Mrs Justice Steyn :

A. Introduction

1. This claim for judicial review concerns the introduction of Relationships and Sexuality Education ('RSE') as a mandatory element of the new curricula for maintained schools in Wales, under the Curriculum and Assessment (Wales) Act 2021 ('the 2021 Act'). There is no challenge to the lawfulness of any provision of the 2021 Act. The claimants' challenge focuses on two documents issued by the Welsh Government pursuant to the 2021 Act, namely, *The Curriculum for Wales – Relationships and Sexuality Education Code* ('the Code') and *The Relationships and Sexuality Education (RSE): Statutory Guidance* ('the Guidance').

2. The claimants are parents of children attending maintained schools in Wales who object on religious and/or philosophical grounds to the introduction of RSE without a 'right of excusal', that is, without a parental right to withdraw their child from lessons in which RSE is taught. The strength of feeling underlying their challenge is evident. In this context, it is important to note the constitutional role of the court in judicial review litigation. That role entails the court carrying out an exercise of *review* of the impugned acts or decisions – here, the promulgation of the Code and the Guidance – to determine whether they are compatible with the applicable legal rules and principles.

3. The claimants were granted permission by Turner J to seek judicial review on four grounds. These grounds give rise to the following issues (which are agreed save for the additional issues raised by the claimants in (2A) and (3A)):

   (1) **Grounds 1, 2 and 3(b)**: In respect of the grounds of challenge relating to a claimed parental right of excusal from RSE:

      a) does the *common law* provide for the constitutional parental right of excusal for which the claimants contend?

      b) If so, what is the nature of that right?

      c) If any such right exists, has it been abrogated by the 2021 Act (and/or any other legislation)?

      d) If, in the alternative, any such common law right does not exist, has the *statutory* right of excusal provided for by s.405 of the Education Act 1996 been abrogated by the 2021 Act (and/or any other legislation)?

      e) Do the Code and/or the Guidance misstate the law in relation to any right of excusal?

      f) In relation to the argument advanced under the *first sentence of Article 2 of the First Protocol* to the European Convention on Human Rights ('A2P1' and 'the Convention'):

         i) is it open to the claimants to contend that the absence of a parental right of excusal breaches the first sentence of A2P1, or would such a challenge have to be targeted at the 2021 Act itself?

5. Section 7 of the Education Act 1996 ('the 1996 Act') provides so far as relevant:

> "The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable –
>
> (a) to his age, ability and aptitude, and
>
> (b) to any …additional learning needs (in the case of a child who is in the area of a local authority in Wales) he may have,
>
> either by regular attendance at school or otherwise." (Emphasis added.)

(Compulsory school age is defined in s.8 of the 1996 Act.)

6. Section 9 of the 1996 Act provides:

> "In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure."

(A local authority in Wales means a county council in Wales or a county borough council: s. 579 of the 1996 Act.)

7. A parent of a child who is a registered pupil at a school commits a criminal offence if the child does not attend the school in accordance with the rules prescribed by the school, unless a specified exception applies: s.444 of the 1996 Act and *Isle of Wight Council v Plant* [2017] UKSC 28, [2017] 1 WLR 1441, Baroness Hale DSPC at [48].

Curriculum and Assessment (Wales) Act 2021

8. The 2021 Act is an Act of the Senedd which, as described in its long title, establishes "*a new framework for a curriculum for pupils of compulsory school age at maintained schools …*" Part 1 of the 2021 Act sets out "*basic concepts that have effect in relation to a curriculum*" for, among others, "*registered pupils at maintained schools (except those over compulsory school age)*" (s.1(1)) and "*includes provision about key documents that support a curriculum of that kind*" (s.1(2)).

9. Section 2 of the 2021 Act provides that the "*four purposes*" of a curriculum are:

> "To enable pupils and children to develop as ambitious, capable learners, ready to learn throughout their lives;
>
> To enable pupils and children to develop as enterprising, creative contributors, ready to play a full part in life and work;
>
> To enable pupils and children to develop as ethical, informed citizens of Wales and the world;

> To enable pupils and children to develop as healthy, confident individuals, ready to live fulfilling lives as valued members of society."

10. Section 3(1) of the 2021 Act provides that there are six "*areas of learning and experience for a curriculum*" ('areas of learning'), namely:

> "Expressive Arts
> Health and Well-being
> Humanities
> Languages, Literacy and Communication
> Mathematics and Numeracy
> Science and Technology." (Emphasis added.)

11. Section 3(2) provides that within those six areas of learning:

> "…the following are mandatory elements –
>
> English
> Relationships and Sexuality Education
> Religion, Values and Ethics
> Welsh." (Emphasis added.)

12. Section 8 of the 2021 Act provides:

> "(1) The Welsh Ministers must issue a code (the "RSE Code") setting out themes and matters to be encompassed by the mandatory element of Relationships and Sexuality Education.
>
> (2) A curriculum does not encompass the mandatory element of Relationships and Sexuality Education unless it accords with the provision in the RSE Code.
>
> (3) Teaching and learning does not encompass the mandatory element of Relationships and Sexuality Education unless it accords with the provision in the RSE Code.
>
> (4) For further provision about the RSE Code, see section 77." (Emphasis added.)

13. Section 77 lays down the *procedure* for issuing or revising the RSE Code. In particular, the Welsh Ministers must consult the persons they think appropriate (if any), lay a draft of the proposed Code before the Senedd, and if the Senedd resolves to approve a draft the Welsh Ministers must issue the RSE Code in the form of the approved draft.

14. Whereas there is a duty to issue the RSE code, s.71 provides a power to issue other guidance. Section 71 states:

> "(1) The Welsh Ministers may issue guidance in relation to the exercise of functions conferred by or under this Act.

> (1) If the parent of any pupil in attendance at a maintained school in England requests that he may be wholly or partly excused from receiving sex education at the school, the pupil shall, except so far as such education is comprised in the National Curriculum, be so excused accordingly until the request is withdrawn.
>
> (2) In subsection (1) the reference to sex education does not include sex education provided at a maintained school in England as part of statutory relationships and sex education.
>
> (3) If the parent of any pupil in attendance at a maintained school in England requests that the pupil may be wholly or partly excused from sex education provided as part of statutory relationships and sex education, the pupil must be so excused until the request is withdraw, unless or to the extent that the head teacher considers that the pupil should not be so excused.
>
> (4) In this section "statutory relationships and sex education" means education required to be provided at a school in England under section 80(1)(d) of the Education Act 2002."

The transitional provisions

32. The 2021 Act was passed by the Senedd on 9 March 2021 and it received Royal Assent on 29 April 2021. It establishes a new comprehensive framework for curricula at maintained schools in Wales. By virtue of the Curriculum and Assessment (Wales) Act 2021 (Commencement No. 3 and Transitional Provision) Order 2022/652, the new framework is taking effect on a rolling basis:

    (1) Since September 2022, the new framework has applied to all year groups in primary school (i.e. from Reception to Year 6), and to Year 7 in 104 secondary schools that expressed a wish to roll out the new framework in September 2022;

    (2) From September 2023, the new framework will apply to all year groups from Reception to Year 8;

    (3) From September 2024, the new framework will apply to all year groups from Reception to Year 9, and so on until the roll-out is complete in September 2026.

33. The effect of the transitional provisions is that the substantive provisions of the 2021 Act do not apply to pupils who are currently in Year 8 or above, and will not apply to them as they progress to Year 9 next year and up through their schools in subsequent years. The provisions that were previously in force will continue to apply to those pupils, including the statutory right of excusal contained in s.405(1) of the 1996 Act from "*sex education*" as provided in accordance with s.101(1)(c) of the Education Act 2002.

The Human Rights Act 1998 and the Government of Wales Act 2006

34. The "*Convention Rights*" referred to in s.1(1) of the Human Rights Act 1998 ('the HRA') include A2P1 which is contained in Schedule 1 to the HRA and provides:

(7) In 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 Resolution 1928 (2013) 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."

C. The facts

The background to the 2021 Act

42. In March 2014, the Welsh Government commissioned Professor Graham Donaldson, an honorary professor at Glasgow University's School of Education and the former chief professional advisor on education to the Scottish Government, to undertake an independent review of the curriculum and arrangements for assessment in Wales. Professor Donaldson's report was published in 2015 and the Welsh Government accepted all his recommendations. One of his recommendations was that the curriculum in Wales should be organised into six "*areas of learning and experience*", including "*health and well-being*", which would include education on sex and relationships.

43. In March 2017, the Welsh Government asked Estyn (the body with responsibility for inspecting the quality and standards of education and training in Wales) to evaluate the quality of healthy relationships education being taught in schools and Estyn did so, publishing a report in June 2017. In the report, entitled *A Review of Healthy Relationships Education*, Estyn advised:

> "Healthy relationships education is the term used to describe the range of learning experiences and support that schools provide

- In both RE and RSE only a parent can request that a child be withdrawn. Therefore, a pupil of any age, including those in the sixth form, cannot withdraw them self at any point and must rely on the parent to do that for them.

3.76 These arrangements have been in place and unchanged for decades. Central to the new curriculum is the right of children and young people to have access to a curriculum which fulfils the four purposes.

3.77 We are therefore keen to explore approaches to modernise these arrangements. In considering a potential new approach we are keen to ensure the rights of children and young people are central to considerations but also that full consideration of the impact on all protected characteristics is given. We also want to ensure that any changes do not increase the burden on schools and teachers.

3.88 At this stage, we would welcome views on the case for change and any specific ideas of how to modernise this area.

Questions:

11. Should the right to withdraw from RE and RSE be retained?

12. If the right to withdraw is to be retained, should it remain with the parent (parent includes those with parental responsibility or those who have care of the child)?

13. If the right to withdraw is removed, what alternative, if any, should be in its place?"

51. The Welsh Government's summary of the responses to the White Paper published in July 2019 showed that of 1,632 respondents, 10.2% agreed with the proposal to make "*age and developmentally appropriate RSE compulsory for pupils aged 3-16 years*", whereas 87.5% disagreed. Of the 1,602 respondents who answered the question whether the right to withdraw from RE and RSE should be retained, 88.7% agreed it should be retained and 9.2% expressed the view it should not be retained.

52. On 3 October 2019, the Welsh Government launched a consultation on a specific proposal not to include a right of excusal in relation to RSE. The consultation ran until 28 November 2019. In the consultation document, entitled *Consultation on proposals to ensure access to the full curriculum for all learners*, the Welsh Government recognised that "*these are issues on which there are strong views*". As Mr Owain Lloyd, the Director of Education and Welsh Language who has given a statement on behalf of the Welsh Ministers, has said, "*the Welsh Government recognised that many parents who responded to the White Paper had expressed strong and genuinely-held opposition to RSE being compulsory*". The consultation document stated:

61. Once the 2021 Act had been passed and received Royal Assent (see paragraph 32 above), on 21 May 2021 the Welsh Government published a consultation document setting out a draft code and statutory guidance on RSE. The consultation period ran to 16 July 2021. Revised versions of both documents were drafted in light of the consultation responses.

62. On 23 November 2021, a draft Code was laid before the Senedd for its approval pursuant to s.71 of the 2021 Act. The Senedd voted to approve the draft Code on 14 December 2021. A draft of the Guidance was also provided to Senedd members, although there is no requirement under the 2021 Act for the Senedd to approve a draft of the Guidance.

63. On 10 January 2022, the Guidance and the Code were first published as a composite webpage on the Welsh Government's "*Hwb*" website (which is a website dedicated to learning, teaching and school curricula). On 25 January 2022, the Code was published on the Welsh Government's main website as a separate document. When the Guidance is accessed on the Hwb website, there are embedded definitions of certain words and phrases. These definitions were part of the Guidance that was approved by the Minister for Education pursuant to s.71 of the 2021 Act. The version of the Code originally published on the Hwb website also included embedded definitions of three words and phrases. However, as those definitions did not form part of the version of the Code approved by the Senedd they have since been removed.

