Neutral Citation Number: [2015] EWHC 1436 (Admin)

Case No: CO/4981/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN WALES

Date: 22/05/2015

Before:
MR JUSTICE WYN WILLIAMS
- -
Between:

The Queen on the Application of: **(1) Diocese of Menevia** **(2) The Governors of Bishop Vaughan Catholic Comprehensive School** **(3) W (by her litigation friend SC)**	**Claimants**
- and -	
City and County of Swansea Council	**Defendant**

- -

Dinah Rose QC and **Iain Steele** (instructed by **Bindmans LLP**) for the **Claimants**
Rhodri Williams QC and **Nazeer Chowdhury**(instructed by **Head of Legal, Democratic Services and Procurement**) for the **Defendant**

Hearing dates: 10 and 11 February 2015
Further written representations 25 February and 26 February 2015
- -

Approved Judgment

Mr Justice Wyn Williams:

Introduction

1. The First Claimant provides support, financial and spiritual, to Catholic schools within the county and city of Swansea. The Second Claimant is the governing body of Bishop Vaughan Catholic Comprehensive School, a school supported by the First Claimant. The Third Claimant is a pupil at St Joseph's Cathedral Primary School which is also supported by the First Claimant. All the schools supported by the First Claimant are "voluntary aided schools" but for ease of reference in this judgment all voluntary aided schools supported by the First Claimant and other religious institutions are called "faith schools".

2. The Defendant is the local education authority for the city and county of Swansea. Within the Defendant's administrative district there are six faith schools. Five of the schools are Catholic schools; one is supported by the Church in Wales. The Claimants assert that there are 2,979 pupils in these schools currently although the Defendant's figure is 2,657.

3. Most children within the Defendant's administrative area are taught through the medium of English. However, there are twelve schools within its area in which the teaching is undertaken through the medium of Welsh (Welsh medium schools). The total number of pupils in those schools is 4,586 according to the Claimants although the Defendant's case is that the number is 3,948.

4. The Defendant has a published policy governing the provision of free transport for pupils attending primary and secondary schools. The policy is contained within a document entitled Home to School Transport Policy (hereinafter referred to as "the current policy" or "the amended policy" as appropriate). So far as is relevant to these proceedings, the Defendant's current policy is that all pupils of primary school age living two miles or more from their catchment area school, as measured by the nearest available walking route, are eligible for free transport; the same facility is afforded to secondary school pupils who live three miles or more from their catchment area school. Additionally, the current policy provides that pupils attending Welsh medium schools or faith schools are provided with free transport to and from the school in question provided the relevant distance criteria are met even if there is an English medium school and/or non-faith school within two/three miles of their home.

5. On 30 July 2014, at a meeting of the Full Council, the Defendant resolved to amend aspects of the current policy. As from September 2015 (and subject to transitional provisions specifically designed to continue free transport provision for pupils already attending a particular faith school until that pupil leaves the school) pupils attending faith schools will be entitled to free public transport only if the relevant distance criteria are met and no suitable alternative school is located within two/three miles of home. For the purposes of the amended policy a suitable alternative school will include a non-faith school. So, for example, if a pupil lives more than three miles away from Bishop Vaughan Catholic Comprehensive School but there is a non-faith comprehensive school within three miles of the home of the pupil he/she will not be provided with free transport to attend Bishop Vaughan.

6. The Defendant's amended policy does not apply to those pupils who attend Welsh medium schools. Accordingly, a pupil whose home is more than three miles from a Welsh medium comprehensive school will continue to be eligible for free transport to and from that school even though there may be an English medium comprehensive school within three miles of home.

7. In these proceedings the Claimants argue that the Defendant's decision of 30 July 2014 to amend its policy in relation to pupils attending faith schools as from September 2015 is unlawful. They seek an order quashing the decision.

8. The Statement of Facts and Grounds identifies seven discrete grounds of challenge. I granted permission on all grounds. At the substantive hearing the Claimants pursued six of the seven grounds. The Claimants acknowledged that ground 7 would not succeed as a discrete ground if the other grounds were rejected by the court. Before I turn to deal with each of the grounds individually it is necessary to set out some of the background against which the decision of 30 July 2014 was taken.

Relevant Factual Background

9. In common with all local authorities in Wales, the Defendant has been faced with making substantial cuts in its expenditure. In February 2013 Mr Brian Roles, the Defendant's Head of Service for education, planning and resources, contacted Ms Katherine Swain the Defendant's Group Leader in relation to Transportation and asked her to indicate how the Defendant might reduce its spending on transportation of pupils to and from the schools in its area. Ms Swain responded in June 2013 by producing a written note in which she set out the potential savings in expenditure should the Defendant cease to provide free transport to pupils attending the six faith schools. In her note Ms Swain assumed that the change would commence in September 2015 and that it would include transitional provisions. Upon those assumptions her estimate was that the savings in expenditure would increase, gradually, over the period 2015 to 2021 and that in that period the savings, cumulatively, would exceed £2m.

