a child in respect of whom a school attendance order under section 436I is in force may not under section 436O request the local authority to amend the order by substituting a pupil referral unit for the school named in the order.

(6) Where a child is a registered pupil at both a pupil referral unit and at a school other than such a unit, the references in section 444 to the school at which the child is a registered pupil are to be read as references to the unit."

[26] Clause 33 specifies that:
"After section 436S of the Education Act 1996 (as inserted by section 32) insert—

"Children not in school and school attendance orders: processing of information
436T Processing of information
(1) This section applies to section 434A, sections 436B to 436Q and Schedule 31A, and provisions of regulations made under any of those provisions.

(2) Except as provided by subsection (3), a disclosure of information authorised or required under any provision to which this section applies does not breach—
(a) any obligation of confidence owed by the person making the disclosure, or
(b) any other restriction on the disclosure of information (however imposed).

(3) None of the provisions to which this section applies are to be read as requiring or authorising the processing of information which would contravene the data protection legislation (but in determining whether the processing would do so, take into account the duty imposed or the power conferred by the provision in question).

(4) In this section, "the data protection legislation" and "processing" have the same meaning as in the Data Protection Act 2018 (see section 3 of that Act).""

the data protection legislation. These new duties and power are however "to be taken into account" in determining whether the processing would contravene that data protection legislation (which is to say the Data Protection Act 2018 and the UK GDPR (which is defined in Section 3(10) of the Data Protection Act 2018 as meaning Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018).

Guidance on homeschooled children and school attendance order [27]

3.37 Clause 34 makes provision for statutory Guidance to be issued by the Secretary of State as regards England and by the Welsh Ministers as regards Wales on the topic of homeschooled children and school attendance orders to which a local authority must have regard in exercising its functions under sections 436B to 436P.

Consequential amendments

3.38 Clause 35 of and Schedule 2 to the Bill sets out further detailed consequential amendments to other statutory and regulatory provisions consequent on these proposed reforms to the regime concerning school attendance orders to take into account the situation of homeschooled children.[28]

[27] Clause 34 specifies that:

"After section 436T of the Education Act 1996 (as inserted by section 33) insert—

"Guidance on children not in school and school attendance orders

436U Guidance

In exercising its functions under sections 436B to 436P, a local authority must have regard to—

(a) in the case of a local authority in England, any guidance given by the Secretary of State;

(b) in the case of a local authority in Wales, any guidance given by the Welsh Ministers.""

[28] These consequential amendments referred to in Clause 35 are set out in full in Schedule 2 to the Bill.

4. HUMAN RIGHTS PRINCIPLES RAISED BY THE BILL'S PROPOSALS ON HOME EDUCATION

General democratic principles in a human rights governed polity

4.1 It should never be forgotten that the European Convention on Human Rights (of which the UK is a signatory) is a "post-Nuremberg" document in the sense of having been drafted in conscious and complete rejection of two central aspects of the legal system which prevailed in Nazi Germany: first, the positivist/instrumentalist vision of the law's absolute validity without reference to any moral values; and secondly the readiness of legislators to enact, and lawyers to enforce, laws which promoted inequality, deprived rights from and enshrined discrimination against persons on the basis, in particular, of their religion and/or their deemed ethnicity and/or their physical or mental disabilities.

4.2 The post Nuremberg constitutional polity of the signatory states to the ECHR was instead characterised by their embodiment of classic values of a liberal democracy. In particular this has meant the acceptance of *limitations* on the powers of the liberal democratic State. Each and every State signatory to the ECHR is obliged, as a matter of international law, at all times to respect the human rights and fundamental freedoms of <u>*all*</u> those falling within the ambit of the powers of the State. The decision of the Strasbourg Court in *Dogan v Turkey* (2017) 64 EHRR 5 confirms (at §§ 109-110):

> "109 … Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". 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 treatment of people from minorities and avoids any abuse of a dominant position.
>
> Pluralism is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion."

4.3 The governing principle behind the formulation and the adoption of the European Convention of Human Rights (and other post-Nuremberg international human rights law instruments) is the *rejection* of the totalitarian State. The development, in particular, of the concept of subsidiarity was a response to a conscious rejection of the ideology of the *totalitarian* State, the ideology of which was perhaps most clearly articulated by the Italian dictator Mussolini (in a speech in La Scala Milan in 1925): *tutto nello Stato, niente al di fuori dello Stato, nulla contra lo Stato – everything within the State, nothing outside the State, naught against the State.* Instead as was observed in *O'Keefe v. Ireland* (2014) 59 EHRR 15 (in a joint and partly dissenting Opinion):

> "According to the Preamble to the Convention, fundamental freedoms are best maintained in an effective political democracy. The notion of a democratic society

encompasses the idea of subsidiarity. *A democratic society may flourish only in a state that respects the principle of subsidiarity and allows the different social actors to self-regulate their activities. This applies also to the domain of education.* [29]

4.4 In *R (Countryside Alliance) v. Attorney General* [2007] UKHL [2008] 1 AC 719 Baroness Hale observed ay § 116:

> "Article 8 ECHR, it seems to me, reflects two separate but related fundamental values. One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airwaves or the ether, within which people can both be themselves and communicate privately with one another.
>
> The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly. Families are subversive. They nurture individuality and difference. One of the first things a totalitarian regime tries to do is to distance the young from the individuality of their own families and indoctrinate them in the dominant view. Article 8 ECHR protects the private space, both physical and psychological, within which individuals can develop and relate to others around them."

4.5 She returned to this theme *In re B (Children)* [2008] UKHL 35 [2009] 1 AC 11 at § 20:

> "In a totalitarian society, uniformity and conformity are valued. Hence *the totalitarian state tries to separate the child from her family and mould her to its own design.*
>
> Families *in all their subversive variety are the breeding ground of diversity and individuality. In a free and democratic society we value diversity and individuality.*
>
> Hence the family is given special protection in all the modern human rights instruments including the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 8), the International Covenant on Civil and Political Rights (article 23) and throughout the United Nations Convention on the Rights of the Child."

4.6 In *Christian Institute v. Lord Advocate* [2016] UKSC 51 [2016] HRLR 19 in a unanimous opinion jointly authorised by Baroness Hale, Lord Reed and Lord Hodge (with which Lord Wilson and Lord Hughes agreed) the following salient observations were made in effect by the whole bench:

> "73. Individual differences are the product of the interplay between the individual person and his upbringing and environment. Different upbringings produce different people.

[29] *O'Keefe v. Ireland* (2014) 59 EHRR 15 (Joint Partly Dissenting Opinion of Judges Zupancic, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek at O-11-7)

The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way.

As Justice McReynolds, delivering the Opinion of the Supreme Court of the United States famously put it in *Pierce v Society of Sisters* 268 US 510 (1925) at pp.534–535:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state *to standardize its children by forcing them to accept instruction from public teachers only*.
>
> The child is *not* the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." [30]

...

75 The privacy of a child or young person is also an important interest. Article 16 UNCRC provides:

> "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
>
> 2. The child has the right to the protection of the law against such interference or attacks."

The concept of "private life" in article 8 ECHR covers the disclosure of personal data, such as information about a person's health, criminal offending, sexual activities or other personal matters. The notion of personal autonomy is an important principle underlying the guarantees of the ECHR. See, for example, *Gillan v United Kingdom* (2010) 50 EHRR 45 at [61].

76 Article 8 protects confidential information *as an aspect of human autonomy and dignity*: *Campbell v MGN Ltd* [2004] 2 A.C. 457, Lord Hoffmann at [50]-[51], Lady Hale at [134]."

Subsidiarity and respect for the family as the basic unit of society

4.7 The post-Nuremberg/anti-totalitarian State is one which is obliged, at the level of fundamental constitutional principle, to recognise and respect *the family* as a basic society in its own right. This is an established principle of international human rights law. As Lord Hope noted in *Fornah v Home Secretary* [2007] AC 412 at § 45:

> "45 It is universally accepted that the family is a socially cognisable group in society.... Article 23(1) of the 1966 International Covenant on Civil and Political Rights states that

[30] See too *Wisconsin v. Yoder* 406 US 205 (1972) per Chief Justice Burger delivering the Opinion of the US Supreme Court at 232-233:

> "[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."

the family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State'. The ties that bind members of a family together, whether by blood or by marriage, define the group. It is those ties that set it apart from the rest of society."

4.8 Remarks to similar effect were made by Baroness Hale in *R (Bibi) v Home Secretary* [2015] UKSC 68 [2015] 1 WLR 5055 at § 31:

> "31 All of this reflects the importance attached to family relationships in modern international human rights law. The Universal Declaration of Human Rights of 1948 proclaimed that
>
> > 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the state': article 16.3.
>
> The International Covenant on Civil and Political Rights of 1966 translated this into a binding obligation in exactly the same words: article 23.
>
> Both of these documents proclaimed that the rights they provided must be respected without discrimination on grounds such as race and sex: article 2 in each case. The Human Rights Committee, in General Comment No 19 (1990), explained that different states might have different concepts of the family, but whatever their concept, it must be afforded the protection required. The International Covenant on Economic and Social Rights goes even further, in providing that
>
> > 'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society': article 10.1."