"Whole-school approach" and RSE as a "cross-cutting element"

64. As Mr Lloyd explains, and as is evident from the Guidance, there is a distinction between the "*whole-school approach*" and the concept of RSE as a "*cross-cutting element*" of the curriculum:

> "110. … the whole-school approach is concerned with ensuring that the teaching that pupils receive is reflected across the whole school community, and that the culture of the school allows pupils to seek non-judgemental support where necessary. This is likely to include, for example, ensuring that the school's policies reflect the values that are taught in RSE and preclude discrimination on grounds of a person's sex, sexuality or gender identity.
>
> 111. The whole-school approach is to be distinguished from the provision in the Guidance for RSE to be treated as a cross-cutting element of the curriculum. As the Guidance explains, RSE is 'a broad, interdisciplinary and complex area that includes biological, social, psychological, spiritual, ethical and cultural dimensions', and this means that RSE teaching can pick up on themes that emerge in other subject areas, and *vice versa*, in order to place them in context. …
>
> 112. For example, the guidance on designing a languages, literacy and communication curriculum points out that considering RSE themes in literature can help learners to start to think critically about how relationships, gender, sexual identity

D. The Code and the Guidance

74. The 2021 Act provides that RSE is a mandatory element within the prescribed areas of learning, but the 2021 Act, the Code and the Guidance do not prescribe a single curriculum for RSE (or, indeed, a single curriculum more broadly for maintained schools in Wales). The RSE that a pupil receives will depend on the curriculum that is designed by the headteacher of their school, and adopted by the headteacher and governing body, and on the implementation of that curriculum.

The Code

75. The Code was issued pursuant to the statutory duty on the Welsh Ministers imposed by s.8(1) of the 2021 Act (see paragraph 12 above). The Code is addressed, so far as relevant, to head teachers and governing bodies of maintained schools and local authorities in Wales. The curriculum designed, adopted and taught by a maintained school in Wales *must accord* with the Code.

76. The Code is a 14 page document. Save to the extent necessary to provide context, I set out here only those parts to which the claimants take objection. In both the Code and the Guidance, I have included the paragraph numbers added by the parties, for ease of navigation.

> "[C1] This Code contains mandatory requirements, the legal basis for which is set out in the **legislation summary** of this Curriculum for Wales framework guidance. It sets out the themes and matters that must be encompassed in RSE. A curriculum and teaching and learning must encompass the mandatory element of RSE outlined within the following RSE Code.
>
> **Designing your curriculum**
>
> [C2] This mandatory RSE Code supports schools to design their RSE. The content is set within the context of broad and interlinked learning strands, namely:
>
> - relationships and identity
> - sexual heath and well-being
> - empowerment, safety and respect.
>
> [C3] These strands allow practitioners to design and develop a curriculum tailored to their learners, making connections and developing authentic contexts for learning across the curriculum.
>
> [C4] The Welsh Government committed to covering the following themes in RSE: relationships; rights and equity; sex, gender and sexuality; bodies and body image; sexual health and well-being; and violence, safety and support. To assist schools

		disrespectful and harmful, offline and online.

…" (Emphasis added, save in [C1] the words "*legislation summary*" are hyperlinked to that document: see paragraph 80 below.)

The Guidance

77. The Guidance was issued pursuant to the *power* given to the Welsh Ministers by s.71(1) of the 2021 Act (see paragraph 14 above). Head teachers and governing bodies of maintained schools, and local authorities in Wales, are required to have regard to the Guidance in exercising their functions. This means that they must proceed on a proper understanding of it, take it into account and act in accordance with it unless they have clear reasons for departing from it.

78. The Guidance is an 11 page document. Again, save to the extent necessary to provide context, I set out here only those parts to which the claimants take objection.

"**Introduction**

[G2] **Mandatory**

Relationships and *sexuality* education (RSE) is a statutory requirement in the Curriculum for Wales framework and is mandatory for all learners from ages 3 to 16.

[G3] RSE has a positive and empowering role in learners' education and plays a vital role in supporting them to realise the **four purposes** as part of a *whole-school approach*. Helping learners to form and maintain a range of relationships, all based on mutual trust and respect, is the foundation of RSE. These relationships are critical to the development of emotional well-being, resilience and empathy. An understanding of sexuality with an emphasis on rights, health, equality and *equity* empowers learners to understand themselves, take responsibility for their own decisions and behaviours, and form relationships that are fully inclusive, reflecting **diversity** and promoting respect.

[G4] Schools and settings have an important role to play in creating safe and empowering environments that support learners' rights to enjoy fulfilling, healthy and safe relationships throughout their lives. This is critical to building a society which treats others with understanding and empathy, whatever their ethnicity, social economic background, disability, or *sex*, *gender* or sexuality.

[G5] This section of the Curriculum for Wales framework contains:

> Sex: "(Rhyw) attributed to a person on the basis of primary sex characteristics (genitalia) and reproductive functions."
>
> Sexuality: "(Rhywioldeb) a central aspect of being human and encompasses sexual orientation, gender identities and roles, sex, reproduction and intimacy. Sexuality is experienced and expressed through thoughts, beliefs, behaviours and relationships."

Legislation summary

80. The "*legislation summary*" which is referred to and hyperlinked in both the Code and the Guidance includes under the heading "*Relationships and sexuality education*":

> "**Pluralistic requirement**
>
> **Mandatory**
>
> In all schools and settings, RSE must be objective, critical and pluralistic as to its content and manner of teaching (see the case of 'Dojan and Others v Germany 2011 application no. 319/08'). By pluralistic we mean that where questions of values are concerned, schools and settings must provide a range of views on a given subject, commonly held within society. This also means providing a range of factual information on RSE issues. In all schools, where they explore specific beliefs or views, this must include a range of other faith and non-religious views on the issue.
>
> For example, schools may include learning about current tensions, disagreements or debates within society, or they may explore different perspectives within faiths on issues. Developing this pluralism is important in ensuring learners develop as informed citizens who are aware of and sensitive to a range of different opinions, values and beliefs. This supports them to engage with and navigate potential tensions.
>
> A good understanding of learners' views, emerging values and backgrounds is central to developing this pluralism. Positive relationships with wider communities can help to create a constructive context for exploring aspects and tensions in a sensitive way."

E. Grounds 1 and 2: the right of excusal and the principle of legality

The claimants' submissions

95. If the defendant is right on either of these first two issues, it follows that the Code and the Guidance do not misstate the law. But, in any event, the Code and the Guidance do not themselves refer to a right of excusal and none of the passages relied on misstates the law.

ANALYSIS AND DECISION ON GROUNDS 1 AND 2

The legislative history of compulsory education

96. As Baroness Hale recounted in *Platt*,

> "8. … During the early 19th century, the Church of England, the Methodist Church and other Churches set up many elementary schools, but attendance was not compulsory and the state had no obligation to provide universal elementary education. The Elementary Education Act 1870 (33 & 34 Vict c 75) by section 5 required there to be provided in every school district 'sufficient amount of accommodation in public elementary schools' for all the children resident in the district 'for whose elementary education efficient and suitable provision is not otherwise made'.
>
> 9. However, the 1870 Act did not insist that attendance be made compulsory everywhere. This was politically controversial. … Instead, therefore, section 74 of the 1870 Act empowered each school board, with the approval of the Secretary of State, to make byelaws (1) requiring parents of children of specified ages (between five and 12 inclusive) to cause them to attend school, unless there was some reasonable excuse, (2) fixing the times when children were required to attend school, with two exceptions, one of which was for "any day exclusively set apart for religious observance by the religious body to which his parent belongs", and (4) [sic] imposing penalties for breach. …

97. Section 7 of the 1870 Act allowed parents the unconditional right to withdraw their child from attending "*any religious observance or any instruction in religious subjects in the school or elsewhere*", and such observance or instruction was required to be either at the beginning or the end of the school day, to make the exercise of such rights of withdrawal effective. This statutory right of excusal from religious instruction was preserved in, among others, the Education Acts of 1918 and 1921.

98. Baroness Hale continued:

> 10. Only a minority of school boards made such byelaws. However, the climate of opinion soon changed. The Elementary Education Act 1876 (39 & 40 Vict c 79) prohibited the employment of children under ten, and of children between ten and 13 who had not attained an appropriate standard of education (section 5), and for the first time imposed upon parents a duty to cause their children 'to receive efficient elementary instruction in reading, writing and arithmetic': section 4. Thus such a parent

Supreme Court held in *Platt* that "*regularly*" means "*in accordance with the rules prescribed by the school*": Baroness Hale, [48]. The Supreme Court considered that this interpretation reflects an important legislative policy, having regard to the disruptive effect of unauthorised absences on the education of the individual child and the work of other pupils, and the extra work required by the child's teacher ([40]).

101. "*Sex education*" was first introduced as a required element of the curriculum for secondary school pupils by s.241 of the Education Act 1993, which amended the Education Reform Act 1988 ('the 1988 Act'). At the same time, Parliament created a statutory right of excusal from receiving sex education at school, save to the extent that such education was comprised in the National Curriculum. Section 17A of the 1988 Act was in essentially the same terms as s.405(1) of the 1996 Act prior to its amendment by the 2021 Act (see paragraph 31 above). The statutory right of excusal from sex education could be exercised by a parent without giving any reasons, and it could not be overridden.

102. The statutory right of excusal from sex education or religious instruction is distinct from a parent's right to opt to secure suitable education for their child otherwise than at a school (which is sometimes referred to as the 'right of withdrawal'): s. 7 of the 1996 Act (paragraph 5 above). Parents can choose to secure suitable education for their children by educating them at home or by sending them to private schools, albeit, as the claimants emphasise, for many parents home schooling may not be a realistic and practically viable option, and most parents would not be able to afford private school fees.

Common law right of excusal

103. The first key question is whether the authorities demonstrate that the courts have recognised the existence of the claimed common law right of excusal. For the reasons given by the defendant, as summarised in paragraphs 91-92 above, with which I agree, if the authorities do not show that such a right exists, this court should not now *develop* such a right in a field that has been comprehensively regulated by the legislature for many years.

104. *Lyons v Blenkin* pre-dated the 1870 Act. Lord Eldon LC considered the jurisdiction of the Court of Chancery to control the authority of a father over his minor children. The father of three daughters had placed them in the care of their grandmother who, in her will, made provision for their education and for them to be under the guardianship of their aunt. Although the grandmother had not had the power to establish such a guardianship, the father was found to have enabled it by his consent. Following the aunt's marriage the father sought to have his three daughters returned to his care. The court rejected the father's application. While recognising that it is "*always a delicate thing for the Court to interfere against the parental authority*", Lord Eldon held that in circumstances where the father's situation left him "*without the means of so educating them as they ought to be educated, regard being had to their fortune and estate*", having consented to their course of education, the father was precluded from being "*permitted to break in and introduce a new system of education, which cannot be consistent with the system to which they have been habituated*". This case provides no support for the claimed right, in particular the parental right to determine the content of their child's education.

105. In *Agar-Ellis* a Protestant man married a Roman Catholic woman, having promised prior to the marriage that any children of the marriage would be brought up as Roman Catholics. At the time of the proceedings, the couple had three minor daughters. Although their father had, soon after the birth of the first child, reneged on his promise and determined that the children should be brought up as Protestants, the mother had brought them up as Catholics. When the daughters refused to go with their father to a Protestant place of worship, he applied for them to be made wards of court and sought directions as to where, and the persons by whom, his daughters should be educated. The mother brought a counter-petition. Malins V-C found for the father.

106. On appeal to the Court of Appeal, James LJ observed that there could be no question of any conflict of rights *between the husband and wife* as to the education of the children. That reflected the husband's position as "*master of his own house, as king and ruler in his own family*" (p.75), in accordance with which it was the wife's duty to obey her husband. Consequently, the main argument was as between the father and the children themselves (p.71). James LJ held:

> "It is conceded that by the law of this country the father is undoubtedly charged with the education of his children. The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt, the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But, in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right. It is a legal right with, no doubt, a corresponding legal duty; but the breach of intended breach of that duty must be proved by legal evidence before that right can be rightfully interfered with." (Emphasis added.)

107. James LJ's observations regarding the rights as between the husband and wife obviously do not reflect the law today, and the claimants place no reliance on that outdated aspect of the case. But they submit that substituting "*parent*" for "*father*", the principle to be derived from *Agar-Ellis* is that a parent has a right (or power), on a par with the right to life, liberty and property, to educate his or her children.