10. In the autumn term of 2013 all the Defendant's Heads of Service were tasked with identifying potential budget cuts of 20% over a three year period. As a consequence Mr Roles initiated informal discussions with representatives of the faith schools about potential savings in expenditure. Two meetings took place, on 16 October 2013 and on 22 November 2013, between representatives of the schools and officers of the Defendant.

11. In December 2013 the officers produced a draft discussion paper. The paper set out an analysis of the expenditure then being incurred in transporting pupils and identified five options for reducing that expenditure. Option 3 was the suggestion that the current policy should be amended so that free transport to the faith schools would be provided only when the distance criteria were met and when there was no nearer non-faith school for the pupils in question. The paper did not put forward as an option any amendment to the current policy as it related to the provision of free transport for pupils attending Welsh medium schools.

12. As an appendix to the paper the authors provided a summary of the legal advice which had been received by this stage. The relevant parts of the appendix are as follows:-

> "The Learner Travel Operational Guidance covers (at pages 16-18) Welsh Medium Transport, and (at pages 18-19) denominational schools. Both are discretionary, in that the Authority does not have to provide them. However the Guidance details the process that must be followed before the Authority can decide this and also other factors it has to take into consideration.
>
> **Welsh Medium**
>
> In the case of Welsh schools although there is not a duty to provide transport under section 10 of the Measure places a duty on local authorities in Wales and on Welsh Ministers "to promote access to education and training through the medium of the Welsh language". One of the examples they give is that this is met by providing transport. Therefore the Authority would have to demonstrate if it decided to cease Welsh Medium transport how it would still comply with its duty. It would be difficult for the Authority to meet this duty if it did not provide the transport.
>
> **Faith Schools**
>
> With regard to Faith Schools again there is not a duty on a Local Authority to provide transport however there is a general duty under section 9 of the Education Act 1996 which places a general duty on local authorities to 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 effective instruction and training and the avoidance of unreasonable public expenditure. However unlike the situation with Welsh Medium Education there is no specific duty with regard to Faith Schools. I note that some authorities will only provide transport where parents provide evidence that their children have been baptised etc."

13. Between the date upon which this paper was produced and 11 February 2014 it was the subject of discussion amongst senior officers of the Defendant and members of the Defendant's Cabinet. It was favourably received.

14. On 11 February 2014 the Defendant's Cabinet approved the commencement of a formal consultation upon changes to the current policy. The report provided to the Cabinet for its meeting suggested that three proposed changes to the policy should be the subject of consultation; one of the changes was the proposal to amend the current policy relating to free transport provision to the faith schools. The consultation period was 3 March 2014 to 11 April 2014. There were a large number of responses and

many voiced opposition to the proposed change as it related to the provision of free transport to faith schools.

15. From an early stage in the process leading to the consultation officers of the Defendant had appreciated that an Equality Impact Assessment (EIA) would be necessary in order to assess the impact of the proposed changes in policy. Mr Rhodri Jones was the person responsible for producing an EIA. He first produced an EIA screening form; this was on or about 3 October 2012. Q3 on the form invited the author to describe the potential impact of the proposal by reference to "High Impact" "Low Impact" and "Don't know". Mr Jones described the impact as "high" in respect of religion and Welsh Language by putting an X in the relevant box within the form; he did not provide any indication of the impact upon race because he did not put an X in any relevant box.

16. The first draft EIA dates from October 2013; the EIA in its finalised form is dated 11 June 2014. Section 3 of the EIA is a table which permits the writer to identify any impact upon "protected characteristics" (a phrase defined by the Equality Act 2010 - see paragraph 25 below). In the first draft, in respect of the characteristics age, disability, religion and carers Mr Jones placed an X in the "negative" box indicating his view that the proposed change in policy would have an adverse impact on those characteristics. In respect of the characteristics race and Welsh language Mr Jones described the impact as being neutral. I deal more fully with the finalised version of the EIA below.

17. On 1 July 2014 the Defendant's Cabinet was provided with a comprehensive report in relation to the changes to the current policy which had been the subject of consultation. The report's author invited the Cabinet to consider which if any of the changes "should be taken forward to Council for approval". The decision of the Cabinet was to forward two of the three proposed changes to Full Council for approval. The changes forwarded for approval included the change to the provision of free transport for pupils attending faith schools.