4.9 Specific reference to the duty of the State to respect the "family" is reiterated in other international catalogues of fundamental rights thus:

(1) *"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State"*: Article 16(3) of the Universal Declaration of Human Rights 1948 (UDHR) and Article 23(1) of the International Convention on Civil and Political Rights 1966 (ICCPR)

(2) *"Everyone has the right to respect for his private and family life, his home and his correspondence"*: Article 8(1) ECHR 1950

(3) *"The greatest possible protection should be accorded to the family, which is the natural and fundamental group unit of society … particularly for its establishment and while it is responsible for the care and education of dependent children"*: Article 10(1) of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)

(4) The Preamble to the UNCRC emphasises *"the family, as the fundamental group of society and the natural environment for the growth and wellbeing of all its*

members and particularly children" and states that the obligations of State Parties under the UNCRC is to afford *the family* with "*the necessary protection and assistance so that it can fully assume its responsibilities within the community*". These principles are then reflected in the terms of Articles 3(2), 5 and 18 UNCRC which underline that the State has a subsidiary role to parents in matters concerning the wellbeing of children in providing as follows:

> *"3(2) State Parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*"
> ...
> *"5. State parties shall respect the responsibilities, rights and duties of parents ... to provide in a manner consistent with the evolving capacity of the child appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention ..."*
>
> *"18. Parents ... have the primary responsibility for the upbringing and development of their child: the best interests of the child will be their basic concern."*

4.10 As was also observed in *O'Keefe v. Ireland* (2014) 59 EHRR 15 (Joint Partly Dissenting Opinion of Judges Zupancic, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek at O-11-7):

> "Legislation pertaining to private education should respect the legitimate autonomy of private schools. Article 2 of Protocol No.1 ECHR guarantees the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. It is clear that the democratic state has to respect the education choices of the parents as well as the parents' primary responsibility for the development and well-being of their children."

4.11 The principle of subsidiarity (which is implicit in any human rights governed polity) may be understood *in the positive sense* as entailing constitutional obligations on the post-Nuremberg State to offer economic, institutional or legal support to those basic social associations which form the essential cells of society, chief among which is the family. The principle of subsidiarity also entails a corresponding series *of negative* implications that requires the State to *refrain* from using its coercive powers in a manner which subverts or undermines those smaller essential associations that go to make up society, notably the family. [31]

[31] See generally Maria Cahill "Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach" (2017) 15 *International Journal of Constitutional Law* 201-224

The fundamental rights of parents in relation to the education of their children

4.12 The requirements of subsidiarity as properly understood within a modern European democracy governed by the rule of law and respectful of fundamental rights means that the State has to recognise that *parents* have the primary social, moral and legal responsibility to safeguard the welfare and promote the health, development and flourishing of their children and to provide, in a manner appropriate to the stage of development of the individual child, direction and guidance. Parents have a fundamental right - which the State must respect - to raise their children in accordance with their own views and beliefs about what is best for their child's wellbeing and flourishing.

4.13 This right of parents is also expressly acknowledged in the various international instruments' expression of the right to education [32] for example:

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[32] See too in terms specifically of religious/moral education opt-outs by parents from State provision *R (Isherwood) v. Welsh Ministers* [2022] EWHC 3331 (Admin) [2023] PTSR 901 per Steyn J at § 41:

> *Other international instruments and measures*
>
> **41** The claimants also rely upon the following international instruments, comments, recommendations and resolutions:
>
> (1) Article 5(1)(b) of the *UN Convention against Discrimination in Education* (1960) provides:
>
> > "It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the state for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction".
>
> (2) Article 13(3) of the *International Covenant on Economic, Social and Cultural Rights* (1966) provides:
>
> > "The states parties to the present covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the state and to ensure the religious and moral education of their children in conformity with their own convictions."
>
> (3) Article 18(4) of the *International Covenant on Civil and Political Rights* (1966) ("the ICCPR") provides:
>
> > "The states parties to the present covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."
>
> (4) In *General Comment No 22: article 18 (Freedom of Thought, Conscience and Religion)* (1993), the Human Rights Committee expressed the view (in § 6) that:
>
> > "public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians."
>
> (5) Article 5(2) of the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) provides:
>
> > "Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against

(5) *Parents have a prior right to choose the kind of education that shall be given to their* children: Article 26(3) UDHR

(6) *In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions:*Article 2 Protocol 1 ECHR

(7) *The State Parties to the present Covenant undertake to have respect for the liberty of parents and, where applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions*: Article 13(3) ICESCR

(8) *The freedom to found educational establishments with due respect for democratic principles and the rights of parents to ensure the education and training of their children in conformity with their own religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right*: Article 14(3) CFR.

The role of the State to prevent harm befalling children

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the wishes of his parents or legal guardians, the best interests of the child being the guiding principle."

(6) Recommendation 1396 (1999) of the Parliamentary Assembly of the Council of Europe on religion and democracy recommends that the Committee of Ministers invite the governments of the member states to

> "guarantee freedom of conscience and religious expression within the conditions set out in the European Convention on Human Rights for all citizens", to "promote education about religions" and, in particular (§ 13(2)(e)), to: "avoid - in the case of children - any conflict between the state-promoted education about religion and the religious faith of the families, in order to respect the free decision of the families in this very sensitive matter."

(7) In its Resolution 1928 (2013) on *Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence*, the Parliamentary Assembly of the Council of Europe called on member states to:

> "9.11 while guaranteeing the fundamental right of children to education in an objective, critical and pluralistic manner, respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions; …"
> "9.13 ensure the full respect of article 9 of the European Convention on Human Rights and relevant jurisprudence of the European Court of Human Rights and that the freedom of communities and individuals defined by religion or belief is respected and exercised within the limits of the law".

(8) In its Resolution 2163 (2017) on *The protection of the rights of parents and children belonging to religious minorities*, the Parliamentary Assembly of the Council of Europe called on member states "to protect the rights of parents and children belonging to religious minorities by taking practical steps", including to:

> "5.4 ensure easy-to-implement procedures for children or parents to obtain exemptions from compulsory state religious education programmes that are in conflict with their deeply held moral or religious beliefs; the options may include non-confessional teaching of religion, providing information on a plurality of religions and ethics programmes."

4.14 The State undoubtedly has a legitimate interest in protecting children from *harm*. The CJEU noted in Case C-244/06 *Dynamic Medien* [2008] ECR I-505 at § 42:

> "Although the protection of the child is a legitimate interest which, in principle, justifies a restriction on a fundamental freedom guaranteed by the EC Treaty…. the fact remains that such restrictions may be justified only if they are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary in order to attain it."

4.15 In *Gaughran v Chief Constable of Northern Ireland Police* [2015] UKSC 29 [2015] 2 WLR 1303 which concerned a challenge to the Article 8 ECHR compatibility of the policy of the PSNI to retain indefinitely DNA profiles, fingerprints and photographs of all those convicted of recordable offences in Northern Ireland Lord Kerr (dissenting on the result) observed as follows (at §§ 76, 82):

> "[W]here it is clear that the legislative objective can be properly realised by a less intrusive means than that chosen, or where it is not possible to demonstrate that the database that is created by the PSNI policy is in fact needed to achieve the objective, this is, at least, a strong indicator of its disproportionality … There must be a proper inquiry into whether the measure affects the right of the individual no more than is necessary. That does not require the state to show that every conceivable alternative is unfeasible - a condition of unique practicability is not demanded. But if it is clear that the measure goes beyond what the stated objective requires, it will be deemed disproportionate."

4.16 The rationale for State intervention in the family has to be the protection and conservation of the family as a primary unit. The law is required to protect the family from unwarranted intrusion while, at the same time, protecting children from *harm*: *In re J (Children) (Care Proceedings: Threshold Criteria)* [2013] UKSC 9 [2013] 1 AC 680 per Baroness Hale at § 1. This is, in essence, the principle of subsidiarity. Except in a situation where the family is wholly dysfunctional - and is therefore no longer a space in which a child is being protected from harm - the State should not use its *coercive* powers to intervene in the family.

4.17 While acknowledging that family and society at large have complementary functions in defending and fostering the good of each and every human being, the constitutional principle of subsidiarity means the State cannot and must not take away from families the functions that they can just as well perform on their own or in free association with others. It is therefore the duty of the State to *defer* to families as regards the care, upbringing, welfare and wellbeing, education and training of their children. It is only in exceptional circumstances – for example of family breakdown or child endangerment -

that the State is justified in using its powers to intervene in family life with a view to protecting a child from *harm*.

4.18 Again these principles were acknowledged and applied by the UK Supreme Court in *Christian Institute v. Lord Advocate* [2016] UKSC 51 [2016] HRLR 1972 where the court observed as follows (at § 72):

> "72. As is well known, it is proper to look to international instruments, such as the UN Convention on the Rights of the Child 1989 ("UNCRC"), as aids to the interpretation of the ECHR. The Preamble to the UNCRC states:
>
> > "[T]he family, as the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."
>
> Many articles in the UNCRC acknowledge that it is the right and responsibility of parents to bring up their children. Thus
> - Article 3(2) UNCRC requires States Parties, in their actions to protect a child's wellbeing, to take into account the rights and duties of his or her parents or other individuals legally responsible for him or her;
> - Article 5 UNCRC requires States Parties to respect the responsibilities, rights and duties of parents or, where applicable, other family or community members or others legally responsible for the child to provide appropriate direction and guidance to the child in the exercise of his or her rights under the Convention;
> - Article 14(2) UNCRC makes similar provision in relation to the child's right to freedom of thought, conscience and religion;
> - Article 27(2) UNCRC emphasises that the parents have the primary responsibility to secure, within their abilities and financial capabilities, the conditions of living necessary for the child's development;
> - Article 18(1) UNCRC provides that:
>
> > "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be *their* basic concern." (Emphasis supplied.)
>
> - Articles 27(3) UNCRC and 18(2) UNCRC make it clear that the state's role is to assist the parents in carrying out their responsibilities, although Article 19(1) UNCRC requires the State also to take appropriate measures to protect the child from all forms of abuse or neglect.
>
> 73 This represents the detailed working out, for children, of the principle established in Article 16(3) of the Universal Declaration of Human Rights and Article 23(1) of the International Covenant on Civil and Political Rights that
>
> > "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state".
>
> There is an inextricable link between the protection of the family and the protection of fundamental freedoms in liberal democracies. The noble concept in art.1 of the Universal Declaration, that "all human beings are born free and equal in dignity and rights" is premised on difference. If we were all the same, we would not need to guarantee that individual differences should be respected."