108. As Lord Denning MR observed in *Hewer v Bryant*, 369, addressing the holding in *In re Agar-Ellis* (1883) 24 Ch D 317 ('*Agar-Ellis (2)*'), 326, that "*the law of England … is, that the father has the control over the person, education and conduct of his children until they are 21 years of age*", that both *Agar-Ellis* cases reflect "*the attitude of a Victorian parent towards his children*", expecting "*unquestioning obedience to his commands*". In *Gillick*, at 183E-F, Lord Scarman said "*there is much in the earlier case law which the House must discard – almost everything I would say but its principle*". He gave as an example of that which must be discarded, "*the horrendous Agar-Ellis*

decisions, 10 Ch D 49; 24 Ch D 317 of the late 19th century asserting the power of the father over his child", which he described as having been "*rightly remaindered to the history books by the Court of Appeal in Hewer v Bryant [1970] 1 QB 357*". At 187B-C he reiterated that the Agar-Ellis cases "*cannot live with the modern statute law*". Also in *Gillick*, at 173B-C, Lord Fraser observed that the *Agar-Ellis* cases "*seemed to have been regarded as somewhat extreme even in their own day*". Lord Bridge agreed with both Lords Fraser and Scarman.

109. I do not read Lord Scarman's speech in *Gillick* as suggesting that the court should continue to derive any core principle from *Agar-Ellis*. On the contrary, it is a case that has been confined to legal history. But even if the claimants were right in their submission that *Agar-Ellis* has not been disapproved, it does not provide any support for a common law right of excusal. The "*sacred right*" to which James LJ referred was the father's right of control over his children, including a power to take decisions for his children regarding their education, even against their wishes. Such a right or power *vis-à-vis* his children is distinct from the claimed parental right which is asserted against a third party. *Agar-Ellis* says nothing about whether a parent who chooses to secure their child's education by placing the child in a school has a right to determine the content of what they are taught at that school, and to excuse their child's attendance (without the school's permission) from any teaching to which the parent takes a religious or philosophical objection.

110. The issue in *Scanlan* was whether, in circumstances where a father had determined the faith in which his children should be brought up, the mother was bound by that determination even after the father's death. Stirling J held that she was bound by the father's determination, at least in part based on his interpretation of the Guardianship of Infants Act 1886. Stirling J cited *Agar-Ellis* in support of "*the absolute right of a father in his lifetime to decide what religious education his children shall receive*" (207), subject to circumstances in which the law may take away that right (208-209). The claimant's reliance on the "*absolute right*" identified in *Agar-Ellis* does not support the claimed right of excusal for the reasons I have given in discussing that case.

111. *Barnardo v McHugh* [1891] AC 388 concerned the custody of a child. The mother had entrusted her son to be brought up in one of the Homes for Destitute Children of which Dr Barnardo was the founder and director. About 18 months later, the mother sought to have her son delivered into the care of a guardian chosen by her, with a view to being brought up as a Catholic. Dr Barnardo refused as he wished the child to be brought up a Protestant. The House of Lords found for the mother. In doing so, the House of Lords drew a distinction between the legal (common law) right not to be improperly detained and the equitable jurisdiction to interfere for the protection of the child, acting as *parens patriae*, in accordance with which the mother's wishes were required to be taken into consideration. Lord Halsbury LC considered it unnecessary to determine whether the mother had a legal right as the same answer was reached as a matter of equity in any event (394-395). Lord Herschell was not satisfied that the mother had a legal right, but he too considered that it was no longer important to determine her rights at common law as all courts were now "*governed by equitable rules, and empowered to exercise equitable jurisdiction*" (398-400). Lord Hannen agreed with both judgments.

112. In *Gyngall* the mother of a 15 year old girl who was living under "*actual assumed guardianship*" made an application for *habeas corpus*, seeking custody of her daughter. Lord Esher MR distinguished the courts' common law and equitable jurisdictions (238-

239). He observed that "*at common law the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct*" (239). The mother was not guilty of any such misconduct, nevertheless the court refused the application for *habeas corpus*, exercising its equitable jurisdiction to act in the interests of the welfare of the child. The court attached particular weight to the child's view as to the religion she wished to practise (245).

113. Both *Barnardo* and *Gyngall* were concerned, insofar as they addressed common law rights, with custody and the right not to be unlawfully detained. No support for the claimed right of excusal can be derived from the common law rights in issue in those cases. Both cases were heard after the Judicature Act 1873 came into force, and primarily turned on the application of the court's equitable jurisdiction, involving the weighing and balancing of considerations to determine what was in the interests of the child's welfare. Plainly, no common law right of excusal can be found in the court's application of such equitable principles.

114. In *Hewer v Bryant* the issue was whether a 15 year old boy who was seriously injured when living and working as an agricultural trainee on a farm, was "*in the custody of a parent*" at the time of the accident, for the purposes of the Limitation Act 1939. The Court of Appeal held that the claim was not statute-barred as he was not in the custody of a parent within the meaning of the Act when the right of action accrued. Sachs LJ observed that in its wider meaning the word "*custody*" is used as if it were almost the equivalent of "*guardianship*" in the fullest sense. He said at 373B-C:

> "such guardianship embraces a 'bundle of rights,' or to be more exact, a 'bundle of powers,' … These include power to control education, the choice of religion, and the administration of the infant's property. They include entitlement to veto the issue of a passport and to withhold consent to marriage. They include, also, both the personal power physically to control the infant until the years of discretion and the right … to apply to the courts to exercise the powers of the Crown as *parens patriae*." (Emphasis added.)

115. Lord Denning MR described the legal right of a parent to the custody of a child, which "*starts with a right of control*", as being a "*dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is*", which right ends on the child's 18th birthday, by which point it is little more than a right to give advice (369).

116. In *Gillick*, the issue was whether, and if so in what circumstances, a doctor could prescribe contraception to a girl under the age of 16 years without the consent of one of her parents. Lord Fraser held at 170D that:

> "parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family. If necessary, this proposition can be supported by reference to *Blackstone Commentaries*, 17th ed. (1830), vol.1,

> p.452, where he wrote 'The power of parents over their children is derived from … their duty.'"

He agreed with Lord Denning's description of the parental right as a "*dwindling*" one (172H).

117. Lord Scarman held at 183H-184B that, approaching the earlier authorities stripped of inappropriate detail,

> "one finds plenty of indications as to the principles governing the law's approach to parental right and the child's right to make his or her own decision. Parental rights clearly do exist, and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child – custody, care, and control of the person and guardianship of the property of the child. But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law, as I shall endeavour to show, is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child." (Emphasis added.)

118. Lord Scarman continued at 184F-185F:

> "We are not concerned in this appeal to catalogue all that is contained in what Sachs LJ has felicitously described as the 'bundle of rights' … which together constitute the rights of custody, care, and control. … A most illuminating discussion of parental right is to be found in *Blackstone's Commentaries*, 17th ed. (1830), vol. 1, chs. 16 and 17. He analyses the duty of the parent as the 'maintenance … protection, and … education' of the child: p.446. …
>
> The two chapters provide a valuable insight into the principle and flexibility of the common law. The principle is that parental right or power of control of the person and property of his child exists primarily to enable the parent to discharge his duty of maintenance, protection and education until he reaches such an age as to be able to look after himself and make his own decisions." (Emphasis added.)

119. I accept the claimants' contention that *Hewer v Briant* and *Gillick* show that parental rights, duties or powers exist, including a duty to secure the child's education. The introduction of the concept of "*parental responsibility*" by the Children Act 1989, which "*means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property*" (s.3(1) of the Children Act 1989), reflects the emphasis in *Gillick* on parental power to control a child existing not for the benefit of the parent but for the benefit of the child. Put into the statutory language of parental responsibility, the observations of their lordships in *Gillick* remain pertinent.

120. However, there is nothing in these authorities that would justify the leap which acceptance of the claimants' argument would require, from a duty on a parent to secure their child's education to a fundamental common law right of excusal. *Gillick* was concerned with the parental power of control of a child in the context of medical treatment of the child. The duty to educate – a duty owed by the parent to the child - was mentioned, but the court was not concerned to address it.

121. *Christian Institute* was a challenge to the information-sharing provisions in the Children and Young People (Scotland) Act 2014, in which the Supreme Court held that those provisions were outside the legislative competence of the Scottish Parliament because they were incompatible with the rights of children, young people and their parents under article 8 of the Convention. Baroness Hale, Lord Reed and Lord Hodge observed at [71]-[73]:

> "71. In the context of this legislation, the interests protected by Art 8 of the ECHR include both family life and privacy. The relationship between parent and child is an integral part of family life. … Family life also encompasses a broad range of parental rights and responsibilities with regard to the care and upbringing of minor children, enabling parents to take important decisions on their behalf, and Art 8 protects the rights of parents to exercise such parental authority (*Nielsen v Denmark*, para 61).
>
> 72. As is well known, it is proper to look to international instruments, such as the United Nations 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 well-being 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 Art 3(2) 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; Art 5 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; Art 14(2) makes similar provision in relation to the child's right to freedom of thought, conscience and religion; … Articles 27(3) and 18(2) make it clear that the state's role is to assist the parents in carrying out their responsibilities…
>
> 73 This represents the detailed working out, for children, of the principle established in Art 16(3) of the United Nations

> Universal Declaration of Human Rights (1948) and Art 23(1) of the United Nations International Covenant on Civil and Political Rights (1966) that '[t]he 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 '[a]ll 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. Justice Barak of the Supreme Court of Israel has put it like this (in *El-Al Israel Airlines Ltd v Danielowitz,* para 14):
>
> > 'The factual premise is that people are different from one another, "no person is completely identical to another" … Every person is a world in himself. Society is based on people who are different from one another. Only the worst dictatorships try to eradicate these differences.'
>
> Individual differences are the product of the interplay between the individual person and his upbringing and environment. Different upbringings produce different people. 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* (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.'" (Emphasis added.)

122. The claimants place considerable reliance on this authority, particularly the passages that I have underlined. But in *Christian Institute* the Supreme Court was not addressing the content of the common law at all. Moreover, the description in [71] of the protection of parental rights provided by article 8 is consistent with *Gillick;* insofar as the Supreme Court cited international instruments in [72], none of them support the existence of the claimed right of excusal; and there is no conflict between the quotation from *Pierce* in [73] and the legal framework applicable in Wales. *Pierce* concerned the Oregon Compulsory Education Act, adopted in 1922, which required parents of children in Oregon to send their children to public (i.e. state) schools. It is common ground that in Wales a parent has a right to choose to secure suitable education for their child

otherwise than at a state school, whether by means of home schooling or by sending the child to a private school.

123. The final authority referred to in the context of the arguments in relation to a common law right of excusal is *Birmingham City Council v D* [2019] 1 WLR 5403. The case concerned the accommodation by a local authority of a child aged 15, who lacked capacity, in circumstances amounting objectively to confinement. The child's parents consented to his accommodation in that setting, and the question was whether their consent had the effect that the child's confinement was not to be imputed to the State. The Supreme Court held that it was not within the scope of parental responsibility for the parents to authorise what would otherwise be a fundamental violation of the child's rights under article 5 of the Convention. The case provides no support for the claimed common law right of excusal.

124. In my judgment, the claimants' reliance on unincorporated international treaties and other texts does not assist their argument. First, those materials can only be relied on, if at all, to show how the common law should develop, rather than what it is; and, as I have said, it would not be appropriate for this court to create the common law right for which the claimants contend. Secondly, I bear in mind that "*it is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom*": *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, Lord Reed PSC, [77], [84] and [91].

125. I address the effect of A2P1 and article 9 below, in the context of grounds 3 and 4. I accept that, in principle, common law rights *may* be more extensive than analogous Convention rights. However, the claimants are wrong to suggest that proposition flows from the concept of the "*margin of appreciation*". As Lord Reed PSC explained in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 WLR 133 at [85]:

> "the margin of appreciation is itself a principle of interpretation. When the European court finds that the contracting states should be permitted a margin of appreciation, it does not cede the function of interpreting the Convention to the contracting states, or enable their domestic courts to divide that function between their institutions. Contracting states can of course create rights going beyond those protected by the Convention, but that power exists independently of the Convention and the Human Rights Act, is not dependent on the margin of appreciation doctrine, and is exercisable in accordance with long-established constitutional principles, under which law-making is generally the function of the legislature." (Emphasis added.)