18. On 11 July 2014 the Bursar of Bishop Vaughan School, Ms Laura Howden- Evans wrote to the Defendant's Chief Executive:-

> "To urge you to seek legal advice from a discrimination law barrister upon the proposed home to school transfer policy and in particular the legal implications of the proposal to remove funding for transport to faith schools whilst continuing to find funding for transport to Welsh-medium schools."

Miss Howden-Evans then went on to explain why she thought that the amended policy would infringe discrimination law. The letter was the forerunner for the first two grounds of challenge, in particular, in this judicial review.

19. On 30 July 2014 the Full Council of the Defendant received a report on the responses to consultation relating to the proposed changes to the current policy. The author of the report recommended that:-

> "1. Council note the outcome of the statutory consultation process and the potential impact on equalities issues, as outlined in the report
>
> 2. Council accept the recommendation of Cabinet that two of the original three proposals in relation to the discretionary areas of provision be approved – that is Passenger Assistance and Voluntary Aided School Transport Provision. Post 16 Transport provision to continue without change.
>
> 3. That Council approve the amended Home to School Transport Policy attached at Appendix A."

20. The report was very detailed. It was supported by three appendices one of which – Appendix B – included the finalised EIA relating to the proposed change to current policy as it related to transportation to and from faith schools.

21. The EIA described the proposed change to the current policy as relevant to a number of protected characteristics including religion. However, the change in policy was not said to be relevant to race or the Welsh language (see Trial Bundle 2 page 328). At section 3 of the EIA Mr Jones, its author, described the possible impact upon the protected characteristics as being neutral in respect of race and the Welsh language and negative in relation to religion (see Trial Bundle 2 page 332). The EIA also included a number of responses by Mr Jones to the "key points" which had been raised in the consultation process. Key point 2 as identified by consultees was:-

> "Perceived discrimination on religious grounds and will treat Aided schools differently than Welsh medium schools."

Mr Jones responded:

> "The proposal to remove this transport is not viewed as discriminatory. The Council is currently treating the Voluntary Aided sector more favourably than the other English medium schools and the new policy will treat both groups equally. It is recognised that this proposal will only impact on the VA schools and it is regrettable that the financial position of the Council has made this proposal necessary. The Council can offer assurances that no child currently in receipt of free transport who is attending a VA school will have their transport removed for their time at that school. As such, the policy is not unlawfully discriminatory; however, the new policy does include the removal of certain longstanding discretionary provisions for faith. However, the Measure (section 10) does require each local authority to promote access to education and training through the medium of Welsh when exercising their functions under the Measure. "

Key Point 4 was recorded as being:-

> "The proposal goes against Statute i.e. section 6 of the Education Act, or Learner Travel (Wales) Measure or Operational Guidance, UNCRC, Human Rights Act, Equality Act 2010."

In response Mr Jones wrote:-

> "The legal view highlighted in the report assures us that we are not contravening any of the above statutes."

That, indeed, was what the report had said about the legal advice received.

22. The minutes of the meeting of 30 July 2014 record that the Full Council resolved:-

> "1. The outcome of the statutory consultation process and the potential impact on equalities issues, as outlined in the report be noted;
>
> 2. Council notes the recommendation of Cabinet that two of the original three proposals in relation to the discretionary areas of provision be approved – that is Passenger Assistance and Voluntary Aided School Transport provision. Post 16 Transport provision to continue without charge.
>
> 3. The amended Home to School Transport policy attached as Appendix A to the Report be approved."

23. It will be necessary to refer, in due course, to passages of the report prepared for the Full Council and to events which occurred at the meeting. However, I propose to do that, as and when necessary, when dealing with the individual grounds of challenge.

The Claimants' Grounds of Challenge

Ground 1

24. By Ground 1 the Claimants allege that the amended policy relating to the provision of free transport for pupils who wish to attend faith schools approved by the Full Council of the Defendant on 30 July 2014 will, when brought into effect, constitute indirect race discrimination under section 19 of the Equality Act (hereinafter referred to as "the Act" or the "2010 Act"). I should stress at the outset that the Claimants do not suggest and have never suggested that the Defendant has engaged in direct discrimination. Before turning to the substance of the argument it is necessary to set out the statutory provisions, statutory guidance and legal principles formulated by the courts which are applicable in order to determine this ground of challenge.

25. Section 4 of the Act lists what are the "protected characteristics" under the Act. They include race and religion or belief. Section 19 of the Act defines indirect discrimination. It provides:-

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

> (2) For the purposes of subsection 1 a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a). A applies, or would apply, it to persons with whom B does not share the characteristics,
>
> (b). it puts, or would put, persons with whom B shares the characteristics at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c). it puts, or would put, B at that disadvantage, and
>
> (d). A cannot show it to be a proportionate means of achieving a legitimate aim."