The subsidiary role of the State in relation to parents as regards the *wellbeing* of children

4.19 The concern with these new proposed provisions to regulate homeschooling as set out in the Bill is that these proposed reforms appear to be predicated on the idea that the proper primary relationship that children will have for their wellbeing and development, nurturing and education is *with the State*, rather than within their families and with their parents.

4.20 Certainly, some of the measures set out in the homeschooling provisions of the Bill may well be of benefit for those children who are in positive need of State supervision and intervention to protect them from a real risk of serious harm in the absence of such State involvement. But the complaint about this proposed homeschooling registration system is precisely its over-breadth. The vast bulk of homeschooled children are not "vulnerable" to risk of <u>*harm*</u> such as to *need* such monitoring and supervision or "early intervention" by the State. The distinction between wellbeing and harm is made plain by Lord Templeman in *Re: KD (a minor ward) (Termination of access)* [1988] 1 AC 806 at page 812

> "The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature. Public authorities exercise a supervisory role and interfere to rescue a child when the parental tie is broken by abuse or separation. In terms of the English rule the court decides whether and to what extent the welfare of the child requires that the child shall be protected against harm caused by the parent."

4.21 But there is simply no evidence to suggest that all homeschooled children and their families require to be a particular focus of concern by the State. The vast bulk of homeschooled children receive if anything an education far superior to that provided by the State, and are fully and properly cared for, nurtured and protected by their parents.

4.22 While the State undoubtedly has a duty to safeguard children from the significant harm which they may suffer from neglect and ill-treatment in their own homes, it is not legitimate for the State to presume to stand *in loco parentis* when a child's parents are in place and fully able to nurture and support and make provision for the proper education of their own child. Parents – who are "in the overwhelming majority of cases the best judges of a child's welfare": *Gillick v. v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 per Lord Fraser 173 - may legitimately have quite different views on these issues and might properly object to the State's imposition of its views.

4.23 The State's views in relation to what constitutes a proper or suitable or sufficient education for children cannot – consistently with the fundamental rights constitutional principles outlined above - be given automatic precedence over the particular visions of individual families of what is required for the flourishing and well-being and suitable education of their children. Rather, they are to allow homeschooling parents, for and with their children, to realise their particular and shared common vision of the good life, in all its diversity and individuality.

4.24 By failing to distinguish the potentially legitimate aim of preventing harm to children from the illegitimate aim of imposing the State's view of wellbeing for children, the measure at issue may not constitute a proportionate interference in the fundamental rights of the families and children involved, and hence be Convention incompatible.

Homeschooling and the European Court of Human Rights

4.25 Article 2 of Protocol No. 1 to the European Convention of Human Rights ("A2P1 ECHR") is in the following terms:

> "**Right to education**
>
> [i] No person shall be denied the right to education.
> [ii] 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."

4.26 As regards the second sentence of A2P1 ECHR concerning the duty of the State *to "respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions*" the United Kingdom has accepted this right under express reservation which has been incorporated into UK law by Section 15(1)(a) and Part II of Schedule 3 to the Human Rights Act and is to the following effect:

> "the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom *only so far as compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure".*

4.27 The Strasbourg court takes a broad view of what constitutes education, the right to which is protected under and in terms of A2P1 ECHR, noting in one early case as follows:

> "33. .... [T]he education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development .... [and] 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.
> ...

40. ... Article 2 (P1-2) constitutes a whole that is dominated by its first sentence, the right set out in the second sentence being an adjunct of the fundamental right to education. [33] ....[T]here is also a substantial difference between the legal basis of the two claims, for one concerns a right of a parent and the other a right of a child. The issue arising under the first sentence is therefore not absorbed by the finding of a violation of the second.

41. The right to education guaranteed by the first sentence of Article 2 (P1-2) by its very nature calls for regulation by the State, *but such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols* [34]" [35]

4.28 In a raft of case law emanating from the European Court of Human Rights since about 2005 there has been an undoubted firming up of the approach to the A2P1 ECHR Convention right to an education as an individual subjective or personal right, rather than simply a general aspiration or aim in public law. As the Grand Chamber of the European Court of Human Rights noted in *Leyla Şahin v. Turkey* (2007) 44 EHRR 5 (Grand Chamber) at §§ 152-5:

"(a) General principles

152. The right to education, as set out in the first sentence of Article 2 of Protocol No. 1, guarantees everyone within the jurisdiction of the Contracting States "a right of access to educational institutions existing at a given time", but such access constitutes only a part of the right to education.

For that right "to be effective, it is further necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed". [36]

Similarly, implicit in the phrase "No person shall ..." is the principle of equality of treatment of all citizens in the exercise of their right to education.

153. The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, without distinction. [37]

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[33] See the above-mentioned *Kjeldsen, Busk Madsen and Pedersen* judgment, pp. 25-26, § 52

[34] See the judgment of 23 July 1968 on the merits of the *"Belgian Linguistic"* case, Series A no. 6, p. 32, § 5

[35] *Campbell and Cousans v. United Kingdom* (1982) 4 EHRR 293 at §§ 33, 40-1

[36] See the *Belgian linguistic case*, cited above, pp. 30-32, §§ 3-5; see also *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A no. 23, pp. 25-26, § 52

[37] See *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 58, § 27

154. In spite of its importance, this right is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State". [38]

Admittedly, the regulation of educational institutions may vary in time and in place, *inter alia*, according to the needs and resources of the community and the distinctive features of different levels of education. Consequently, the Contracting States enjoy a certain margin of appreciation in this sphere, although the final decision as to the observance of the Convention's requirements rests with the Court.

In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to Articles 8 to 11 of the Convention, it is not bound by an exhaustive list of "legitimate aims" under Article 2 of Protocol No. 1. [39] Furthermore, a limitation will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

155 Such restrictions must not conflict with other rights enshrined in the Convention and its Protocols either. [40] *The provisions of the Convention and its Protocols must be considered as a whole. Accordingly, the first sentence of Article 2 of Protocol No. 1 must, where appropriate, be read in the light in particular of Articles 8, 9 and 10 of the Convention*. [41]"

4.29 The Convention jurisprudence on the right to education has developed in line with the approach to the Convention as a "living instrument" so that it can no longer properly be said either that the Convention does not guarantee access to any particular educational institution, or that a breach of A2P1 ECHR requires evidence of a *systemic* failure of the national educational system as a whole resulting in the individual not having access to a minimum level of education. [42] Any such systemic/public law approach to the right to education under A2P1 ECHR was definitively abandoned by the European Court of Human Rights in *Mürsel Eren v. Turkey* where the Strasbourg Court held that right to education within the meaning of A2P1 ECHR was arbitrarily denied by a decision of the

[38] See the *Belgian linguistic case*, cited above, p. 32, § 5; see also, *mutatis mutandis*, *Golder*, cited above, pp. 18-19, § 38, and *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, § 65

[39] See, *mutatis mutandis*, *Podkolzina v. Latvia*, no. 46726/99, § 36, ECHR 2002-II

[40] See the *Belgian linguistic case*, cited above, p. 32, § 5; *Campbell and Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A no. 48, p. 19, § 41; and *Yanasik*, decision cited above

[41] See *Kjeldsen, Busk Madsen and Pedersen*, cited above, p. 26, § 52 *in fine*

[42] *Simpson v United Kingdom* (1989) 64 DR 188 where the Commission also held that had held that Article 6 ECHR was inapplicable to proceedings concerning the laws on education. In particular, it had found that "the right not to be denied elementary education" fell within the domain of public law, since it had no private law analogy and no repercussions on private rights or obligations.

authorities to declare his university entrance exam results a nullity on the basis that, given his poor results in the previous years, his excellent achievement could not be explained.[43] Thus, the Court there held that if the State fails to ensure to an individual "effective access to such educational facilities as the state provides for such pupils" this may constitute a breach of A2P1 ECHR [44] whether such exclusion from the education system is a result of an act which is unlawful in domestic law,[45] or on the application of an *ex facie* valid and lawful domestic policy regarding the placement of children in special school. [46]

4.30 Despite the reference in A2P1 ECHR to the obligation on the State, in the exercise of any functions which it assumes in relation to education and to teaching, to respect the right of parents to ensure such education and teaching in conformity with those parents' own

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[43] *Mürsel Eren v. Turkey* (2007) 44 EHRR 28. The dissenting judgment of Judge Popovic is of interest in showing the extent to which this decision was a development of the previous case law of the Strasbourg court in stating:

> "The majority of judges have found a violation of Art 2 of Protocol No 1 of the Convention in this case. Much to my regret I could not follow the majority for the sake of reasons stated below.
>
> To my mind, the case concerns three different aspects, which might be labelled as the scope of the right to education (1); a right to be admitted (2); and the setting and planning within the educational system, together with questions of expediency (3).
>
> (1) Scope of the right to education
>
> The rule in the *Belgian Linguistic Case*, § 3) determines the scope of the right to education within the meaning of the first sentence of Art 2 of Protocol No 1 of the Convention. It provides to persons subject to the jurisdiction of the Contracting Parties 'the right, in principle, to avail themselves of the means of instruction existing at a given time'.
>
> The applicant was admitted to the Turkish system of education. He did not complain about its rules and it is therefore clear that he had to submit himself to the rules applicable within the educational system, as far as admission to universities is concerned."