126. In my judgment, for the reasons I have given, the case law and texts relied upon by the claimants do not support the existence of a fundamental common law right of excusal. I reject the contention that such a right exists. This conclusion is unsurprising, given the nature of the claimed right, which is conceptually dependent on a pre-existing obligation of school attendance, and which, as defined by the claimants, has the appearance of legislation rather than a common law right.

The principle of legality

127. It is a basic constitutional principle that fundamental rights cannot be taken away by a generally or ambiguously expressed provision in a statute. The principle of legality means that the legislature "*must squarely confront what it is doing and accept the political cost*". As Lord Hoffmann explained in *Simms*, 131F-G:

> "This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

128. In *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, considering the powers of the Scottish Parliament, Lord Reed observed at [152]:

> "The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so."

129. The authorities make clear that common law constitutional rights can be abrogated not only expressly but also by necessary implication. On either basis, for the court to interpret legislation as overriding fundamental rights, it must be "*crystal clear*" that the legislature intended to do so. A reasonable implication will not suffice to override such rights. The implication that the legislature must have abrogated the relevant constitutional right must be one that truly necessarily follows from the express provisions of the legislation construed in their context. See *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 38, [2014] AC 700, Lord Neuberger PSC, [55]; *R (Jackson) v Attorney General* [2006] 1 AC 262, Baroness Hale, [159]; *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, Lord Hobhouse, [45]; and *R (Juncal) v Secretary of State for the Home Department* [2007] EWHC 3024 (Admin), [2008] 1 MHLR 79, Wyn Williams J, [43].

130. Applying this principle of statutory construction to the 2021 Act, I reject the claimants' contention that the Senedd failed squarely to confront the fact that it was removing the right of excusal or that there was any sleight of hand in doing so. I accept that the 2021 Act does not *expressly* state that the parental right of excusal has been abrogated. In addition, if paragraph 20 of Schedule 2 to the 2021 Act is viewed in isolation as the means by which the right was overridden, its terms may be said to provide some, albeit superficial, support for the claimants' argument that the Senedd did not squarely confront what it was doing.

131. But paragraph 20 of Schedule 2 should not be viewed in isolation; it must be considered in context. By the 2021 Act the Senedd adopted a comprehensive new legislative framework for curricula in maintained schools in place of the pre-existing scheme. The 2021 Act expressly provides that RSE is a "*mandatory*" element of the curriculum (s.3(2)), and repeatedly describes it as "*mandatory*" (s.8(1), 24(2) and 29(3)). The 2021 Act expressly provides that the curriculum which is required to be designed, adopted and implemented in each school must encompass the mandatory element of RSE (ss.10, 11, 24 and 27).

132. Importantly, the 2021 Act expressly requires the teaching and learning to be secured for "*each pupil*" to encompass RSE (s.29(2)); and expressly permits limited exceptions to be made (Chapter 4 of Part 2). The most pertinent provision in Chapter 4 is s.42 which (a) enables, but does not require, the Welsh Ministers to provide an exception for individuals pupils; (b) requires that determination of whether to grant such an exception lies with the head teacher; and (c) limits the period for which such an individual exception may initially be given to six months. These provisions must be considered in the legislative context in which a parent of a child who is a registered pupil at a school commits a criminal offence if the child does not attend the school in accordance with the school rules (including, for example, being withdrawn for an hour a week to attend a piano lesson without permission: see paragraph 98 above), unless a specified exception applies: s.444 of the 1996 Act and *Platt*, [48].

133. These express provisions of the 2021 Act are wholly inconsistent with an unlimited and unconditional parental right to exempt a child who is a registered pupil at a maintained school from attendance during periods of the school day when RSE is taught. It is in that context that the consequential amendment was made by paragraph 20 of Schedule 2 to make clear that s.405 of the 1996 Act no longer applies in Wales. The claimants' contention that such a significant amendment had to be placed in the body of the Act to be effective is contrary to authority. As Brett LJ observed in *Attorney General v Lamplough* (1878) 3 Ex D 214, 229, "*[t]he schedule is as much a part of the statute, and is as much an enactment as any other par*t"; and see *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed., 2020), sections 2.7 and 16.9. Further, their submission that the amendments to add "*in England*" in s.405 say nothing about the application of the provision to Wales has no merit. Section 405, as amended, is clearly a provision that only applies to England (where the "*National Curriculum*" and "*sex education*" are taught), and not to Wales where a different framework is in place.

134. I agree with the submission of the Welsh Ministers that the continued existence of any constitutional right of excusal (if, contrary to my view, such a right was created by the common law) would be irreconcilable with the deliberate legislative choices to which I have referred. In addition, subject only to the transitional provisions, it is plain that the statutory right of excusal in s.405 of the 1996 Act no longer applies in Wales.

Do the Code or the Guidance misstate the law in relation to any right of excusal?

135. With respect to the issues identified in paragraph 3 above, I have concluded that: the common law does not provide for the constitutional parental right of excusal for which the claimants contend (1(a)); and so the question as to the nature of the right does not arise (1(b)); in any event, if any such right exists, it has been abrogated by the 2021 Act (1(c)); and the statutory right of excusal provided by s.405 of the 1996 Act has been abrogated by the 2021 Act, in respect of Wales (1(d)). It follows that in describing RSE as "*mandatory*", neither the Code nor the Guidance misstate the law (1(e)).

F. Ground 3: Article 2 of Protocol 1

The claimants' submissions

136. First, in the alternative to grounds 1 and 2, the claimants submit that the absence of a parental right of excusal is in breach of the *first sentence* of A2P1 ("*No person shall be denied the right to education*"). By making the provision of state education conditional

upon parents acting contrary to their religious or philosophical convictions, the state has breached its obligations under the first sentence of A2P1. They submit that the cross-cutting and whole-school approaches "*imposing LGBTQ+ teaching across the whole curriculum*" would render any right of excusal, if it were recognised, "*wholly illusory*", so forcing parents who wish to ensure that their child's education is not contrary to their religious or philosophical beliefs to remove them from maintained schools. In this regard, they contend that paragraphs [C11] of the Code and [G14]-[G16] of the Guidance (paragraphs 76 and 78 above) make the practical exercise of a right of excusal entirely ineffective.

137. The claimants submit that their case is analogous to *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, in which a chamber of the European Court of Human Rights held that the provision of education conditional on the parents accepting that their child would potentially be liable to corporal punishment, contrary to their philosophical convictions, was not reasonable and breached the first sentence of A2P1. In the absence of any guarantee to parents that RSE will be delivered in a way which respects their moral values, the removal of the right of excusal is not Convention-compliant.

138. Secondly, the claimants contend that various passages of the Code and the Guidance authorise or positively approve teaching that would be in breach of the right, conferred on parents by the *second sentence* of A2P1, to ensure education and teaching in conformity with their own religious and philosophical convictions. They contend that the Code and the Guidance impose controversial socio-sexual ideologies or theories, particularly in relation to the "*TQ+ component*" of "*LGBTQ+ diversity, equality and inclusivity teaching*", and teaching based on "*a supposed distinction between sex and gender*", which have no basis in law, and constitute, or risk constituting, indoctrination by the State. The claims in the Guidance that RSE has the power to be "*transformative*" and that to be effective it must "*start early*" are, they contend, strongly suggestive that the programme is designed to be ideological, and that it seeks in some cases to divide children from the values of their parents or the communities they come from on matters of moral and ethical values. At the same time, the claimants contend that the Code and the Guidance have been made "*purposely obscure*", lacking any detail of the resources, books or outside speakers to be used. The claimants take particular objection to paragraphs [C4]-[C5], [C13]-[C14], [C21], [C26], [C36] and [C38] of the Code, and paragraphs [G4], [G9]-[G10] and [G22]-[G23] of the Guidance.

139. Further, the claimants submit that the impacts on their A2P1 rights are required to be, but are not, prescribed by law and foreseeable. Mr Diamond submits that *A v SSHD* is not the appropriate test because the Code and the Guidance constitute, in effect, *ultra vires* subordinate legislation. Given the lack of detail of the content of RSE in the 2021 Act, the Code and the Guidance should be subjected to the same intensity of review as the courts would give to the interpretation of powers delegated under a so-called Henry VIII clause.

140. The claimants contend that maintaining a liberal democratic state requires the adoption by the State of a neutral stance with regards to areas of controversy in fields that transgress on privacy rights. A coercive use of the public power that seeks to ensure that the children of the citizenry conform to a version of the good as defined by the State, is illiberal and intolerant, even if done in the name of tolerance and inclusion. The neutral public square needs compromise over differences on matters such as sexual

ethics. They contend neutrality and impartiality are impossible to achieve in the field of sexual ethics because of the breakdown in consensus; and the assertion that teaching will be neutral and impartial is implausible.

141. In support of this ground, the claimants rely upon *Kjeldsen and others v Denmark* (1976) 1 EHRR 711, *Campbell and Cosans*, *Folgerø v Norway* (2008) 46 EHRR 47 (GC), *Zengin v Turkey* (2008) 46 EHRR 44, *Dojan v Germany* (2011) 53 EHRR SE24, *Lautsi v Italy* (2012) 54 EHRR 3 (GC), and *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 (Admin), [2016] PTSR 405. I address these authorities below.

The defendant's submissions

142. The Welsh Ministers submit that it is not open to the claimants to contend that the absence of a right of excusal breaches the first sentence of A2P1. Such an argument is not a challenge to the Code or the Guidance which are the only texts challenged in these proceedings. Rather, it necessarily amounts to an allegation that the material provisions of the 2021 Act were outside the Senedd's legislative competence: s.108A of the Government of Wales Act 2006.

143. In any event, the defendant submits that the claimants' argument in relation to the first sentence of A2P1 cannot be made out unless they succeed in their argument on the second sentence. The question is whether the 2021 Act would inevitably operate incompatibly with the second sentence of A2P1. The defendant accepts that the removal of a child from school may give rise to a breach of the child's rights under the first sentence of A2P1 if the removal is necessary to avoid a breach of the parent's rights under the second sentence. But the question whether it is necessary inevitably shifts the focus onto whether there would be breach of parental rights.

144. In relation to the argument advanced by the claimants under the second sentence of A2P1, the defendant contends that to succeed the claimants have to show that the Code and/or the Guidance purport to authorise or positively approve unlawful conduct: *A v SSHD*. The question is whether the Code and/or the Guidance will inevitably result in unlawful conduct in a "*material and identifiable number of cases*" or whether it can be operated in a lawful way: *A v SSHD,* [63]. However, in response to the claimants' contention that the *A v SSHD* test is inapplicable, Mr Moffett submits that it is unnecessary for the court to determine whether the approach to assessing the lawfulness of subordinate legislation or a policy applies. The approach is either the same, involving consideration of whether the subordinate legislation will inevitably operate incompatibly with Convention rights in a "*legally significant number of cases*" (*In re Northern Ireland Human Rights Commission's Application for Judicial Review* [2019] 1 All ER 173 ('*In re NIHRC*'), Lord Mance, [74], [82]; *A v SSHD,* [78]), or the claimants would have to show it would be incompatible in "*all or almost all cases*" (*Christian Institute,* [88], citing *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055, per Baroness Hale, [2], [60], Lord Hodge, [69]). While reserving the right to argue for the higher threshold, for the purposes of the argument before this court, the defendant accepts the test as described by Lord Mance.

145. The defendant relies on the "*major principles*" that emerge from A2P1 as enumerated by the Grand Chamber in *Folgerø,* [84]. Much of the jurisprudence on the second sentence of A2P1 relates to religious education, in which context the European Court of Human Rights has emphasised the state's duty of neutrality as between different

religious and philosophical beliefs. But the court has taken a different approach in the context of teaching of sex education, morals and ethics. A position of strict neutrality on the part of the state is not required. The fundamental requirements are of pluralism and the avoidance of indoctrination.