Section 19(3) of the Act repeats the protected characteristics specified in section 4 of the Act. Section 29 provides so far is relevant:-

> "(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with that service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate a person against a person (B) –
>
> (a) as to the terms on which a provides a service to B;
>
> (b) by terminating the provision of the service to B
>
> (c) by subjecting B to any other detriment."

26. By virtue of section 3(1) and (2) of the Learner Travel (Wales) Measure 2008 (hereinafter referred to as "the Measure") a child of compulsory school age must be provided with suitable transport arrangements to facilitate the attendance of that child each day at his place of education if the circumstances and conditions set out in a table which immediately follows section 3(2) are met. For present purposes it is sufficient that I record that the table sets out the distance criteria which are specified in the Defendant's current and amended policy. By virtue of section 3 (3) of the Measure no charge can be made if the relevant circumstances and criteria are met. Section 6 of the Measure provides:-

> "1. This section applies in relation to a learner if –
>
> (a). the learner is ordinarily resident in the local authority's area or
>
> (b). the learner receives educational training in the local authority's area.

> (2) The local authority may make travel arrangements to facilitate the attendance of the learner at a place where that person receives educational training.
>
> (3) The local authority may charge for travel arrangements made under this section for registered pupils of compulsory school age in accordance with the provisions of section 455 and 456 of the Education Act 1996.
>
> (4) A local authority may charge for travel arrangements made under this section for other learners."

Section 10 of the Measure provides:-

> "Each local authority and the Welsh Minister must promote access to education and training through the medium of the Welsh language when exercising functions under this Measure."

27. The Equality and Human Rights Commission has issued a statutory Code of Practice in respect of the 2010 Act. Chapter 5 is concerned with indirect discrimination. Paragraph 5.6 points out that the phrase "a provision, criterion or practice" contained within section 19(1) of the Act is not defined. The guidance in that paragraph, however, suggests that the phrase should be construed widely so as to include, for example, "any formal or informal policies".

28. Nor is the word "disadvantage" defined by the 2010 Act. Paragraph 5.10 of the Guidance suggests that it can include the denial of an opportunity or choice or exclusion. The Guidance goes on to suggest that a disadvantage does not have to be quantifiable and the service user does not have to experience actual loss (economic or otherwise). It is enough that the person can reasonably say that they would have preferred to be treated differently.

29. Paragraph 5.16 of the Guidance makes it clear that once there is a provision, criterion or practice which puts (or would put) people sharing a protected characteristic at a particular disadvantage, the next stage is to consider a comparison between service users with the protected characteristic and those without it.

30. Paragraph 5.18 deals with a concept which has, on occasions, troubled the courts in discrimination cases i.e. the pool of people who are to be used in the comparative exercise referred to in discrimination cases as the pool for comparison. The Guidance provides:-

> "In general, the pool should consist of a group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding people who are not affected by it positively or negatively. In most situations, there is likely to be only one appropriate pool, but there may be circumstances in which there is more than one. If this is the case, the court will decide which pool to use."

31. Paragraphs 5.19 – 5.22 offer guidance upon how the comparison is to be made between the impact of the provision, criterion or practice on people without the relevant protected characteristic and its impact on people with the characteristic in question. The guidance is clear that the way the comparison is to be undertaken will depend upon a variety of circumstances but it acknowledges that in some circumstances it will be necessary to carry out a formal comparative exercise using statistical evidence.

32. Paragraph 5.21 sets out what it describes as an "established approach" if a court is asked to undertake a formal comparative exercise in order to decide an indirect discrimination claim. The approach involves asking the following series of questions:-

> - "What proportion of the pool has the particular protected characteristic?
>
> - Within the pool, does the provision, criterion or practice affect service users without the protected characteristic?
>
> - How many of these service users are (or would be) disadvantaged by it? How is this expressed as a proportion ('x')?
>
> - Within the pool, how does the provision, criterion or practice affect service users who share the protected characteristic?
>
> - How many of these service users are (or would be) put at a disadvantage by it? How is this expressed as a proportion ('y')?"

The task of the court after answering these questions will be to compare 'x' with 'y'. It can then decide whether the group with the protected characteristic experiences a particular disadvantage in comparison with others. Whether a difference is significant will depend upon the context, such as the size of the pool and the numbers behind the proportion. It is not necessary to show that the majority of those within the pool who share the protected characteristic are placed at a disadvantage. (See guidance paragraph 5.22).

33. I have set out the relevant parts of the guidance in some detail since all the leading cases to which I was referred during the course of argument relate to statutory provisions and or directives which precede the coming into force of the 2010 Act. No one has suggested to me that these cases were not relevant to my decision; however, as is obvious, my task is to apply section 19 of the 2010 Act and it is common ground that in carrying out that task I must have regard to the statutory guidance. That said there can be no doubt that some of the principles formulated in cases decided before the coming into force of the Act are of considerable importance in this case.