[44] *Eren v Turkey* (2007) 44 EHRR 28

[45] *Timishev v Russia* (2007) 44 EHRR 37

[46] See *DH v Czech Republic* (2008) 47 EHRR 3 (Grand Chamber) which concerned the placement of children in special school which, however, resulted in Roma children being isolated from pupils from the wider population and educated to a more basic curriculum than was followed in ordinary schools, resulting in their receiving "an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems". See similarly *Oršuš and Others v. Croatia* (2011) 52 EHRR 7 (Grand Chamber) at paragraphs 106:

> "106. As to the present case, it seems clear that a "dispute" arose in respect of the applicants' initial and then continuing placement in Roma-only classes during their schooling in primary schools. The proceedings before the domestic courts concerned the applicants' allegations of infringement of their right not to be discriminated against in the sphere of education, their right to education and their right not to be subjected to inhuman and degrading treatment. The applicants raised their complaints before the regular civil courts and in the Constitutional Court and their complaints were examined on the merits."

religious and philosophical convictions, the position of the Strasbourg Court has been that parental rights over the education of children only operate when States attempt to indoctrinate minors through the school programme—thus breaching the right to education—but not when "the curriculum is conveyed in an objective, critical and pluralistic manner". Thus in *Lautsi v. Italy* the Strasbourg Grand Chamber - in overturning a finding of a Chamber of the European Court that the hanging of crucifixes on the walls of the classrooms of State run schools violated the right of parents to educate their children in conformity with their own religious and philosophical convictions, and the right of their children to believe or not to believe - observed that:

> "59. ... [I]n the area of education and teaching art.2 of Protocol No.1 is in principle the *lex specialis* in relation to art.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 art.2 to respect, when exercising the functions they assume in that area, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions (see *Folgerø v Norway* (2008) 46 EHRR 47 at [84]). The complaint in question should therefore be examined mainly from the standpoint of the second sentence of art.2 of Protocol No.1 (See also *Appel-Irrgang v Germany* (45216/07) October 6, 2009).
>
> 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 art.9 of the Convention, (see, for example, *Folgerø* (2008) 46 EHRR 47 at [84]) 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. (31 See, for example, *Şahin v Turkey* (2007) 44 EHRR 5 at [107]). That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs.
>
> 61 The word "respect" in art.2 of Protocol No.1 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 (see *Campbell* (1982) 4 EHRR 293 at [37]). Nevertheless, the requirements of the notion of "respect", which appears also in art.8 of the Convention, vary considerably from case to case, given the diversity of the 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. (See *Bulski v Poland* (46254/99 and 31888/02) November 30, 2004.)
>
> 62 The Court would also refer to its case law on the place of religion in the school curriculum. (see essentially *Kjeldsen v Denmark* (1979–80) 1 EHRR 711 at [50]–[53]; *Folgerø* (2008) 46 E.H.R.R. 47 at [84]; and *Zengin v Turkey* (2008) 46 E.H.R.R. 44 at [51] and [52].) According to those authorities, the setting and planning of the curriculum fall within the competence of the contracting states. In principle it is not for the Court to rule on such questions, as the solutions 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.

On the other hand, as its aim is to safeguard the possibility of pluralism in education, it requires the state, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism.

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 the states must not exceed." [47]

4.31 What A2P1 ECHR does *not* protect is any Convention right of parents to withdraw their children from the education otherwise provided by the State in order to homeschool their children "in conformity with their own religious and philosophical convictions". In Konrad v. Germany (2007) 44 EHRR SE8 the Strasbourg Court rejected as inadmissible a complaint about the fact that full time homeschooling was not permitted under German law. The Court observed as follows:

"A2P1 ECHR implies the possibility for the State to establish compulsory schooling, be it in State schools or private tuition of a satisfactory standard. The Court observes in this respect that there appears to be no consensus among the contracting states with regard to compulsory attendance of primary schools. While some countries permit home education, other States provide for compulsory attendance of its State or private schools. ....[T]he integration into and first experience with society are important goals in primary school education. The German courts found that those objectives cannot be equally met by home education even if it allowed children to acquire the same standard of knowledge as provided for by primary school education. The Court considers this presumption as not being erroneous and as falling within the Contracting States' margin of appreciation which they enjoy in setting up and interpreting rules for their education systems. The Federal Constitutional Court stressed the general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society. The Court regards this as being in accordance with its own case law on the importance of pluralism for democracy: see, *mutatis mutandis*, *Refah Partisi (The Welfare Party) v Turkey* (2002) 35 EHRR 3 at [89]).

Moreover, the German courts have pointed to the fact that the applicant parents were free to educate their children after school and at weekends. Therefore, the parent's right to education in conformity with their religious convictions is not restricted in a disproportionate manner. The compulsory primary school attendance does not deprive the applicant parents of their right to "exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions"

[47] *Lautsi v. Italy* (2012) 54 EHRR 3 (18 March 2011)

4.32 In an academic article published in 2014 the carrying approach taken by European countries to the question of whether or not to permit (and if so to regulate) homeschooling by parents of school-age children was noted as follows:

> "whereas in North America homeschooling is legal both in the United States and Canada, the picture is significantly less uniform in Europe, as different educational sensitivities have shaped quite unique national legal frameworks.
>
> There are several countries where home education enjoys constitutional coverage—Ireland, Denmark, and Finland—and others such as Germany where non-institutional instruction is prohibited and punished; some countries, including the United Kingdom, Austria, Belgium, France, Italy, and Portugal, have opted for a statutory regulation of home education, whereas in several others—Bulgaria, Croatia, Greece, the Netherlands, or Romania—the law remains silent on the subject.
>
> Finally, there are other European countries where recent modifications to education statutes have significantly changed their approach towards out-of-school teaching—in Sweden, a country which had been relatively open to homeschooling, new legislation has *de facto* banned non-institutional education, whereas young eastern European democracies like the Czech Republic, Hungary, Poland, Slovenia, and Russia have rapidly legalized different forms of out-of-school instruction." [48]

4.33 Article 8(1) ECHR specifies that "everyone has the right to respect for his private and family life, his home and his correspondence". Yet the Convention right to respect for private and family life under Article 8 ECHR has not provided any stronger basis for founding any free-standing Convention right to homeschooling. In *Wunderlich v Germany* (18925/15 – 10 January 2018) [2019] ELR 149 the European Court of Human Rights was faced with an application by the parents of four children who had decided to homeschool their children despite the requirement under German law for compulsory school attendance. Although they had paid the fines pertaining to their failure to comply with rules on compulsory school attendance, the applicants continued to homeschool their children, all of different ages. The German authorities took further enforcement action against the parents in the form of making an order partially withdrawing parental authority and transferring those rights to the youth office, and then placing the children in a children's home for three weeks. The applicants argued that the German authorities had thereby unjustifiably interfered with the family's Article 8 ECHR Convention right to respect for private and family life. This interference, they argued, failed a proportionality test as it did not pursue a legitimate aim and was not necessary in a democratic society.

[48] María J. Valero Estarellas **"**The Long Way Home: Recent Developments in the Spanish Case Law on Home Education" (2014) 3 *Oxford Journal of Law and Religion* 127-151 at 128-129

The Court disagreed. In rejecting this complaint the Court observed as follows (at §§ 42, 51, 52):

> "42. … While the prohibition of home-schooling in Germany is an underlying issue of this complaint, the Court observes that it has already decided upon the compatibility of this prohibition with the Convention – in particular Art 8 and Art 2 of Protocol No 1 – before (see, for example, *Konrad v Germany* [2007] ELR 435; *Dojan and Others v Germany* 2011) 53 EHRR SE24 [2011] ELR 511; and *Leuffen v Germany* 9 July 1992) and that the respective part of the application has already been declared inadmissible (see § 4 above).
>
> …
>
> 51. The Court finds that the enforcement of compulsory school attendance, to prevent social isolation of the applicants' children and ensure their integration into society, was a relevant reason for justifying the partial withdrawal of parental authority. It further finds that the domestic authorities reasonably assumed – based on the information available to them – that children were endangered by the applicants by not sending them to school and keeping them in a 'symbiotic' family system.
>
> 52. Insofar as the applicants submitted that the learning assessment taken by the children had shown that the children had had sufficient knowledge, social skills and a loving relationship with their parents, the Court notes that this information was not available to the youth office and the courts when they decided upon the temporary and partial withdrawal of parental authority and the taking of the children into care.
>
> In contrast, having regard to the statements of, in particular, Mr Wunderlich – for example that he considered children to be the 'property' of their parents – and on the information available at the time, the authorities reasonably assumed that the children were isolated, had no contact with anyone outside of the family and that a risk to their physical integrity existed (see §§ [10], [18] and [23] above). The Court also reiterates that even mistaken judgments or assessments by professionals do not *per se* render childcare measures incompatible with the requirements of Article 8 ECHR.
>
> The authorities – both medical and social – have a duty to protect children and cannot be held liable every time genuine and reasonably held concerns about the safety of children *vis-à-vis* members of their families are proved, retrospectively, to have been misguided (see *RK and AK v United Kingdom* (Application No 38000/05) 30 September 2008, § 36). The Court would also add that the unavailability of this information was based on the applicants' resistance to have the learning assessment conducted prior to the removal of the children.
>
> …
>
> 55 … It [the court] notes that the children were returned to their parents after the learning assessment had been conducted and the applicants had agreed to send their children to school. The court therefore concludes that the actual removal of the children did not last any longer than necessary in the children's best interest and was also not implemented in a way which was particularly harsh or exceptional."

Bases for potential Convention rights challenges to the proposed new homeschooling regime of regulation

4.34 In the present case the proposed legislative changes set out in the Bill do *not* seek to replicate the situation in Germany and remove the current rights of parents to withdraw their children from any education in school and make arrangements, in its stead, for their full-time homeschooling education. The Bill only seeks to impose further conditions on the existing right of parents to homeschool their children.