146. The state is entitled to provide teaching that (i) addresses considerations of a moral nature, provided it does not constitute an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour; (ii) aims to equip pupils to protect themselves and to show consideration for others; (iii) seeks to provide pupils with knowledge of biological, ethical, social and cultural aspects of sexuality in order to enable them to develop their own moral views and an independent approach to their own sexuality, and that encourages tolerance towards human beings irrespective of their sexual orientation and identity; and (iv) aims to enable pupils to be tolerant and open to dialogue and to people whose beliefs differ from their own.

147. The defendant submits that it is important to look at the Code and the Guidance as a whole and in context, including the requirement in the 2021 Act that teaching must be developmentally appropriate. There is much in the Code and the Guidance that, even on the claimants' case, is unobjectionable. And the defendant submits that whether taken in isolation, or together and in context, none of the statements in the Code or the Guidance to which the claimants object purports to authorise or positively approve teaching that would breach A2P1. On the contrary, they reflect the general spirit of the Convention as an instrument designed to maintain and promote the ideals and values of a democratic society, including those of tolerance, respect and equality; and are plainly capable of being implemented in a way that is compatible with the second sentence of A2P1.

148. In broad terms, the defendant summarises the purposes of RSE, as set out in the Guidance, as being: (i) to help pupils to form and maintain a range of relationships that are fulfilling, healthy and safe, and that are based on mutual trust and respect [G3, G4, G8]; (ii) to help pupils to understand themselves and make informed decisions, including about sexual relationships and sexual health, and to take responsibility for their own decisions and behaviours [G3]; (iii) to enable pupils to navigate changes in society and to think critically about the range of complex and potentially contradictory messages about relationships and sexuality to which they are exposed [G7, G8, G9]; (iv) to enable pupils to protect themselves and others from abusive relationships and bullying [G9]; (v) to contribute to a society in which people treat others with understanding and empathy, whatever their personal characteristics, and promote equality and equity [G4, G9]. These are, the defendant submits, entirely consistent with the pluralism requirement.

149. The defendant submits that there is nothing in the Code or the Guidance that authorises or positively approves teaching that advocates or promotes any particular identity or sexual lifestyle over another, or that encourages children to self-identify in a particular way. The claimants' argument that it is a breach of A2P1 to teach children that there are persons who self-identify in a gender that is different to their biological sex at birth, and that there are persons who self-identify with the T, Q or + elements of the term LGBTQ+ (i.e. who self-identify as transgender or trans, queer or questioning, or in other identities), is misconceived. It is an incontrovertible fact - which is not denied by the claimants and is recognised by a substantial body of reputable organisations (as identified in Mr Lloyd's statement) - that there are persons who self-identify in a gender

that is different to their biological sex at birth and there are persons who self- identify as T, Q or +; and for many such persons this constitutes an important and often fundamental part of their identity. It cannot be incompatible with A2P1 to teach children that such persons exist, and that they should be treated equally and with respect. Such teaching is entirely aligned with the pluralism requirement.

150. In response to the claimants' contention that the impact of the Code and the Guidance is not "*prescribed by law*", the defendant submits, first, the European Court of Human Rights' approach is to consider whether, as a matter of substance, teaching is in breach of A2P1. A2P1 is not structured in the same way as qualified Convention rights (such as articles 8 and 9) which confer a right which can only be interfered with if prescribed conditions, including that any interference is prescribed by law, are met. Secondly, in any event, both the Code and the Guidance have the quality of law for the purposes of the Convention.

ANALYSIS AND DECISION ON GROUND 3

Standing

151. The defendant has not raised the question whether each of the claimants have standing to pursue this ground, but the question of standing is a jurisdictional issue which must be considered by the court at the substantive stage, if necessary: *R (Good Law Project Ltd) v Prime Minister* [2022] EWHC 298 (Admin), Singh LJ and Swift J, [17]. It falls to be answered by reference to the question whether the claimants (or any of them) would be a "*victim*", for the purposes of article 34 of the Convention, of the alleged breach of A2P1 if proceedings were brought in the Strasbourg court: s.7(3) of the HRA and s.81(2) of the Government of Wales Act 2006.

152. The second, third and fifth claimants each have one or more children who are of such an age as to be affected by the introduction of RSE, and so their rights under A2P1 are affected, and they have standing. However, it does not seem to me that the first or fourth claimants have standing as the former legislative provisions (including the statutory right of excusal from "*sex education*", save to the extent that it forms part of the National Curriculum) continue to apply in respect of each of their children who are of school age. According to the established jurisprudence of the European Court of Human Rights the requirement that a person must be a victim of an alleged violation of Convention rights requires that he or she is directly and personally affected by it. It is clear that an *actio popularis* is not permitted under the Convention.

153. Nonetheless, given that some of the claimants have standing to pursue this ground, this finding does not have any impact on the substance of the argument.

Policy or subordinate legislation: the applicable test

154. In *Gillick* the Department of Health and Social Security had issued to area health authorities a memorandum of guidance on family planning services which contained a section dealing with contraceptive advice and treatment for young people. The lawfulness of the guidance was challenged. At 181F-G Lord Scarman observed:

> "It is only if the guidance permits or encourages unlawful conduct in the provision of contraceptive services that it can be

> set aside as being the exercise of a statutory discretionary power in an unreasonable way."

155. In answering that question, the court first had to determine, "*what is the true meaning of the text*?" (Lord Scarman, 180E). That question fell to be determined by asking: "*what would a doctor understand to be the guidance offered to him, if he should be faced with a girl under 16 seeking contraceptive treatment without the knowledge or consent of her parents?*" (Lord Scarman, 180F-G). It was clear that the guidance "*would convey to any doctor or other person who read it that the decision whether or not to prescribe contraception for a girl under 16 was in the last resort a matter for the clinical judgment of a doctor, even if the girl's parents had not been informed that she had consulted the doctor, and even if they had expressed disapproval of contraception being prescribed to her*" (Lord Fraser, 165F-G; Lord Scarman 180E-F). It was in those circumstances that the issue arose as to whether a doctor could lawfully prescribe contraception to a girl under the age of 16 years without the consent of one of her parents.

156. In *A v SSHD* the Supreme Court identified three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others ([46]). The only one the claimants rely on (albeit they contend that the Code and the Guidance are akin to subordinate legislation rather than a policy) is the first: "*where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i.e. the type of case under consideration in Gillick [1986] AC 112)*" ([46]).

157. In *A v SSHD* the Supreme Court held:

> "63. … where the question is whether a policy is unlawful, that issue must be addressed looking at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way.
>
> …
>
> 65. … In principle, the test for the lawfulness of a policy is not a statistical test but should depend, as the *Gillick* test does, on a comparison of the law and of what is stated to be the behaviour required if the policy is followed."

158. In my judgment, while I accept that arguably the Code may be akin to subordinate legislation, the Guidance is a paradigm example of the type of policy document to which the test in *A v SSHD* applies. In any event, I agree with the defendant that if the test of lawfulness of subordinate legislation applies, the most beneficial outcome for the claimants results in the application of a test that is "*in substance … the same*", namely, whether the Code or the Guidance will inevitably operate incompatibly with Convention rights in a legally significant number of cases (*A v SSHD*, [78]; In re NIHRC, [82]).

159. Accordingly, in assessing the lawfulness of the Code and the Guidance I shall consider whether it can be operated lawfully, or whether it is *bound* to work in a way that is incompatible with Convention rights in a "*legally significant*" or "*material and identifiable*" number of cases. In undertaking this assessment it is necessary to ascertain (a) what the Convention rights require, (b) the meaning of the Code and the Guidance, having regard to how those documents would be understood by those to whom they are addressed, in particular head teachers and governing bodies of maintained schools, and then to compare them.

Does the absence of a parental right of excusal breach the first sentence of A2P1?

160. In my judgment, a challenge alleging that the absence of a parental right of excusal breaches the first sentence of A2P1 would have to be targeted at the 2021 Act. The removal of the statutory right of excusal was effected by the 2021 Act, not by the Code or the Guidance. Moreover, the Welsh Ministers could not lawfully have granted a parental right of excusal in the Code or the Guidance.

161. The claimants have not brought any ground alleging the 2021 Act is outwith the legislative competence of the Senedd, by reason of being incompatible with A2P1 or otherwise. It follows that it is not open to the claimants to contend that the absence of a parental right of excusal breaches the first sentence of A2P1.

162. In any event, I agree with the defendant's submission that, in this case, if the claimants' argument based on the second sentence of A2P1 fails, the argument based on the first sentence must inevitably fall with it. It can only be shown that a child, who has been removed from school by a parent, has thereby been denied the right to education by the state if the removal was necessary to avoid a breach of the parent's rights under the second sentence of A2P1. As I have found, for the reasons that I give below, that neither the Code nor the Guidance breach the second sentence of A2P1, and no other breach of that provision is alleged, it follows that if the argument were open to the claimants, I would find that the absence of a parental right of excusal does not breach the first sentence of A2P1.

Prescribed by law

163. I can dispose briefly of the claimants' contention that any limitations on parental rights in the second sentence of A2P1 flowing from the Code or the Guidance do not satisfy the requirement to be prescribed by law as such limitations are not formulated with sufficient clarity in the 2021 Act.

164. First, unlike the qualified rights in articles 8 to 11 of the Convention which expressly require restrictions to be "*in accordance with the law*" (article 8(2)) or "*prescribed by law*" (articles 9, 10 and 11), A2P1 contains no such words and the European Court of Human Rights has never found any such requirement to be implicit in A2P1. On the contrary, the Strasbourg court's approach is to consider whether, as a matter of substance, there has been a breach of A2P1. In *Perovy v Russia* (app. no. 47429/09, 20 October 2020), the court held that the performance of a religious ceremony in a school did not breach A2P1, even though it was contrary to domestic law (see [17]). In *Lautsi*, the Grand Chamber held, when rejecting the applicants' complaints of a breach of A2P1, that it did not need to determine whether the display of the crucifix in state schools in Italy was incompatible with "*the principle of secularism as enshrined in*

Italian law" ([57]). As Lord Bingham observed in *A v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363, when addressing the interpretation of A2P1:

> "There is no Convention guarantee of compliance with domestic law."

To similar effect, Lord Hoffmann observed that A2P1 "*is concerned only with results*" ([57]; and see [58]-[60]).

165. This is sufficient to dispose of this element of the argument. But in any event the contention that the "*prescribed by law*" requirement, if it applies, can only be met by prescribing any interference with the claimants' rights under A2P1 in an Act is contrary to the highest authority. In *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, Lord Bingham observed at [34]:

> "Mr Gordon, on behalf of Mind, submits that the interference is not 'in accordance with law' because not prescribed by a binding general law. I cannot for my part accept this. The requirement that any interference with the right guaranteed by article 8(1) be in accordance with the law is important and salutary, but it is directed to substance and not form. It is intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied. This could of course have been achieved by binding statutory provisions or binding ministerial regulations. But that was not the model Parliament adopted. It preferred to require the Secretary of State to give guidance and (in relation to seclusion) to call on hospitals to have clear written guidelines. … The rules are accessible, foreseeable and predictable. It cannot be said, in my opinion, that they are not in accordance with or prescribed by law."

166. Lord Hope of Craighead's speech at [91] to [94], citing *Silver v United Kingdom* (1983) 5 EHRR 347 and *Sunday Times v United Kingdom* (1979) 2 EHRR 245, was to the same effect. In particular, at [94] Lord Hope observed:

> "The requirement which the law lays down that those to whom the Code is addressed are expected to follow it unless they can give a good reason for not doing so provides a sufficient assurance of certainty and predictability to satisfy the requirements of article 8(2).".

167. Insofar as the claimants' complaint is directed at the absence of a right of excusal, as I have explained, that is the clear effect of the 2021 Act itself. Insofar as the claimants' complaint is directed at matters which flow from the Code and the Guidance (such as the whole-school approach, the requirement that RSE should be cross-cutting, or the content of the curricula to be designed by head teachers), both the Code and the Guidance plainly have the quality of law for the purposes of the Convention.

168. In relation to the claimants' submission that the Code and the Guidance do not provide sufficient information to enable them to know what their children will be taught in RSE lessons I note, first, that the role of such policy guidance is not to eliminate all uncertainty regarding its application and all risk of legal errors by head teachers or governing bodies (*A v SSHD*, [34]); and secondly, s.11 of the 2021 Act has the effect that these texts will be supplemented by a published summary of the curriculum adopted by the head teacher and governing body of each school.