34. Both Miss Rose QC and Mr Williams QC acknowledge that my starting point must be the proper identification of the "provision, criterion or practice" which is alleged to be discriminatory. None of the cases to which I was referred cast any doubt upon the

view expressed in the guidance that the phrase is to be broadly construed. However, it is worth noting a short passage from the decision in *HM Land Registry –v- Benson* [2012] ICR 627 at paragraph 32 which reads:-

> "For the purpose of a claim of indirect discrimination the PCP [provision, criterion or practice] should be defined so as to focus specifically on the measures taken – that is, the thing or things done – by the employer which result in the disparate impact complained of."

35. During the course of oral argument I was referred to a number of cases concerned with the principles upon which a court should act when identifying the appropriate pool for comparison. It is important that I make reference to these cases since the parties do not agree upon the constitution of the appropriate pool in this case. It seems to me that the leading case is now *Secretary of State for Trade and Industry –v- Rutherford* [2006] 4 All ER 577. In that case the issue was whether sections 109 and 156 of the Employment Rights Act 1996 which, respectively, imposed a cut off age of 65 for the right not to be unfairly dismissed and for the right, on dismissal for redundancy, for a redundancy payment unlawfully indirectly discriminated against men. Successive appellate courts, including the House of Lords, decided that they did not. During the course of her speech Baroness Hale, with whom Lord Scott and Lord Roger agreed, sought to identify the principles upon which the pool for comparison should be identified. She had this to say at paragraphs 71 to 77:-

> "71. The essence of indirect discrimination is that an apparently neutral requirement or condition (under the old formulation) or provision, criterion or practice (under the new) in reality has a disproportionate adverse impact upon a particular group. It looks beyond the formal equality achieved by the prohibition of direct discrimination towards the more substantive equality of results. A smaller proportion of one group can comply with the requirement, condition or criterion or a larger proportion of them are adversely affected by the rule of practice. This is meant to be a simple objective enquiry. Once disproportionate adverse impact is demonstrated by the figures, the question is whether the rule or requirement can objectively be justified.
>
> 72. It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantage and the disadvantaged groups. So it is no answer to say that the rule applies equally to men and women, or to each racial or ethnic or national group, as the case may be. The question is whether it puts one group at a comparative disadvantage to the other. However, the fact that more women than men, or more whites than blacks, are affected by it is not enough. Suppose, for example, a rule requiring that trainee hairdressers be at least 25 years old. The fact that more women than men want to be hairdressers would not make such a rule discriminatory. It would have to be shown that the impact of such a rule worked to the comparative disadvantage of would-be female or male hairdressers as the case might be.

73. But the notion of comparative disadvantage or advantage is not straightforward. It involves defining the right groups for comparison. The twists and turns of the domestic case law on indirect discrimination show that this is no easy matter. But some points stand out. First, the concept is normally applied to a rule or requirement which *selects* people for a particular advantage or disadvantage. Second, the rule or requirement is applied to a group of people who *want* something. The disparate impact complained of is that they cannot have what they want because of the rule or requirement, whereas others can.

74. What is the comparative advantage and disadvantage in this case? It cannot simply be being under or over the age of 65. That in itself is neither an advantage nor a disadvantage, until it is linked to what the people concerned want to have or not to have. If one wants to have a pension, then reaching pensionable age is an advantage. If one wants to go on working beyond pensionable age, then reaching that age may be a disadvantage.

75. The advantage or disadvantage in question here is going on working over the age of 65 while still enjoying the protection from unfair dismissal and redundancy that younger employees enjoy. As Mr Allen QC for the appellants pointed out, that protection has an impact, not only when employment comes to an end, but also upon whether or not it is brought to an end, and if so, how.

76. If that is so, it matters not that there are other men and women who have left the workforce at an earlier age and are thus uninterested in whether or not they will continue to be protected. The people who want the protection are the people who are still in the workforce at the age of 65. And the rule has no disproportionate effect upon any particular group within that group. It applies to the same proportion of women in that group as it applies to men. There is no comparison group who wants this particular benefit and can more easily obtain it.

77. The appellants cannot object that this approach defines the advantage and disadvantage by reference to the very rule which is under attack; on the contrary, that is exactly what they have sought to do by treating the advantage and disadvantage as being under or over the age of 65. But the result is the same even if one defines the advantage and disadvantage without reference to the age limit. The advantage is to be able to enjoy protection against unfair dismissal and redundancy throughout one's working life. As my noble and learned friend Lord Walker of Gestingthorpe has demonstrated, the sex differential between those who can and those who cannot do this is negligible, even though there are more men in the group who

> cannot. But in my view one should not be bringing into the comparison people who have no interest in the advantage in question."