4.35 The basic principles of the proposed regulation of homeschooling provisions contained in the current Bill which raises concerns as to their fundamental rights compatibility concern this use of the *coercive* powers of the State over and against the family. These include the following matters:

(1) the compulsory nature of the registration provisions for *all* homeschooled children, even in cases where there are simply no welfare concerns about the children or families involved;

(2) the proportionality of the measures requiring, under threat of criminal sanction, the provision to local authorities of significant and non-anonymised data on homeschooled children, their parents, and all and any non-parents involved in the provision of education activities to them;

(3) the collation and recording and use which might be made of this data required under compulsion, as well as of such further data and information concerning homeschoolers and the individual homeschooled child which the local authority decided to place on its register;

(4) the local authority's "monitoring" of the homeschooled child (simply because they are homeschooled) and the presumption of its right to share with other State agencies such data collated by it on the homeschooled and home schoolers.

4.36 The proposed treatment under the Bill of those who homeschool may be contrasted and unfavourably compared (in terms of restrictions and intrusions on the general liberties and rights of homeschooling parents and their homeschooled children) to the treatment of those parents who choose not to homeschool their children. Such differential treatment between these two classes of parents in principle falls within the ambit of Article 14 ECHR and therefore requires to be shown to be "justified" (which is to say to conform to the Convention principle of proportionality) in order to be Convention compatible.

4.37 Following the analysis set out in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 38 [2013] UKSC 39 [2014] 1 AC 700 (Lord Sumption at § 20 and Lord Reed § 74) the following four-step analysis – which involves "exacting analysis of the factual case advanced in defence of the measure" – must be followed in order to determine a measure's proportionality:

(i) whether its objective is sufficiently important to justify the limitation of a fundamental right;
(ii) whether it is rationally connected to the objective;
(iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
(iv) whether the impact of the rights infringement on individuals is disproportionate to the likely benefit of the impugned measure to the interests of the community.

Bill's proposed regulation of homeschooling falling within the ambit of substantive civil rights protected under ECHR

4.38 As we have seen, the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions is an express right under A2P1 ECHR. Although the case law of the European Court of Human Rights has to date been to the effect that this does *not* enshrine a right for parents to homeschool their children the fact is that once a State such as the UK has chosen to allow for the possibility of such homeschooling under its domestic law then the fundamental rights nature of the parent's homeschooling under reference to Article 8 ECHR and to A2P1 ECHR can be prayed in aid. As Sir Thomas Etherton MR explained in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916 [2018] QB 804 at § 42:

> "It is also well established and common ground that, even where the state is under no obligation to provide a particular measure in order to comply with its obligations under article 8 ECHR, if it does provide a particular measure which does fall within the ambit of article 8 ECHR, it must provide the measure without discrimination in compliance with article 14 ECHR. There are numerous Strasbourg authorities to that effect, in which the positive measure is described as a 'modality' of the right conferred by the substantive provision of the Convention …"

4.39 And this is consistent with the line of case law exemplified in the decision of the Strasbourg Court in *Savez Crkava "Rijec Zivota" v. Croatia* (2012) 54 EHRR 36 §§ 56 and 58.:

> "[T]he Convention, including Article 9(1) ECHR, cannot be interpreted so as to *impose* an obligation on states to have the effects of religious marriages recognised as equal to

those of civil marriages. [49] .. . It also notes that Croatia allows certain religious communities to provide religious education in public schools and nurseries and recognises religious marriages performed by them.

The Court reiterates in this connection that the prohibition of discrimination enshrined in article 14 ECHR applies also to those additional rights, falling within the wider ambit of any Convention article, for which the state has voluntarily decided to provide. Consequently, the state, which has gone beyond its obligations under Article 9 ECHR in creating such rights cannot, in the application of those rights, take discriminatory measures within the meaning of article 14 ECHR".

4.40 Equally the UK state authorities - which has gone beyond its obligations under Article 8 ECHR and A2P1 ECHR by recognising under domestic UK law rights of homeschooling - is obliged under Article 14 (absent an objective and reasonable justification) to treat persons in similar situations in the same way [50] and to treat unlike cases differently, since a failure to make a distinction in the way in which situations which are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 ECHR.[51] Separately when State authorities are acting within the ambit of Convention

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[49] See *X v. Germany*, n. 6167/73, judgment of 18th December 1974; *Khan v. United Kingdom*, n. 11579/85, judgment of 7th July 1986; *Spetz v. Sweden*, n. 20402/92, judgment of 12th October 1994; and *Serife Yigit v. Turkey*, n. 3976/05, judgment of 2nd November 2010, §. 102.

[50] See *Pasquinelli v. San Marino* (2025) 80 EHRR 8 at §§ 123-124:

"123 The notion of discrimination prohibited by both Article 14 ECHR and Article 1 of Protocol No. 12 is to be interpreted in the same manner, namely, "discrimination" means treating differently, without an objective and reasonable justification, persons in similar situations

124 Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another. It lists specific grounds which constitute "status" including, *inter alia*, sex, race and property. However, the list set out in Article 14 ECHR is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") and the inclusion in the list of the phrase "any other status" (in French "*toute autre situation*"). The words "other status" have generally been given a wide meaning and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent."

[51] See *M.F. v. Hungary* [2017] ECtHR 45855/12 (Fourth Section, 31 October 2017) where the Strasbourg noted at §§ 67, 73 (emphasis added):

"65. *Discrimination is treating differently, without an objective and reasonable justification, persons in relevantly similar situations. Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction.* It is for this reason that *the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment*

...

73. ... [W]hen investigating violent incidents triggered by suspected racist attitudes, the State authorities are required to take all reasonable action to ascertain whether there were racist motives and to establish whether feelings of hatred or prejudices based on a person's ethnic origin played a role in the events. *Treating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights. A failure to make a distinction in the way in which situations which are essentially*

rights they are bound by democratic constitutional general principles, such as subsidiarity, proportionality and the requirement of acting in accordance with law, which are implicit within and imbue the framework of the ECHR.

The Convention principle of legality

4.41 In *Gillan v United Kingdom* (2010) 50 EHRR 1105 the Strasbourg Court confirmed (at §§ 76-77) that in order to comply with the Convention principle of "legality" domestic law must provide legal protection against "arbitrary interferences by public authorities with the rights safeguarded by the Convention". It is Convention incompatible for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Instead domestic law "must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise". This line of case law was reaffirmed in *MK v. Ukraine* [2022] ECtHR 24867/13 (Fifth Section, 15 September 2022) where the Strasbourg court observed (at §§ 36-37, 39-41, 47-51:

> 36. Any interference with an individual's Article 8 rights can only be justified under Article 8 § 2 if it is in accordance with the law, pursues one or more of the legitimate aims to which that paragraph refers and is necessary in a democratic society in order to achieve any such aim. [52]
>
> 37. The wording "in accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8 ECHR.
>
> *The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his or her conduct.* [53]
>
> *The foreseeability requirement also means giving individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention.* [54]

4.42 In *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2014] UKSC 35 [2015] AC 49 Lord Reed also observed (at § 114) that to satisfy the Convention test of legality there must be sufficient safeguards in place to demonstrate that the State has properly addressed the issue of the proportionality of any interference to enable it to be examined in a particular instance. And Lord Reed's opinion in *R(T) v. Home*

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different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention."

[52] See *Azer Ahmadov v. Azerbaijan*, no. 3409/10, § 63, 22 July 2021

[53] See *S. and Marper v. the United Kingdom* (2009) 48 EHRR 50 (Grand Chamber) at § 95

[54] see *Fernández Martínez v. Spain* (2015) 60 EHRR 3 (Grand Chamber) at § 117

Secretary makes clear (at § 115) the issue of respect for the Convention principle of legality in "not a matter in relation to which the court allows national authorities a margin of appreciation". Being "in accordance with law" requires that domestic law not only be accessible but clear and "sufficiently precise to enable the individual to foresee the consequences" and to be in a position to be able to identify and challenge abuse or actions in excess of the powers conferred upon the State functionary. Similarly, in *R (Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79 [2016] 1 WLR 210 where Baroness Hale and Lord Reed noted at § 3:

> "[T]he Convention concept of legality entails more than mere compliance with the domestic law. It requires that the law be compatible with the rule of law. This means that it must be sufficiently accessible and foreseeable for the individual to regulate his conduct accordingly. More importantly in this case, there must be sufficient safeguards against the risk that it will be used in an arbitrary or discriminatory manner. As Lord Kerr of Tonaghmore JSC put it in *Beghal v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2016] AC 88 § 93,
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> > 'The opportunity to exercise a coercive power in an arbitrary or discriminatory fashion is antithetical to its legality' in this sense.'"

Proportionality and ab ante challenges to legislative schemes

4.43 In *Re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 Lord Nicholls (at § 87) accepted that the courts can consider a fundamental rights compatibility challenge in relation to the very scheme of general legislation on the basis that there is "inconsistency with a basic principle of a statute, as distinct from inconsistency with express provisions within the statute".

4.44 In Case C-439/19 *B v. Latvia* EU:C:2021:504 [2022] 1 CMLR 9 the CJEU Grand Chamber observed (at § 105) that:

> "[T]he fundamental rights to respect for private life and to the protection of personal data are not absolute rights, but must be considered in relation to their function in society and be weighed against other fundamental rights. Limitations may therefore be imposed, so long as, in accordance with art.52(1) of the Charter, they are provided for by law, respect the essence of the fundamental rights and observe the principle of proportionality.
>
> Under the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. They must apply only insofar as is strictly necessary and the legislation which entails the interference must lay down clear and precise rules governing the scope and application of the measure in question."