A2P1: the authorities and applicable principles

169. A2P1 has been addressed by the Grand Chamber of the European Court of Human Rights in two cases: *Folgerø* and *Lautsi*. Neither case concerned sex education (or RSE).

170. In *Folgerø*, Christianity, religion and philosophy were taught as a single subject, "*KRL*", following a change to the school curriculum. The applicants, who were Humanists, had previously been able to exempt their children from Christian faith lessons but following the change they were only able to obtain exemptions excusing their children's attendance during certain parts of KRL. They complained that the refusal of a full exemption from KRL constituted a breach of their A2P1 and article 9 rights. By nine votes to eight, the Grand Chamber found a violation of A2P1.

171. In *Folgerø*, at [84], the Grand Chamber drew together the "*major principles*" which emerge from the court's caselaw on the interpretation of A2P1 (omitting the footnotes):

> "(a) The two sentences of Art.2 of Protocol No.1 must be interpreted not only in the light of each other but also, in particular, of Arts 8, 9 and 10 of the Convention.
>
> (b) It is on to the fundamental right to education that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between state and private teaching. The second sentence of Art.2 of Protocol No.1 aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through state teaching that this aim must be realised.
>
> (c) Article 2 of Protocol No.1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire state education programme. That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State. The verb "respect" means more than "acknowledge" or "take into account". In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. The term "conviction", taken on its own, is not synonymous with the

words "opinions" and "ideas". It denotes views that attain a certain level of cogency, seriousness, cohesion and importance.

(d) Article 2 of Protocol No.1 constitutes a whole that is dominated by its first sentence. By binding themselves not to "deny the right to education", the contracting states guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time and the possibility of drawing, by official recognition of the studies which he has completed, profit from the education received.

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

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

(g) However, the setting and planning of the curriculum fall in principle within the competence of the contracting states. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era. In particular, the second sentence of Art.2 of Protocol No.1 does not prevent states from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.

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

(i) In order to examine the disputed legislation under Art.2 of Protocol No.1, interpreted as above, one must, while avoiding any evaluation of the legislation's expediency, have regard to the material situation that it sought and still seeks to meet. Certainly,

> abuses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism."

172. Applying those principles, the Grand Chamber held that the question was whether the state "*had taken care that information or knowledge included in the Curriculum for the KRL subject be conveyed in an objective, critical and pluralistic manner or whether it had pursued an aim of indoctrination*" ([85]). The court held that the answer to that question was that the state had not taken sufficient care, in circumstances where the object was "*to help give pupils a Christian and moral upbringing*" ([90]), and this object was compounded by the "*clear preponderance of Christianity in the composition of the subject*" ([91]), as well as "*qualitative differences applied to the teaching of Christianity as compared to that of other religions or philosophies*" ([95]). The system of partial exemption, in practice, was a theoretical or illusory rather than practical and effective means of the guaranteeing the applicants' rights. The possibility of seeking alternative education in private schools which were heavily subsidised by the state did not dispense with the obligation to safeguard pluralism in state schools ([101]).

173. In *Lautsi* the Grand Chamber held by 15 votes to two that there was no violation of A2P1 as a result of the display of the crucifix in Italian state school classrooms. The court held at [60]-[61] that A2P1:

> "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, which guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion, and which imposes on contracting states a 'duty of neutrality and impartiality'.
>
> In that connection, it should be pointed out that states have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs." (Emphasis added.)

174. The Grand Chamber observed that there was no evidence that the display of a religious symbol on classroom walls influenced young persons whose convictions were still in the process of being formed ([66]). In determining that the principle of neutrality was not breached it was significant that the presence of the crucifix was no more than a passive symbol ([72]). Provided that states' decisions did not lead to a form of indoctrination, the court had a duty to respect their decisions regarding the organisation of the school environment, and the setting and planning of the curriculum, including the place they accord to religion ([69]). The presence of a Christian symbol, conferring preponderant visibility on the country's majority religion, was not sufficient to denote a process of indoctrination ([71]).

175. The claimants place reliance on one further A2P1 case outside the context of sex education or RSE: *Zengin*. *Zengin* concerned a course in religious culture and ethics which was taught in primary and secondary schools in Turkey. The second applicant, who was a pupil in a state school, was required to attend the course, despite her father's request for an exemption. The course was mandatory for Muslims, whereas Christian and Jewish children could seek an exemption. The applicants were adherents of Alevism, a belief system generally considered to be one of the branches of Islam, but which rejects the sharia and sunna. The court noted that the Alevi faith has deep roots in Turkish society and the proportion of the Turkish society belonging to it was said to be "*very large*" ([67]).

176. The court observed in *Zengin* at [49]:

> "Article 2 of Protocol No.1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire state education programme. That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the 'functions' assumed by the State. The verb 'respect' means more than 'acknowledge' or 'take into account'. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. The word 'convictions', taken on its own, is not synonymous with the words 'opinions' and 'ideas'. It denotes views that attain a certain level of cogency, seriousness, cohesion and importance."

177. The course taught the Sunni understanding of Islam. Pupils were given instruction in the precepts, rites and prayers of the Muslim faith, in its Sunni form, whereas there was no teaching on the confessional or ritual specificities of the Alevi faith. The court held, having regard to the content of the subject, that the course did not meet the criteria of objectivity and pluralism and failed to respect the religious and philosophical convictions of the second applicant's father, a follower of the Alevi faith, "*on the subject of which the syllabus is clearly lacking*". The exemption procedure did not provide sufficient protection for the father's religious or philosophical convictions. Consequently, the court held that the applicants' rights under the second sentence of A2P1 had been breached.

178. The European Court of Human Rights has considered A2P1 in the context of four cases concerned with sex education, namely, *Kjeldsen, Jiménez v Spain* (app. no. 5118/99, 25 May 2000), *Konrad v Germany* (2007) 44 EHRR SE8 and *Dojan.* A2P1 was also considered by the court in *Appel-Irrgang v Germany* (app. no. 45216/07, 6 October 2019), a case which concerned compulsory ethics lessons, rather than sex education, but in which there is some overlap between the content of ethics and the relationships aspect of RSE. None of these judgments found a breach of A2P1. Apart from *Kjeldsen*, the complaints in all these cases were found to be manifestly ill-founded, and therefore inadmissible.

179. *Kjeldsen* was determined more than thirty years before *Folgerø*. It was cited extensively by the Grand Chamber in that case, as well as in *Lautsi* and many of the individual Section decisions. The facts of *Kjeldsen* are close to those of the present case. In

Kjeldsen three couples with school age children objected to "*integrated and hence compulsory, sex education as introduced into State primary schools in Denmark*" ([14]). The legislature had "*directed schools to include in their curricula, often in conjunction with traditional subjects, certain new topics such as road safety, civics, hygiene and sex education*" ([16]). As in Wales, children had a right to free education in state schools, but parents were not obliged to enrol them in state schools; they could home educate their children or send them to private schools ([15]). However, unlike in Wales, the Danish state subsidised 85% of the running costs of private schools with at least 20 pupils, and no fewer than 10 pupils per class ([18]).

180. The legislation was introduced, following a report by a committee set up by the Danish Government, to implement the recommendation that "*it was essential for sexual instruction to be adapted to the children's different degrees of maturity and to be taught in the natural context of other subjects, for instance when questions by the children presented the appropriate opportunity*" ([21]). The list of matters to be taught is identified as including, the concept of the family, the difference between the sexes, conception, birth and development of the child, family planning, relations with adults whom the children do not know, puberty, sexual organs, hormones, heredity, sexual activities (masturbation, intercourse, orgasm), methods of contraception, venereal disease, homosexuality, pornography, and ethical, social and family aspects of sexual life ([28]).

181. In *Kjeldsen*, the court identified, at [50]-[54], the principles that were later endorsed by the Grand Chamber in *Folgerø* in subparagraphs (a), (b), the first sentence of (c), (d), (e), the third and fourth sentences of (g), (h) and (i) of [84] (see paragraph 171 above). At [53], having held that A2P1 does not permit parents to object to the integration of teaching of a directly or indirectly religious or philosophical kind in the curriculum, provided that it is "*conveyed in an objective, critical and pluralistic manner*" and does not pursue an aim of "*indoctrination*", the court observed,

> "In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications."

182. In determining that the applicants' complaints should be rejected, the court had regard to the objectives that the Danish legislature sought to pursue ([54]). The court recognised that the teaching entailed considerations "*of a moral order*", and that it was capable of "*encroaching on the religious or philosophical sphere*". But there was no breach of A2P1 given that:

> "Examination of the legislation in dispute establishes in fact that it in no way amounts to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour. It does not make a point of exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible. Further, it does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line the parents' own religious or philosophical convictions."

183. *Jiménez* concerned a 13-14 year old girl whose father withdrew her from sex education classes which were given in the context of Natural Sciences. He considered that a booklet distributed to his daughter went well beyond the scope of Natural Sciences and contained guidelines on sexuality which were contrary to his moral and religious convictions. The booklet comprised chapters entitled, "*Concept of sexuality*"; "*We are sexual beings*"; "*Body awareness and sexual development*"; "*Fertilisation, pregnancy and childbirth*"; "*Contraception and abortion*"; and "*Sexually transmitted diseases and Aids*". The daughter sat an examination in which she did not answer any of the questions on sex education. Consequently she failed the examination and was required to re-sit the year.

184. At p.6 the court observed:

> "In the instant case the Court notes that the sex education class in question was designed to provide pupils with objective and scientific information on the sex life of human beings, venereal diseases and Aids. The booklet tried to alert them to unwanted pregnancies, the risk of pregnancy at an increasingly young age, methods of contraception and sexually transmitted diseases. That was information of a general character which could be construed as of general interest and which did not in any way amount to an attempt at indoctrination aimed at advocating particular sexual behaviour."

185. In rejecting the complaint, the court also took into account, as it had done in *Kjeldsen*, that the parents' ability to educate their child in line with the parents' own religious and philosophical convictions was unaffected; and that the parents had opted for a state school in circumstances where (state-subsidised) private schools were available.

186. In *Konrad*, the applicants' complained that Germany had refused their application to be authorised to educate their children at home, and exempted from compulsory primary school attendance, on grounds of (among other reasons) their religious objection to sex education. Notably, the court's assessment that the allegation of a breach of A2P1 was manifestly ill-founded was in the context of the more far-reaching absence of a right of withdrawal from education in school, rather than the lack of a right of excusal from sex education after opting for a state school.

187. The court stated at p.143-144:

> "In the present case, the Court notes that the German authorities and courts have carefully reasoned their decisions and mainly stressed the fact that not only the acquisition of knowledge, but also the 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 E.H.R.R. 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" (see, *mutatis mutandis*, *Kjeldsen, v Denmark,* cited above, at [54]; *Efstratiou v Greece* (2006) 43 E.H.R.R. 24 at [32])." (Emphasis added.)

188. *Dojan* also concerned the German education system in which compulsory elementary school attendance was imposed and home education was, in general, not a permissible option (*Dojan*, [62]). Mandatory sex education classes formed part of the school curriculum in the fourth year of primary schooling. In addition, a two day school theatre workshop addressing sex education was organised at regular intervals as a mandatory event for children in the third and fourth years (comprising children between seven and nine). The aim of "*sexual education*" in school, according to the relevant German legislation, was "*to provide pupils with knowledge of biological, ethical, social and cultural aspects of sexuality according to their age and maturity in order to enable them to develop their own moral views and an independent approach towards their own sexuality. Sexual education should encourage tolerance between human beings irrespective of their sexual orientation and identity*" ([44]).

189. The applicants were five couples who were members of the Christian Evangelical Baptist Church and who had several children who attended state primary schools in Germany. They complained that compulsory attendance at sex education lessons, the theatre workshop and another event infringed their rights under A2P1. In similar terms to the objections raised in this case, in *Dojan* the parents objected to the content of a book that was used in sex education lessons, "*which in their opinion was partly pornographic and contrary to Christian sexual ethics requiring that sex should be limited to patrimony. In their view, it set forth a liberal, emancipatory image of sexuality which was not consistent with their religious and other moral beliefs and would lead to premature 'sexualisation' of the children*" ([12]). The applicants were fined, and ultimately sentenced to terms of imprisonment of up to 43 days, for failing to secure their children's attendance at school when sex education lessons or events were taking place.