36. On the basis of the approach identified by Baroness Hale a pool for comparison would not include persons who have no interest in the advantage or disadvantage identified as a consequence of the provision under scrutiny. The Baroness repeats that proposition at paragraph 82 of her speech.

37. In *Pike –v- Somerset County Council* [2010] ICR 46 the Court of Appeal adopted the same approach – see paragraph 18 of the judgment of Maurice Kay LJ. That said, the Court also acknowledged the possibility that cases would exist in which more than one appropriate pool of comparison could be identified.

38. During the course of his oral submissions Mr Williams QC placed a good deal of emphasis upon a passage in the judgment of Sedley LJ in *Allonby –v- Accrington and Rosendale College and Others* [2001] ICR 1189. At paragraph 17 and 18 the Lord Justice had this to say about the identification of an appropriate pool: -

> "17. As often happens, once the condition or requirement is identified the "pool" within which its impact has to be gauged falls into place. So here, as the Employment Tribunal held, the pool was "all persons who would qualify for …..continuous employment if the requirement or condition had not been taken into account" This meant not simply the dismissed hourly-paid workforce but the entire body of lecturers at the college: a total of 177 men and 292 women. The proportion of men in the pool who could comply with the condition was 67 out of the 177, about 38%. The proportion of women in the pool who were able to comply was 68 out of 292, about 21%.
>
> 18. The appeal tribunal held that there was no error of law in the tribunal's choice of a pool. Lindsay J quoted the decision of the President, Waite J, in *Kidd –v- DRG (UK Limited)* [1985] ICR 405, 415:
>
> > "The choice of an appropriate section of the population is in our judgment an issue of fact (or perhaps strictly a matter for discretion to be exercised in the course of discharging an exclusively fact-finding function)…."
>
> I would sound a strong note of caution about this. As the appeal tribunal's excellent analysis of the possible pools shows, once the impugned requirement or condition has been defined there is likely to be only one pool which serves to test its effect. I would prefer to categorise the identification of the pool as a matter neither of discretion nor of fact finding but of logic. This was the approach adopted by this court in *Barry –v- Midland Bank PLC* [1999] ICR 319, 334, and endorsed by Lord Slynn of Hadley on further appeal [1999] ICR 859, 863. Logic may on occasion be capable of producing more than one

> outcome, especially if two or more conditions or requirements are in issue. But the choice of the pool is not at large."

39. In my judgment, nothing in the passage quoted above is inconsistent with the approach taken by Baroness Hale in *Rutherford* as explained by Maurice Kay LJ in *Pike*. I readily accept that the court must determine the appropriate pool not by any exercise of discretion but, rather, by reference to a logical analysis which has as its starting point the provision criterion or practice identified as being, allegedly, discriminatory.

40. I should also refer to *London Underground Limited –v- Edwards (No. 2)* [1999] ICR 494. In that case Ms Edwards was employed as a train operator working a shift system which she was able to organise to fit in with her responsibilities as a single mother. When the respondent introduced a new rostering system which would have involved her working excessively long hours in order to work only during the day she left her employment on voluntary severance terms but then complained of unlawful sex discrimination under section 1(1) (b) of the Sex Discrimination Act 1975. The Industrial Tribunal upheld her complaint as did successive appellate courts. In the Court of Appeal it was common ground that the pool for comparison was all train operators to whom the new rostering arrangements applied. At paragraph 23 Potter LJ dealt with the pool for comparison in the following way:-

> "23. The first or preliminary matter to be considered by the tribunal is the identification of the appropriate pool within which the exercise of comparison is to be performed. Selection of the wrong pool will invalidate the exercise, see for instance *Edwards (No.1)* [1995] ICR 574 and *University of Manchester –v- Jones* [1993] ICR 474 and of the judgment of Stephenson LJ in *Perera –v- Civil Service Commission* (No.2) [1983] ICR 428, 437 in the context of racial discrimination. The identity of the appropriate pool will depend upon identifying that sector of the relevant workforce which is affected or potentially affected by the application of the particular requirement or condition in question and the context or circumstances in which it is sought to be applied. In this case, the pool was all those numbers of the employer's workforce, namely train operators, to whom the new rostering arrangements were to be applied……It did not include all the employer's employees. ……."

41. During the course of oral argument Mr Williams QC relied upon this decision as supporting the pool of comparison for which he was contending on behalf of the Defendant – as to which see below. For my part, however, I can see no distinction of substance between the approach adopted by Potter LJ in the *London Underground* case and that advocated by Baroness Hale and Maurice Kay LJ in *Rutherford* and *Pike* respectively. If I am wrong in that conclusion, of course, I am, in any event, bound to follow *Rutherford and Pike*.