4.45 But as was noted in *Christian Institute v. Lord Advocate* [2016] UKSC 51 [2016] HRLR 19 at § 88:

> "[A]n *ab ante* challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with article 8 ECHR rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights." [55]

Data protection and Article 8 ECHR

4.46 In *LB v. Hungary* (2023) 77 EHRR 1 the Strasbourg Grand Chamber held that the publication, pursuant to legislation passed by the Hungarian Parliament, of the applicant's personal data by the Tax Authority in connection with the fact that he had failed to fulfil his tax payment obligations, infringed his right to respect for private life under Article 8 ECHR. The judgment of the Grand Chamber usefully reiterated some general principles about the interplay between data protection obligations and individuals right to respect for their private life (at §§ 103):

> "103 The Court notes that the right to protection of personal data is guaranteed by the right to respect for private life under Article 8 ECHR.
>
> As it has previously held, the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 ECHR. Article 8 ECHR thus provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such a form or manner that their Article 8 ECHR rights may be engaged.
>
> In determining whether the personal information retained by the authorities involves any private-life aspects, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained."

4.47 The court in *LB v. Hungary* then notes (at § 123):

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[55] See to similar effect *R (Joint Council for the Welfare of Immigrants) v. Home Secretary* [2020] EWCA Civ 542 [2021] 1 WLR 1151 per Hickinbottom LJ at §§ 116, 118:

> "116. … [T]his claim was not brought by any individual claiming that he or she has been the victim of discrimination as a result of the operation of the Scheme. Rather, it is a challenge to the validity of the statutory provisions themselves. Sir James submitted that a challenge to a legislative measure has to be distinguished from the operation of that measure in individual cases.
>
> …
>
> 118. .. [L]egislation will not be unjustified (and, so, not unlawful) unless it is incapable of being operated in a proportionate way in all or nearly all cases."

"[W]hen assessing the processing of personal data under Article 8 ECHR, the Court has frequently had regard to the principles contained in data protection law. These have included:

(α) *The principle of purpose limitation* (Article 5 (b) of the Data Protection Convention), according to which any processing of personal data must be done for a specific, well-defined purpose and only for additional purposes that are compatible with the original purpose. Thus, in some instances the Court has found that broad entitlement allowing the disclosure and use of personal data for purposes unrelated to the original purpose of their collection constituted a disproportionate interference with the applicant's right to respect for private life.

(β) *The principle of data minimisation* (Article 5 (c) of the Data Protection Convention), according to which personal data should be adequate, relevant and limited to what is *necessary* in relation to the purposes for which they are processed, and the excessive and superfluous disclosure of sensitive private details not related to the purported aim of informing the public is not justified.

(γ) *The principle of data accuracy* (Article 5 (d) of the Data Protection Convention). The Court has emphasised that the inaccurate or false nature of the information contained in public registers can be injurious or potentially damaging to the data subject's reputation, requiring statutory procedural safeguards for the correction and revision of the information.

(δ) *The principle of storage limitation* (Article 5 (e) of the Data Protection Convention), according to which personal data are to be kept in a form which permits identification of data subjects for no longer than is *necessary* for the purposes for which the data are processed. The Court has held that the initially lawful processing of accurate data may over time become incompatible with the requirements of Article 8 where those data are no longer necessary in the light of the purposes for which they were collected or published."

4.48 The judgment of the Strasbourg Grand Chamber is here referring to and endorsing, within the context of the protections afforded by Article 8 ECHR, the general principles already set out in the Council of Europe Data Protection Convention 1981, which provides that personal data under reference to which a person may be identified must be:

(a) obtained and processed fairly and lawfully;
(b) stored for specified and legitimate purposes, and not used in a way incompatible with those purposes;
(c) adequate, relevant and not excessive in relation to the purposes for which they are stored;
(d) accurate and, where necessary, kept up to date; and
(e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

4.49 Consistently with this last mentioned principle of "storage limitation" in *Hurbain v Belgium* (2023) 77 EHRR 34, the European Court of Human Rights confirmed that Convention compatibility of this "right to be forgotten" as originally developed in EU law [56] in holding there to be no breach of the free expression rights guaranteed under Article 10 ECHR (which has its parallel in article 11 of the EU Charter of Fundamental Rights[1]) for a newspaper to be required to anonymise a website article about a doctor whose conviction for causing death by driving was spent.

4.50 Finally, on the issue of whether such Article 8 ECHR considerations could be prayed in aid in relation to general legislation passed by a parliament, the Strasbourg Grand Chamber in *LB v. Hungary* observed as follows:

> "125 … [T]he Court has repeatedly held that the choices made by the legislature are not beyond its scrutiny and has assessed the quality of the parliamentary and judicial review of the necessity of a particular measure. It has considered it relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess. A general measure has also been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay as well as of discrimination and arbitrariness. The application of the general measure to the facts of the case remains, however, illustrative

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[56] The "right of data erasure (right to be forgotten)" was first established as a matter of EU law by the CJEU Grand Chamber in Case C-131/12 *Google Spain v AEPD* EU:C:2013:424 [2014] QB 1022. In Case C-131/12 *Google Spain* the CJEU held that the processing of personal data may be incompatible with the then applicable Data Protection Directive 95/46/EC not only because the data are inaccurate but, in particular, also because "they are inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes" (paragraph 92). The CJEU confirmed in Case C-131/12 *Google Spain* that there was thus a fundamental right to be forgotten, such that *still accurate* but aging data no longer should be so readily publicly available in relation to an individual. The Grand Chamber noted at §§93-7 (emphases added):

> "93 .. [E]ven initially lawful processing of accurate data may, *in the course of time*, become incompatible with the Directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, *or excessive in relation to those purposes and in the light of the time that has elapsed*.
>
> 94 Therefore, if it is found, following a request by the data subject pursuant to article 12(b) of Directive 95/46, that the inclusion in the list …. containing true information relating to him personally is, at this point in time, incompatible with article 6(1)(c) to (e) of the Directive because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue …. the information and links concerned in the list of results *must* be erased….
>
> 95…..[I]t must be pointed out that in each case the processing of personal data must be authorised under article 7 for the entire period during which it is carried out….
>
> 96. … [I]t is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject.
>
> 97 ..[T]he data subject may, in the light of his fundamental rights under articles 7 and 8 of the Charter, request that the information in question no longer be made available…"

of its impact in practice and is thus material to its proportionality. *It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State or the public generally and those directly affected by the legislative choices.*

126 The central question as regards such measures is not whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the impugned measure, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it."

4.51 The necessity for there to be effective safeguards against abuse of the possibility of the sharing of personal data among public authorities is also underlined by the Strasbourg Court in a child protection context in *KT v. Norway* (2009) 4 EHRR 4 as follows:

"69. … [T]he Court observes that the applicant, led by his lawyer, refused to co-operate with the child welfare services in this respect.

It cannot be said that by obtaining information from the general practitioner of the applicant and his sons, the sons' respective school and kindergarten and the police, the child welfare services failed to strike a proper balance between the applicant's interest in maintaining the *confidentiality* of certain personal data and the best interests of the children.

The disclosure of information to the child welfare authorities [1] was of limited nature, [2] was subject to a duty on their part to maintain the confidentiality of the information and [3] was notified to the applicant; *it was thus accompanied by effective and adequate safeguards against abuse.*"

Continued post-Brexit relevance of CJEU jurisprudence via ECHR

4.52 In its judgment in *LB v. Hungary* the Strasbourg Court also made extensive reference to the case law of the Court of Justice of the European Union (CJEU) which in many way parallels and echoes and reinforces the approach adopted by the European Court of Human Rights in this area.

4.53 In Joined Cases C-92/09 & C-93/09 *Volker und Markus Schecke GbR* [2010] ECR I-11063 the CJEU noted (§ 52) that:

"the right to respect for private life with regard to the processing of personal data, recognised by articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual . . . and the limitations which may lawfully be imposed on the right to protection of personal data correspond to those tolerated in relation to article 8 ECHR."

4.54 In Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* ECLI:EU:C:2014:238 [2015] QB 127 the Grand Chamber CJEU noted (at §32) that the retention of data for the purpose of possible access to them by the competent national authorities "*derogates from the system of protection of the right to privacy*" established under EU law (specifically the Electronic Communications Directives 95/46 and 2002/58). Moreover, the CJEU observed (at §33) - with reference to its previous judgment in Joined Cases C-465/00 & C-138,9/01 *Rechnungshof v Österreichischer Rundfunk* [2003] ECR I-4989 at § 75 - that an interference with privacy is constituted irrespective of *"whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way"*. At §37 the CJEU emphasized that the fact that "*data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance*". The CJEU also emphasized that the judicial review of the EU legislature's discretion "*should be strict*" because of "*the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by the Data Retention Directive 2006/24*": §48. In addition, the CJEU emphasized that even highly important objectives such as the fight against serious crime and terrorism cannot justify measures which lead to forms of interference that go beyond what is "*strictly necessary*": §51. The CJEU concluded (at §54) that it was a condition of the lawfulness of this data retention legislation that it *"lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data."* [57]