190. The court in *Dojan* reiterated the principles governing the general interpretation of A2P1 as set out in *Kjeldsen, Folgerø* and *Zengin*. Having referred to the conclusion the court reached in *Konrad*, the court stated:

"63 The Court finds that similar considerations apply in the case at hand, where the applicants do not seek a general exemption from compulsory schooling with a view to educating their children at home but rather request exemption from specific sex education classes or school events which they deem to conflict with their religious convictions.

64 The Court observes that the sex education classes at issue aimed at, as stated by the Paderborn District Court, the neutral transmission of knowledge regarding procreation, contraception, pregnancy and childbirth in accordance with the underlying legal provisions and the ensuing guidelines and the curriculum, which were based on current scientific and educational standards. The goal of the theatre workshop 'My body is mine' was to raise awareness of sexual violence and abuse of children with a view to its prevention.

65 The Court refers in this context to s.33 of the North Rhine-Westphalia Schools Act stipulating that the aim of sexual education is to provide pupils with knowledge of biological, ethical, social and cultural aspects of sexuality according to their age and maturity in order to enable them to develop their own moral views and an independent approach towards their own sexuality. Sexual education should encourage tolerance between human beings irrespective of their sexual orientation and identity. This objective is also reflected in the decisions of the German courts in the case at hand, which have found in their carefully reasoned decisions that sex education for the concerned age group was necessary with a view to enabling children to deal critically with influences from society instead of avoiding them and was aimed at educating responsible and emancipated citizens capable of participating in the democratic processes of a pluralistic society—in particular, with a view to integrating minorities and avoiding the formation of religiously or ideologically motivated 'parallel societies'.

66 The Court finds that these objectives are consonant with the principles of pluralism and objectivity embodied in art.2 of Protocol No.1.

…

68 The Court finds that the presumptions underlying the decisions of the domestic authorities and courts are not erroneous and fall within the contracting states' margin of appreciation in setting up and interpreting rules for their education systems. It further notes that there is nothing to establish that the information or knowledge included in the curriculum and imparted within the scope of the said events was not conveyed in an objective, critical and pluralistic manner. In this respect the Court shares the view of the domestic courts,

> which concluded that there was no indication that the education provided had put into question the parents' sexual education of their children based on their religious convictions or that the children had been influenced to approve of or reject specific sexual behaviour contrary to their parents' religious and philosophical convictions. Neither did the school authorities manifest a preference for a particular religion or belief (*Zengin* at [59]) within the scope of the school activities at issue. The Court reiterates in this context that the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions (see *Appel-Irrgang v Germany* (45216/07) October 6, 2009).
>
> 69 Moreover, as also pointed out by the German courts, the applicant parents were free to educate their children after school and at weekends and thus their right to educate their children in conformity with their religious convictions was not restricted in a disproportionate manner." (Emphasis added.)

191. *Appel-Irrgang* concerned the introduction, by means of primary legislation, of ethics as a compulsory subject for all pupils in grades 7 to 10 in state schools. The objective of ethics lessons was:

> "to promote the propensity and ability of pupils, regardless of their cultural, ethnic, religious or ideological background, to address, in a constructive manner, the fundamental cultural and ethical problems of individual life and social coexistence and different value systems and explanations of life. Pupils shall thus acquire the foundations for leading an autonomous and responsible life, and develop an ability to interact socially and an aptitude for intercultural dialogue and ethical discernment. To this end, knowledge shall be imparted of philosophy, religious and philosophical ethics, different cultures and ways of life, the main world religions and questions of lifestyle."

192. The course outline specified that the teaching would be neutral from a religious and ideological perspective, and indoctrination was prohibited, but the "*course shall not be value-neutral [wertneutral], however. Young people must be educated in a spirit of humanity, democracy and freedom. Tolerance and respect for the convictions of others are part of this education …*" The course outline listed six subject areas to be addressed: "*Identity, friendship and happiness*", "*Freedom, responsibility and solidarity*", "*Discrimination, violence and tolerance*", "*Equality, law and justice*", "*Guilt, duty and conscience*" and "*Knowledge, hope and belief*".

193. The first applicant was a state school pupil and the other applicants were her parents. They were Protestants who sought, but failed to obtain through the German courts, an exemption from the obligation to attend the ethics class. In their complaint to the Strasbourg court they contended that the ethics class imposed views which conflicted with their religious convictions, and had been introduced in breach of the state's duty of neutrality. At p.10 the court stated:

> "The Court particularly emphasises that the setting and planning of the curriculum fall in principle within the competence of the Contracting States, which must nonetheless ensure that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind with regard to religion in a calm atmosphere which is free of any misplaced proselytism. They are also forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions, as the parents are primarily responsible for the education and teaching of their children. That is the limit that must not be exceeded."

194. The court concluded that the aims of the ethics classes were in keeping with the principles of pluralism embodied in A2P1. Unlike in *Zengin*, the ethics classes that the first applicant was required to attend were "*neutral and do not give particular weight to any one religion or faith; rather they seek to transmit a common base of values to pupils and to teach them to be open to people whose belief differs from theirs*". The court noted that there was no evidence that the "*ethics tuition given in practice*" had sought to unduly influence or indoctrinate the pupils. (*Appel-Irrgang*, p.11.)

195. At p.12 the court observed:

> "As regards the applicants' claims that the ethics classes were contrary to their religious beliefs, the Court observes that neither the School Act nor the course outline indicated that the classes were designed to give one belief priority over another, or omit or challenge other beliefs, in particular the Christian faith. … As to the applicants' submission that the ethics classes contained ideas or conceptions critical of or opposed to Christian beliefs, the Court considers that it is not possible to deduce from the Convention a right not to be exposed to convictions contrary to one's own (see, mutatis mutandis, *Konrad*, cited above). The Court observes above all that the first applicant can continue to attend the Protestant religion classes provided on the school premises and that there is nothing to prevent her parents from enlightening and advising their daughter, playing their natural role as educators or guiding her in a direction compatible with their own religious convictions …
>
> In the light of the foregoing, the Court considers that by introducing compulsory ethics classes the national authorities did not exceed the margin of appreciation conferred by Article 2 of Protocol No. 1."

196. Finally, I note that Warby J addressed A2P1 in *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 (Admin), [2016] PTSR 405. The claimants sought judicial review of a decision of the Secretary of State to issue new GCSE Religious Studies subject content for the 2016 academic year and, at the same time, to assert that the subject content was consistent with the statutory requirements for the provision of religious education. That assertion was materially misleading because it encouraged

readers to conclude that a GCSE formulated in accordance with the new content would be enough on its own to satisfy the state's obligation to provide religious education, whereas the subject content allowed for the complete exclusion of any study of non-religious belief for the whole of Key Stage 4. Warby J observed that the Strasbourg jurisprudence shows that "*the duty of impartiality and neutrality owed by the state do not require equal airtime to be given to all shades of belief or conviction*", but the complete exclusion for two years of schooling of any study of non-religious beliefs was incompatible with A2P1 ([74]).

197. In addressing the interpretation of A2P1, Warby J observed that the requirement to safeguard the possibility of pluralism is separate and distinct from the prohibition on indoctrination; "*the requirements of A2P1 will be infringed by the state if it fails in its duty to take care that the educational provision it makes is conveyed in an objective, critical and … pluralistic manner, even if it does not go so far as – in the ordinary sense of the phrase – to 'pursue the aim of indoctrination"*" ([29]-[31]). In *Fox* the allegation, upheld by the court, was that the pluralism requirement was not met.

198. Drawing the threads together, in my judgment the key points for the purposes of this case are these:

(1) Pluralism is essential for the preservation of a modern liberal democracy, and this aim must be realised above all through state teaching. (*Folgerø,* [84(b)]).

(2) The state may not pursue an aim of indoctrination (*Folgerø*, [84(h)]).

(3) When considering whether there is a breach of the second sentence of A2P1, it is necessary to have regard to the material situation and the objectives that the relevant education seeks to meet (*Folgero,* [84(i)]). However, the instruction provided may breach A2P1, even if the state's aims are consonant with that article (e.g. *Zengin*, [59], [70]).

(4) A2P1 must be read as a whole (while recognising that the first sentence is dominant), and in light of, in particular, states' responsibility under article 9 for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. It is not necessarily incompatible with the duty of neutrality or A2P1 for a state to give greater priority to the majority religion, but A2P1 does not permit a state to treat the religious or philosophical convictions of minorities in a way that is significantly different at the qualitative level (*Folgerø*, [84(a), (d), (f), *Lautsi* [60], *Zengin*, [63], *Fox*, [31]-[39]).

(5) Teaching should be neutral from a religious perspective, but it is not required to be value neutral. In particular, sex and ethics education which aims to encourage tolerance between human beings irrespective of their sexual orientation and identity, and to enable children to deal critically with influences from society, so that they develop into responsible and emancipated citizens capable of participating in the democratic processes of a pluralistic society, is consonant in its objectives with the principles of pluralism and objectivity embodied in A2P1 (*Appel-Irrgang*, pp.7, 9-11).

(6) In determining the content of education and the manner of its provision the state has a duty to respect parents' convictions, be they religious or philosophical. Respect

entails more than merely acknowledging or taking into account parents' convictions; it implies a positive obligation. For the purposes of A2P1, convictions are views that attain a certain level of cogency, seriousness, cohesion and importance; are worthy of respect in a democratic society; and are not incompatible with human dignity, or the child's right to education under A2P1 (*Folgerø,* [84(c), (e)).

(7) However, the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions (*Dojan*, [68]).

(8) The setting and planning of a curriculum is, in principle, a matter for the state, and this mainly involves questions of expediency within the state's competence and margin of appreciation (*Folgerø,* [84(g)], [89]).

(9) Teaching of information or knowledge of a directly or indirectly religious or philosophical kind will be compatible with A2P1 if the state takes care to ensure that such information or knowledge is conveyed in an objective, critical and pluralistic manner, and does not breach the prohibition on indoctrination (*Folgerø,* [84(g), (h)]).

(10) If those criteria are not breached, A2P1 does not permit parents to object to the inclusion of such teaching in the curriculum, even where compulsory school attendance with no possibility of home schooling is required (*Folgerø,* [84(g)], *Konrad, Dojan*). In this regard, it is relevant that compulsory schooling does not deprive parents of the ability to educate their children outside school in line with their own religious and philosophical convictions (*Kjeldsen,* [54], *Dojan,* [69]).

Application of the A2P1 principles to the facts

199. I have set out the background to the introduction of RSE in paragraphs 42 to 64 above. It is evident that its introduction as a mandatory element of curricula in Wales has been the product of a process of careful consideration which has involved input from expert professionals (including teachers), children's charities and faith groups; extensive consultation with the public; and detailed consideration by the Senedd. The expert advice provided to the Welsh Government was to the effect that high quality RSE is of great benefit to pupils, a key element of successful RSE is to teach pupils about the importance of equality and to respect the rights of others, RSE should be made a mandatory part of the curricula taught in schools, and RSE works best when it is supported by a "*whole school*" approach.

200. The Welsh Government's objectives, and the purposes of mandatory RSE, are also evident in the background documents to which I have referred, and in the Guidance itself, particularly paragraph G3-4 and G7-9. I agree with, and the claimants have not disputed, the defendant's summary of the broad purposes of RSE (paragraph 148 above). In relation to the third purpose, I note that a key element of the material situation is the Welsh Government's view that it has a "*moral obligation to ensure that children in schools receive neutral and accurate information*" on these issues, in circumstances where they have access to a vast amount of information (and misinformation) through the internet and social media (see paragraph 52 above). I would also add to the defendant's summary that mandatory RSE has the overarching aim of supporting the realisation of the "*four purposes*" (paragraph 9 above), including by enabling pupils to

develop as healthy, confident individuals, and as ethical, informed citizens of Wales and the world.