42. It was common ground between Miss Rose QC and Mr Williams QC that the phrase "particular disadvantage" to be found in section 19(2) (b) and (c) of the 2010 Act is to be given a meaning consistent the Guidance (as to which see paragraph 32 above). Ultimately, whether or not a particular disadvantage has been established in a given

case must depend upon the particular circumstances prevailing in that case. In the past this issue has been resolved (albeit that the words under consideration were not "particular disadvantage") after a statistical analysis in which the proportion of the advantaged persons within the group for comparison had been compared with the proportion of disadvantaged persons. In some instances in the decided cases the court simply compared the percentages; there are other instances where the courts have compared the percentages when they are expressed as a ratio. These methodologies were subject to a rigorous analysis in the speech of Lord Walker in *Rutherford*. Miss Rose QC, in particular, relied upon a number of passages from his speech. Since in this case, however, the parties have relied upon statistical analysis using a methodology which is consistent with the statutory guidance set out at paragraph 32 above (albeit they disagree about the appropriate pool for comparison) and their differences are not solved by reference to Lord Walker's speech no useful purpose would be served by citing large extracts from his speech; I merely alert the reader to paragraphs 59 to 70 of the speech in which his analysis is set out.

43. I should mention, finally, in the context of establishing a "particular disadvantage" the decision in *Homer –v- Chief Constable of West Yorkshire Police* [2012] 3AER 1287. During the course of her judgment, with which all other members of the Supreme Court agreed, Lady Hale made it clear that one of the objects of the 2010 Act and the wording chosen in section 19 was to remove the need for statistical comparisons in cases involving alleged indirect discrimination where no meaningful statistics might exist. Lady Hale emphasised that all that the statute required was that a claimant demonstrate a particular disadvantage in comparison with other people who do not share the protected characteristic in question – see paragraph 14 of her judgment.

44. Ms Rose QC and Mr Williams QC agree that if I conclude that the Defendant's amended policy is discriminatory on the ground of race within section 19 of the Act the challenge under ground 1 will succeed unless the Defendant succeeds in persuading me that its amended policy is a proportionate means of achieving a legitimate aim – see section 19(2)(d). It is common ground that the Defendant did not address this aspect of the statutory provisions when it reached its decision on 30 July 2014. At that point in time the Defendant did not consider that its decision and the amended policy were in any way discriminatory. However, Ms Rose QC and Mr Williams QC also agree, as a matter of principle, that the fact that this issue was not considered by the Defendant at the decision-making stage is not fatal to its defence in relation to ground 1. It is for the court to judge whether the amended policy is a proportionate means of achieving a legitimate aim on the basis of the evidence now available. Given this agreement between the parties, no useful purpose would be served by extensive citation from authority to establish this legal principle. However, there can be no doubts that the courts have acknowledged the principle - see *R(Elias)v Secretary of State for Defence* [2006] 1WLR 3213 and *Hardy and Hanson PLC –v- Lax* [2005] ICR 1565.

45. What constitutes a legitimate aim is a matter for the court to determine – see *Elias*. However, it is accepted by Mr Williams QC that the saving of cost alone cannot be regarded as a legitimate aim. That said, Mr Williams QC relies upon what is colloquially known as the "costs plus principle" in support of his case. This principle was considered, recently, by the Court of Appeal in *Woodcock v Cumbria Primary*

Care Trust [2012] ICR 1126. During the course of his judgment in that case Rimer LJ said this:-

> "67. If the trust's treatment of the Claimant is correctly characterised as no more than treatment aimed at saving or avoiding costs, I would accept that it was not a means of achieving a "legitimate aim" and that it was therefore incapable of justification. It would fall foul of the limitation upon justification explained in such cases as *Hill –v- Revenue Commissioners* [1999] ICR 48. On the unusual facts of this case, I would not, however, regard that as a correct characterisation. The dismissal notice of 23 May 2007 was not served with the aim, pure and simple, of dismissing the claimant before his 49th birthday in order to save the trust the expense it would occur if he was still in its employ at 50. It was served, and genuinely served, with the aim of giving effect of the trust's genuine decision to terminate his employment on the grounds of his redundancy. The appeal tribunal had no doubt that the dismissal of an employee on such grounds is a legitimate aim. "It is an entirely legitimate aim for an employer to dismiss an employee who has become redundant". I agree; and it cannot, in my view, cease to be a legitimate aim simply because, if there is no dismissal, the employer will continue to incur costs that such dismissal is directed at saving.
>
> 68. I also agree with both the employment tribunal and the appeal tribunal that it was a legitimate part of that aim for the trust to ensure that, in giving effect to it, the dismissal also saved the trust the additional element of costs that, had it not timed the dismissal as it did, it would be likely to have incurred. In considering the timing of the steps it needed to take towards dismissing the claimant for redundancy it was obviously legitimate for the trust to have that consideration in mind, as it clearly did as early as March 2007……."