[57] In *R. (Davis) v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin)[2016] 1 CMLR 13 a Divisional Court (Bean LJ, Collins J) held that Section 1 of The Data Retention and Investigatory Powers Act 2014 was inconsistent with EU law and invalid in so far as it did not lay down clear and precise rules providing for access to and use of communications data retained pursuant to a retention notice to be strictly restricted to the purpose of preventing and detecting precisely defined serious offences or of conducting criminal prosecutions relating to such offences, and access to the data was not made dependent on a prior review by a court or an independent administrative body whose decision limited access to and use of the data to what was strictly necessary for the purpose of attaining the objective pursued. The Court of Appeal then referred the case to the CJEU asking whether the CJEU in *Digital Rights Ireland* intended to lay down a list of new mandatory requirements of EU law with which the national legislation of Member States must comply and separately whether in that case the CJEU intended to expand the effect of Articles 7 and/or 8 of EU Charter beyond the effect of Article 8 ECHR as established to date in the jurisprudence of the ECtHR. The response of the CJEU to this preliminary reference is reported as Joined Cases C-203/15 and C-698/15 *Tele 2 Sverige AB and others* EU:C:2016:572, EU:C:2016:970 [2017] QB 771. The CJEU held that article 15(1) of Directive 2002/58, read in the light of articles 7, 8, 11 and 52(1) of the Charter precluded national legislation, such as the United Kingdom provisions, governing the protection and security of traffic and location data and, in particular, access of the national authorities to the retained data, where the objective pursued by that

4.55 In Case C-362/14 *Schrems v Data Protection Commissioner* EU:C:2015:650 the CJEU Grand Chamber confirmed that legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by article 7 of the Charter. The CJEU also ruled that Commission Decision 2000/520 (that the United States ensured an adequate level of protection of the personal data transferred there from the EU) made no reference to the existence of effective legal protection against unlawful interference and that this did not respect the essence of the fundamental right to effective judicial protection as enshrined in article 47 of the Charter. It followed that Decision 2000/520 had to be declared invalid. The CJEU noted (at §95):

> "95. … [EU secondary] legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter.
>
> The first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.
>
> The very existence of effective judicial review designed to ensure compliance with *provisions of EU law is inherent in the existence of the rule of law."*

UK GDPR and fundamental rights considerations

4.56 The objectives pursued by the General Data Protection Regulation (EU) 2016/679) (the "EU GDPR") appear, in particular, from Article 1 GDPR and the terms of it recitals (1) and (10), [58] which refer to ensuring a high level of protection with regard to the fundamental right of natural persons to the protection of personal data concerning them, as enshrined in Article 8(1) of the EU Charter of Fundamental Rights ("CFR") [59] and in

access, in the context of fighting crime, was not restricted solely to fighting serious crime, where access was not subject to prior review by a court or an independent administrative authority, and where there was no requirement that the data concerned should be retained within the European Union.

[58] See Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net v Premier ministre* EU:C:2020:791 [2021] 1 WLR 4457 at § 207 and Case C-319/20 *Meta Platforms Ireland Ltd (formerly Facebook Ireland Ltd) v Bundesverband der Verbraucherzentralen und Verbraucherverbände—Verbraucherzentrale Bundesverband eV* EU:C:2022:322 [2022] 4 WLR 69 at § 73.

[59] Article 8(1) CFR provides as follows:

> "Everyone has the right to the protection of personal data concerning him or her."

Article 16(1) of the Treaty on the Functioning of the European Union ("TFEU"). [60] The limitations which may lawfully be imposed as a matter of EU law on this right to the protection of personal data correspond to those tolerated under the case law of the European Court of Human Rights in relation to Article 8 ECHR.[61]

4.57 Similarly, the provisions of the UK GDPR - which apply to the issue of the protection of "personal data" such as is contained in the proposed register on home education – have equally to be interpreted and applied in accordance with the requirements of fundamental rights.

4.58 It is to be noted that these principles in the Council of Europe Data Protection Convention 1981 (which the Strasbourg Grand Chamber referred to and relied upon in its judgment in *LB v. Hungary*) are then echoed and built upon and expressly incorporated into (EU and UK law) law by the GDPR which in Article 5 GDPR provides as follows:

> **"Article 5 Principles relating to processing of personal data**
> 1. Personal data shall be:
>
> (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');
>
> (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), [62] not be considered to be incompatible with the initial purposes ('purpose limitation');

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[60] Article 16(1) TFEU provides as follows:
"1. Everyone has the right to the protection of personal data concerning them."

[61] See Joined Cases C-92/09 & C-93/09 *Volker und Markus Schecke GbR v Land Hessen* [2010] ECR I-11063 at § 52.

[62] Article 89 of the UK GDPR is in the following terms:
Article 89 Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes
"1. Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, shall be subject to appropriate safeguards, in accordance with this Regulation, for the rights and freedoms of the data subject. Those safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation. Those measures may include pseudonymisation provided that those purposes can be fulfilled in that manner. Where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner.

1A. In the Data Protection Act 2018, section 19 makes provision about when the requirements in paragraph 1 are satisfied."

(c) adequate, relevant and limited to what is *necessary* in relation to the purposes for which they are processed ('data minimisation');

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');

(e) kept in a form which permits identification of data subjects for no longer than is *necessary* for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');

(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability')."

4.59 Further Article 6 UK GDPR provides as follows:

Article 6 Lawfulness of processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is *necessary* for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is *necessary* for compliance with a legal obligation to which the controller is subject;

(d) processing is *necessary* in order to protect the vital interests of the data subject or of another natural person;

(e) processing is *necessary* for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is *necessary* for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall *not* apply to processing carried out by public authorities in the performance of their tasks.

The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by domestic law.

The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia:

- the general conditions governing the lawfulness of processing by the controller;
- the types of data which are subject to the processing;
- the data subjects concerned;
- the entities to, and the purposes for which, the personal data may be disclosed;
- the purpose limitation;
- storage periods; and
- processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX.

The domestic law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.

4.60 In Case C-439/19 *B v. Latvia* EU:C:2021:504 (CJEU Grand Chamber, 22 June 2021) [2022] 1 CMLR 9 the Luxembourg Grand Chamber confirmed (at § 96) that

> "96 All processing of personal data must comply, first, with the principles relating to processing of data set out in art.5 of the GDPR and, secondly, with one of the principles relating to lawfulness of processing listed in art.6 of that regulation"

4.61 In terms of compliance with the principles set out in Regulation 6 UK GDPR (which are all predicated on the processing being "necessary") in *Christian Institute v. Lord Advocate* [2016] UKSC 51 [2016] HRLR 19 the UK Supreme Court made the following apposite observation (at § 56) on the concept of necessity within the context of duties of data protection and powers of data disclosure or dissemination

> "The meaning of "necessary" was considered by this court in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55 [2013] 1 WLR 2421 As was explained there at [25]–[27], it is an expression whose meaning depends on the context in which it falls to be applied.
>
> Where the disclosure of information constitutes an interference with rights protected by Article 8 ECHR, as in the present context (as explained at [75]-[77] below), the requirement that disclosure is "necessary" forms part of a proportionality test: the disclosure must involve the least interference with the right to respect for private and family life which is required for the achievement of the legitimate aim pursued.
>
> Disclosure where the data processor considers that the information is likely to be relevant cannot be regarded as necessary if the legitimate aim could be achieved by something less.
>
> It cannot be "necessary", in that sense, to disclose information merely on the ground that it is objectively relevant, let alone on the ground that a particular body considers that it is likely to be relevant.
>
> Relevance is a relatively low threshold: information may be relevant but of little significance. A test of potential relevance fails to recognise the need to weigh the

importance of the disclosure in achieving a legitimate aim against the importance of the interference with the individual's right to respect for her private and family life. That deficiency is not made good by the requirement that the data controller considers that the information ought to be provided."

4.62 In Case C-26/22 *UF and another v. Land Hessen* EU:C:2023:598 [2024] 3 CMLR 4 the CJEU confirmed that the condition that personal data processing be necessary for the purposes of the legitimate interests pursued required the relevant national authority to ascertain that those interests could not reasonably be achieved just as effectively by other means less restrictive of the fundamental rights and freedoms of data subjects, in particular the rights to respect for private life and the protection of personal data guaranteed by articles 7 and 8 of the EU Charter of Fundamental Rights. That condition must be examined in conjunction with the "data minimisation" principle in Article 5(1)(c) GDPR, in accordance with which personal data must be "adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed".

4.63 To like effect in Case C-394/23 *Mousse v. Commission nationale de l'informatique et des libertés and SNCF Connection* (9 January 2025, CJEU First Chamber) at §§ 28, 32-33, 44-45, 46, 48, 49, 50:

"28. ...[T]he requirement of necessity relating to the justification relied on is not met where the objective pursued by that processing of data could reasonably be achieved just as effectively by other means less restrictive of the fundamental rights of data subjects, in particular the rights to respect for private life and to the protection of personal data guaranteed in Articles 7 [63] and 8 [64] of the Charter, since derogations and limitations in relation to the principle of protection of such data must apply only in so far as is strictly necessary

....

Point (b) of the first subparagraph of Article 6(1) of the GDPR

32 Point (b) of the first subparagraph of Article 6(1) of the GDPR provides that the processing of personal data is lawful if it is 'necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract'.

33 In that regard, in order for the processing of personal data to be regarded as necessary for the performance of a contract within the meaning of that provision, it must be objectively indispensable for a purpose that is integral to the contractual obligation intended for the data subject. The controller must therefore be able to demonstrate how the main subject matter of that contract cannot be achieved if that processing does not occur.

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[63] Article 7 CFR provides as follows:

"Everyone has the right to respect for his or her private and family life, home and communications."

[64] Article 8(1) CFR provides as follows:

"Everyone has the right to the protection of personal data concerning him or her."

34 The fact that such processing may be referred to in the contract or may be merely useful for the performance of that contract is, in itself, irrelevant in that regard. The decisive factor for the purposes of applying the justification set out in point (b) of the first subparagraph of Article 6(1) of the GDPR is that the processing of personal data by the controller must be essential for the proper performance of the contract concluded between the controller and the data subject and, therefore, that there are no workable, less intrusive alternatives

...