201. These objectives and purposes are entirely consonant with the principles of pluralism and objectivity embodied in A2P1 (see paragraph 198 above). Indeed, there is a close resemblance between the Welsh Government's objectives and the purposes of teaching that the Strasbourg court considered compatible with A2P1 in *Kjeldsen* and *Dojan.*

202. In my judgment, the content of the Code and the Guidance is consistent with the requirement to take care to ensure that RSE teaching is conveyed in an objective critical and pluralistic manner, and does not breach the prohibition on indoctrination. There is nothing in the Code or the Guidance that authorises or positively approves teaching that advocates or promotes any particular identity or sexual lifestyle over another, or that encourages children to self-identify in a particular way. I agree with Mr Moffett's submission that there is a disjunct between the contents of the Code and the Guidance, and what is alleged by the claimants. For example, some of the claimants have expressed concerns about the RSE curriculum based on their belief that it "*reflects a body of educational advocacy known as Comprehensive Sexuality Education ('CSE') which originated in the United States*". It is clear that neither the Code nor the Guidance seek to encourage teaching which reflects the claimants' understanding of CSE. Nor do those texts promote libertarianism or the sexualisation of children.

203. I reject the contention that any of the statements in the Code or the Guidance to which the claimants object will inevitably result in teaching that is contrary to A2P1 in an identifiable, material or legally significant number of cases. Both the Code (at [C1]) and the Guidance (at G6]) expressly refer head teachers and governing bodies to the "*legislation summary*" (paragraph 80 above), in which they are advised in clear terms that the content and manner of teaching RSE "*must be objective, critical and pluralistic*", meaning that schools must, where questions of values are concerned, "*provide a range of views on a given subject, commonly held within society*", including "*a range of other faith and non-religious views*".

204. The first paragraphs of the Code to which the claimants take particular objection are [C4] and [C5] (paragraph 76 above). Paragraph [C4] merely summarises the themes to be covered in RSE. Paragraph [C5] requires RSE to be "*inclusive*" and to "*reflect diversity*", including by developing learners' awareness of different identities, views and values. On its face, this paragraph is consistent with the pluralism requirement. Head teachers would understand that this paragraph means that RSE should develop pupils' awareness of different identities, and a diversity of relationships, gender and sexuality, including LGBTQ+ lives, as well as developing their awareness of differing views and values.

205. This is consistent with the legislation summary which makes clear to head teachers and governing bodies that in designing, adopting and implementing an RSE curriculum for their school, when addressing sensitive issues on which there are "*current, tensions, disagreements or debates within society*" (such as the topic of gender identity) they must provide a range of views and perspectives. Openness to a plurality of ideas and the ability to engage sensitively, critically and respectfully with such debates, which RSE seeks to encourage and develop, fully accords with the aim of pluralism in a liberal and democratic state. The fact that such teaching is likely to include the expression of some views with which the claimants profoundly disagree (and, no doubt, other views

with which others would disagree equally strongly) does not violate A2P1 (see paragraph 198 above).

206. With respect to the claimants' contention that it is a breach of A2P1 to teach their children that some people self-identify in a gender that is different to their biological sex at birth, or self-identify as transgender/trans, queer or questioning, or in other identities, I agree with the defendant's submissions as summarised in paragraph 149 above. I also note that in *Elan-Cane* the Supreme Court recognised, in light of the Strasbourg Court's case law concerning transgender individuals, that the appellant's identification as non-gendered was an aspect of private life within the meaning of article 8 (Lord Reed PSC, [23], [26] and [30]). The appellant's article 8 right was outweighed in the circumstances of the case, nonetheless it shows that the law has recognised that in accordance with the principle of autonomy a person's identity as non-gendered, and other identities such as trans and non-binary, are aspects of private life protected by article 8.

207. [C13] and [C14] explain that learners should develop the understanding and behaviours that will enable them to develop and maintain healthy, safe and fulfilling relationships and should be able to recognise and value diverse types of relationships; they should develop their sense of self and of everyone being unique, and should explore the various factors that inform a person's identity, including cultural and religious norms. In the second and third columns of [C21], to which objection is taken, the Code states, in essence, that learners should be taught to show respect for and value others, to recognise the importance of equality and to challenge stereotypes and unfair behaviour, to be aware of and able critically to explore how positive and negative social, cultural and religious norms can shape perceptions and influence relationships and behaviours, to be able to advocate for rights of all, and to understand the law and human rights in relation to sex, sexuality and gender. The Code explains in [C36] that learners need to develop an understanding of the nature and impact of harmful behaviours and state; and in the third column of [C38] that learners should be taught the importance of inclusivity and the value of diversity.

208. Pluralism is an ethic of respect that values human diversity, and the promotion of a spirit of tolerance. In my judgment, the curricula and teaching envisaged in the Code is clearly in line with the pluralism requirement.

209. I also reject the contention that the term "*explore*" in [C14] and [C21] gives any reasonable cause for concern. Those to whom the Code is directed would understand that "*explore*" is used here, as it often is by teachers, to mean "*learn about*" or "*study*".

210. Finally, I note that the claimants also take strong objection to the first column of [C21] in which the Code indicates that from the age of three learning should support the "*use of accurate terminology for all body parts*". The 2021 Act provides, and the Code reinforces the point, that RSE must be developmentally appropriate for each pupil. The first column of [C21] indicates that "*practitioners should start to consider*" ([C9]) from the age of three whether such use of accurate terminology is developmentally appropriate for learners. For the youngest age group, this may mean, for example, starting with learning body parts such as arms and legs, and terms such as stomach (rather than 'tummy'). The claimants express concern that there are no tools or means to determine the age and developmental appropriateness of topics or resources, but it is inherent in the 2021 Act that the Senedd trusts teachers and head teachers to be able to

apply the concept of developmental appropriateness. The aim of this paragraph is to help protect children from abuse by enabling more effective reporting, avoiding the use of euphemistic labels that are prone to misunderstanding. In any event, it is impossible to see how a requirement to use accurate terminology could breach A2P1. Such teaching is obviously scientific, factual and neutral.

211. With respect to the Guidance, the claimants focus on paragraphs [G4], [G9]-[G10] and [G22]-[G23] (paragraph 78 above) which state, in essence, that schools have an important role to play in creating safe and empowering environments that support learners' rights to enjoy fulfilling, healthy and safe relationships; that all children have the right to receive high quality and inclusive RSE that achieves a range of positive outcomes; that RSE should empower learners to support their health and well-being, develop healthy relationships, navigate and make sense of how relationships, sex, gender and sexuality shape identities and lives, and understand and support their rights and those of others to enjoy healthy relationships throughout their lives; that RSE should be taught in a way that is inclusive and accords with principles of equality, and which reflects the diversity among learners, their families and their communities; and that learners should be equipped to think critically about gender and sexual norms in a changing world, and to understand the difference values, including religious values, that inform values and identities.

212. The claimants express concern that RSE is said to have the potential to be "*transformative*" ([G9]). However, a head teacher or member of a governing body reading the Guidance would not understand that term as authorising or approving teaching that advocates or promotes any particular identity or sexual lifestyle over another, or that encourages children to self-identify in a particular way. The sense of the word "*transformative*", as it is used in the Guidance, is in line with the language used in s.2(1) where the Senedd described the four purposes of enabling the *development* of pupils in various identified ways. Education may, in that sense, generally be said to have the potential to be transformative.

213. In my judgment, both the Code and the Guidance reflect the general spirit of the Convention as an instrument designed to maintain and promote the ideals and values of a modern liberal democracy, including the values of tolerance, respect and equality. These documents are clearly capable of being implemented in a way that is fully compatible with the second sentence of A2P1. The contention that they fall foul of the prohibition against indoctrination is misconceived.

Conclusion on ground 3

214. With respect to the issues identified in paragraph 3 above I have concluded that:

(1) it is not open to the claimants to contend that the absence of a parental right of excusal breaches the first sentence of A2P1 (1(f)(i));

(2) in any event, the absence of such a right does not breach the first sentence of A2P1 (1(f)(ii));

(3) none of the passages in the Code or the Guidance to which the Claimants object purport to authorise or positively approve teaching that will be in breach of the second sentence of A2P1 (2(a));

(4) there is no requirement in A2P1 that any impacts on parental rights under the second sentence are prescribed by law, but in any event the Code and the Guidance have the status of law for the purpose of the Convention (2(b));

(5) *A v SSHD* sets out the relevant test for determining the lawfulness of the Code and the Guidance, but in any event the test in respect of subordinate legislation (as stated by Lord Mance in *In re NIHRC*) is in substance the same (2A(c)); and

(6) neither the Code nor the Guidance breach A2P1, whether by reference to the duty of neutrality, or as result of the whole-school approach (or cross-cutting elements), or otherwise (2A(d) and (e)).

G. Ground 4: Article 9

The parties' submissions

215. The claimants submit that the same passages of the Code and the Guidance also give rise to a separate and distinct breach of the rights of their children under article 9 of the Convention. In particular, they contend that the Code and the Guidance, in seeking to introduce "*transformative*" RSE teaching, and by adopting an approach which they contend amounts to state indoctrination, breaches the right to freedom of thought, conscience and religion. The protection for the *forum internum* (that is, the sphere of private personal beliefs) is not subject to the restrictions contained in article 9(2) which apply to the *manifestations* of religion or belief. The claimants submit that any attempt by teachers, who stand in a position of authority, to re-orient the beliefs of pupils will breach article 9: *Larissis and others v Greece* (1998) 27 EHRR 329.

216. The Welsh Ministers submit, first, the correct approach to the challenge to the Code and the Guidance is the same as in relation to the second sentence of A2P1: applying *A v SSHD*, the claimants have to show that the Code and/or the Guidance will inevitably result in teaching that would breach article 9. Secondly, the European Court of Human Rights has repeatedly emphasised that A2P1 is the *lex specialis* in the education sphere, that it falls to be interpreted consistently with article 9, and so article 9 gives rise to no separate issue: *Kjeldsen*, [57]; *Folgerø*, [54] and [84(a)]; *Appel-Irrgang*, p.13; *Dojan*, [55] and [75]; *Perovy*, [47]-[48]; *Lautsi*, [77] and *Fox*, [24]. For both reasons, the defendant submits that this ground adds nothing to ground 3. In any event, they submit that nothing in the Code or the Guidance will inevitably result in teaching that constitutes religious indoctrination.

ANALYSIS AND DECISION ON GROUND 4

Standing

217. The reasons that I have given in paragraph 152 above for finding that the first and fourth claimants do not have standing to pursue a claim for breach of A2P1 apply equally to the alleged breach of article 9. But additional questions arise as to whether each of the second, third and fifth claimants have standing to pursue this ground. The defendants do not contest the claimants' standing insofar as they are bringing an *ab ante* 'in principle' challenge based on article 9. Although the rights relied on under this head are the rights of the children, I note that in *R (Holub) v Secretary of State for the Home Department* [2001] 1 WLR 1359, Tuckey LJ, [14], the Court of Appeal took the view

(albeit without full argument) that the parent of a minor whose human rights have been breached has standing to complain under s.7 of the HRA. So I accept that the second, third and fifth claimants have standing to bring an *ab ante* challenge.

218. However, a claim that relies on article 9 directly would have to be targeted at the RSE teaching that the child receives. The second and fifth claimants each have one or more children who attend a maintained school and are of an age such that they will be taught RSE. Although there is no evidence as to what they are being taught, I consider that is relevant to the question of breach rather than standing. I accept that the second and fifth claimants have standing to pursue this ground of claim. In circumstances where the third claimant's younger child is currently home schooled, it cannot be said she has been the victim of any teaching in breach of article 9, and so I do not consider the third claimant has standing in respect of this ground. As some of the claimants have standing, these findings do not affect the substance of the ground.

Lex specialis

219. The case law of the European Court of Human Rights makes clear, first, that A2P1 has to be interpreted in light of, among other Convention rights, article 9. Secondly, the authorities to which the defendant has referred (see paragraph 216 above) show that the Strasbourg court has consistently held that in the area of education and teaching A2P1 is, in principle, the *lex specialis* in relation to article 9; and as a consequence no separate issue arises under article 9.

220. In any event, I agree with the defendant that the applicable test would be the same (see paragraphs 154 to 159 above); and that this ground of claim falls to be dismissed in light of my rejection of the A2P1 ground of claim.

H. Conclusion

221. For the reasons I have given, the claim is dismissed on all grounds.