Point (f) of the first subparagraph of Article 6(1) of the GDPR

44 Point (f) of the first subparagraph of Article 6(1) of the GDPR provides that the processing of personal data is lawful if it is 'necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'.

45 According to settled case-law, that provision lays down three cumulative conditions so that the processing of personal data covered by that provision is lawful, namely,

- first, the pursuit of a legitimate interest by the data controller or by a third party;
- second, the need to process personal data for the purposes of the legitimate interests pursued; and
- third, that the interests or fundamental freedoms and rights of the person concerned by the data protection do not take precedence over the legitimate interest of the controller or of a third party.

...

46 As regards, first, the condition relating to the pursuit of a legitimate interest, it must be stated that, according to Article 13(1)(d) of the GDPR, it is the responsibility of the controller, at the time when personal data relating to a data subject are collected from that person, to inform him or her of the legitimate interests pursued where that processing is based on point (f) of the first subparagraph of Article 6(1) of that regulation. In the absence of a definition of the concept of 'legitimate interest' in the GDPR, a wide range of interests is, in principle, capable of being regarded as legitimate. In particular, that concept is not limited to interests enshrined in and determined by law

...

48 As regards, second, the condition relating to the need for processing personal data for the purpose of attaining the legitimate interest pursued, and having regard to the case-law referred to in paragraph 28 of the present judgment, it is for the referring court to ascertain whether the legitimate interest pursued by the processing of the data can reasonably be achieved just as effectively by other means less restrictive of the fundamental freedoms and rights of data subjects, since such processing must be carried out only in so far as is strictly necessary for the attainment of that legitimate interest.

49 In that context, it should also be recalled that the condition relating to the need for processing must be examined in conjunction with the data minimisation principle enshrined in Article 5(1)(c) of the GDPR, in accordance with which personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed

...

50 Lastly, as regards, third, the condition that the interests or fundamental rights and freedoms of the person concerned by the data protection do not take precedence over the legitimate interests of the controller or of a third party, the Court has held that that condition entails a balancing of the opposing rights and interests in question which

> depends, in principle, on the specific circumstances of the particular case and that, consequently, it was for the referring court concerned to carry out that balancing exercise, taking account of those specific circumstances. Furthermore, as follows from recital 47 of the GDPR, the interests and fundamental rights of the data subject may in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect such processing."

4.64 And in Case C-46/23 *Újpest Önkormányzat v Nemzeti Adatvédelmi Hatóság* EU:C:2024:239 [2024] 4 WLR 50 the CJEU underlined (at § 32) that the data controller, in accordance with the principle of 'accountability' laid down in article 5(2) GDPR, is responsible for compliance with article 5(1) GDPR and bears the burden of proof to be able to demonstrate its compliance with each of the principles set out therein.

5. PROVISIONAL CONCLUSIONS ON THE BILL'S PROPOSED NEW REGIME FOR HOMESCHOOLING

5.1 The Bill's provisions on homeschooling have not yet been finalised or come into law. Further, as the UK Supreme Court observed in *Christian Institute v. Lord Advocate* [2016] UKSC 51 [2016] HRLR 19 (at § 81):

> "In deciding whether there is sufficient foreseeability to allow a person to regulate his or her conduct and sufficient safeguards against arbitrary interference with fundamental rights, the court can look not only at formal legislation but also at published official guidance and codes of conduct."

5.2 It is therefore not possible to make any definitive judgment as to the Convention compatibility of the proposed regime on homeschooling, not only because the relevant provisions have not yet assumed any final form in statute and have not yet come into law but also because in determining whether the regime complies with the Convention principle of law (is "in accordance with the law" for the purposes of Article 8 ECHR) it will be necessary to take into account not only the terms of any final Act, but also the terms of any statutory guidance which public authorities are required to have regard to and/or any Codes of Conduct or subsidiary Regulations which the public authorities administering this regime may be required as a matter of law to follow.

5.3 One thing that does, however stand out at this stage, is that the data protection provisions contained in Clause 33 of the Bill are remarkably opaque and lacking in any proper specification such as to comply with the Convention principle of legality by providing "sufficient foreseeability to allow a person to regulate his or her conduct, and sufficient safeguards against arbitrary interference with fundamental rights". As we have seen Clause 33 simply states that nothing in the proposed new duties or powers to process

information under any of the proposed new sections 434A through to 436Q and Schedule 31A, requires or authorises the processing of information which would contravene current data protection legislation in the UK. Yet these new duties and power are however "to be taken into account" in determining whether the processing would contravene that data protection legislation (which is to say the Data Protection Act 2018 and the UK GDPR.

5.4 Similarly vague and general statutory invocations or references to data protection legislation was the subject of some pointed criticism by the UK Supreme Court in its decision in *Christian Institute v. Lord Advocate* [2016] UKSC 51 [2016] HRLR 19. At §§ 52 and 83 of its judgment, the Supreme Court cited relevant provisions of the (Scottish) legislation at issue in that case. Those provisions stated that they did not permit or authorise the provision of information in breach of a prohibition or restriction on its disclosure arising by virtue of an enactment or rule of law (other than in relation to a duty of confidentiality). This meant, according to the court, that the powers and duties of disclosure otherwise set out in these Scottish statutory provisions could not be "be taken at face value" on the basis that to the extent that their terms may be inconsistent with the requirements of the relevant data protection legislation, they have no effect. Yet the Data Protection Act 1998 (like the Data Protection Act 2018) itself contained provisions which confer exemptions from some of its requirements where they are inconsistent with another enactment, or which treat some of its requirements as satisfied where disclosure is necessary for compliance with a statutory obligation.

5.5 In these circumstances, the court noted, it was necessary for anyone wanting to try to understand the effect of the Scottish legislation at issue concerning the disclosure of information to have its provision in one hand and the relevant data protection legislation in the other, to determine the priority which their respective provisions have vis-à-vis one another and to try, by cross-reference, to work out their cumulative effect. If such an exercise were carried out the court concluded that in several crucial respects, the scope of the duties and powers to disclose or share information set out on the face of Scottish legislation were, in reality, significantly curtailed by the requirements of the relevant data protection legislation (now the Data Protection Act 2018 and the UK GDPR). But this need to read together and cross refer between provisions of the (Scottish) legislation and the relevant data protection legislation and work out the relative priority of their respective provisions resulted in there being "very serious difficulties in accessing the relevant legal rules" (§ 83) and "of even greater concern is the lack of safeguards which would enable the proportionality of an interference with Article 8 ECHR rights to be

adequately examined." (§ 84). This led the court to conclude (at § 85) that the information-sharing provisions of the Scottish legislation as drafted, in referencing but not explaining their interaction with existing data protection legislation, "do not meet the Article 8 ECHR criterion of being 'in accordance with the law'. This meant that at least this aspect of the Scottish legislation at issue was Convention incompatible. As such beyond the legislative competence of the Scottish Parliament and so "not law" but instead *void ab initio* for want of the necessary vires.

5.6 More generally however the requirement for the compulsory registration of all homeschooled children - regardless of any specific welfare concerns or any issues around the suitability of the education being provided to individual children within their families - would on its face appear to breach the requirements of Article 14 ECHR. In requiring the registration of all homeschooled children and homeschooling parents and other assisting parents in their homeschooling education in the absence of any actual welfare concerns in relation to the child or their family the State is, without proper justification, failing to treat unlike cases differently.

5.7 While there is undoubtedly scope for the State authorities to have specific and special records in relation to those children in respect of whom they have good reason for concerns around the homeschooling of these children (potentially opening up the risk of the child suffering significant harm within the home), it cannot be the case that the simple fact of a child being homeschooled is of itself a risk factor such as to justify the increased State surveillance of children and their parents such as is represented by this proposed register.

5.8 Further, the extensive information to be included on the register may be in breach of the Data Protection principles. In any event the requirement to provide such information under pain of criminal sanction may well be regarded as constituting a disproportionate (and hence Convention incompatible) interference in the Article 8 ECHR rights to respect for the private and family life of home-educating families.

5.9 And on the issue of unjustified differential treatment in breach of Article 14 ECHR for the homeschooled compared to those children who are educated in school, I agree with the briefing document produced by The Christian Institute when it makes the following points:

> "Home-educating parents are being required to reveal to the State, for inclusion on a register, a level of information that is not held on school-attending children:

- If a school-attending child has private music, maths or sports tuition in an evening or at a weekend, there is no requirement for the child's school or the local authority to be aware of this. If a home-educated child was to attend the same tuition, the parents would have to inform the local authority of the name and address of the tutor and the amount of time spent in tuition. This is clearly discriminatory.

- There is nothing in the Bill to exclude religious instruction from "education". It appears home educating parents will have to report to the local authority that their child attends Sunday School, including the postal address of the church and names and addresses of the Sunday School teachers. This has echoes of totalitarian states.

- Parents would also have to notify the local authority of any changes to these arrangements within 15 days, i.e. if the tuition stops or any new tuition is started. This would be an ongoing burden of reporting changes in family routine to the State, which is not expected of school-attending children.

All this is remarkably intrusive. Why should home educating parents have to give the LA such detailed information about their family lives? It treats them as a suspect category and the State will hold a high level of sensitive personal data about home-educated children compared to school-attending children."

5.10 I have nothing more to add at this stage. As I have noted, because the terms of the proposed statutory obligations and accompanying guidance and regulations for a new homeschooling regime have not yet been finalised or come into law, the above observations and conclusions as regards the potential Convention incompatibilities of the proposed regime is necessarily provisional. Nonetheless, I trust that the foregoing is sufficient at this stage for the purposes of The Christian Institute. My instructing solicitor should not hesitate to come back to me if there is any matter arising from all this on which I might usefully further advise whether in writing or at a consultation.

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