46. There was some debate about the true legal status of this principle in the oral argument before me. However the decision in *Woodcock* is binding upon me and, as it seems to me, I have no option but to acknowledge the existence of the "costs plus principle" and to apply it in the context of this case.

47. Assuming that the court is satisfied that the provision in question seeks to achieve a legitimate aim the final issue for the court to determine is whether the Defendant has established that the provision is "proportionate" In *Elias* Mummery LJ, giving the lead judgment with which Arden LJ expressly agreed, held that a three-stage test was applicable to determine whether or not the provision in question was proportionate. He said at paragraph 165:-

> "A three-stage test is applicable to determine whether the birth link criteria are proportionate to the aim to be achieved: see *Defreitas –v- Permanent Secretary of Ministry of Agriculture, Fisheries Lands and Housing* [1999] 1 AC 69, 80 and *R(Daly)*

> *Secretary of State for the Home Department [2001]* 2 AC 532, paras 27 -28. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

48. In the light of the statutory provisions, the relevant guidance and the authorities to which I have referred are the Claimants correct when they assert that the amended policy puts children of black and minority ethnic origin (hereinafter referred to as "BME children") at a particular disadvantage compared with White British children and that the amended policy cannot be justified as being a proportionate means of achieving a legitimate aim? In other words have they established that the amended policy indirectly discriminates against those children on account of their race.

49. In order to answer that question my first task is to identify the provision, criterion or practice within section 19(1) of the Act which it is alleged is discriminatory. The parties agree that the amended policy constitutes a "provision" but in the skeletons, at least, there appeared to be some disagreement about its scope. In the skeleton argument prepared on behalf of the Claimants the "provision" is described thus:-

> "The relevant "provision" …..is the Council's decision that in order for a child to receive free transport to his or her preferred school in circumstances where there is a nearer alternative mainstream school, the preferred school must be a Welsh language school and may not be a faith school."

50. The Defendant formulates the provision in somewhat different words. In the skeleton prepared on behalf of the Defendant the provision is described as:-

> "The Council will provide free transport to the nearest suitable school which provides education through the medium of either Welsh or English provided that the pupil meets the distance criteria or non suitability of a safe walking route whereas the Council does not provide the transport to a faith school unless it is the nearest suitable provision and the distance criteria are met or there is no safe available walking route."

51. During the course of the hearing Miss Rose QC introduced a document prepared by the Claimants' legal team which was headed Statistical Analysis. I will return to some of the detail in this document in due course. The purpose of referring to it at this stage is to note the description of the "provision" contained within the document. At paragraph 1 the relevant provision is defined as:-

> "The provision that the defendant will not provide discretionary free transport for children who wish to attend a faith school but will provide discretionary free transport for children who wish to attend a Welsh or English language school."

52. Once it is realised that the Claimants' latest formulation of the "provision" must be read as implicitly including reference to the relevant distance criteria, where appropriate, it seems to me that there is no difference in substance between the

position adopted on behalf of the Claimants and the Defendant. I am content to proceed on the basis that the formulation of the provision contained within the skeleton argument prepared on behalf of the Defendant is, essentially, agreed although for my part I am somewhat at a loss to understand why the "provision" cannot simply be equated with the actual words used by the Defendant in the amended policy.

53. I turn next to the issue of whether the provision puts BME children at a particular disadvantage when compared with White British children. When the case was opened to me by Miss Rose QC she did not rely upon any kind of statistical analysis to justify the claim that BME children were put at a particular disadvantage as a consequence of the amended policy when compared with White British children. However, during the course of the hearing Miss Rose QC produced the document to which I have just referred at paragraph 51 above. Since, ultimately, both the Defendant and the Claimants rely upon statistical analysis in order to refute or prove the allegation of indirect discrimination it seems to me that I should start my investigation relating to this aspect of the case by considering the analyses provided by the parties.

54. The Defendant's analysis appears in its skeleton argument. I was also provided with a separate document entitled "Defendant's Note on Statistical Analysis" which was prepared to take account of one of the criticisms made by the Claimants about the constitution of the pool for comparison which the Defendant had adopted. As I have said, the analysis undertaken by the Defendant and which appears in the skeleton argument followed the guidance summarised at paragraph 32 above. The Defendant's analysis is derived from the evidence adduced by its witnesses, in particular Mr Jones.

55. At the heart of the Defendant's analysis is the contention that the pool for comparison is constituted by all primary and secondary school pupils of compulsory school age in the Swansea area – see the Defendant's skeleton argument paragraph 33. Mr Williams QC submits that logic dictates that this is the only appropriate pool.

56. The Defendant's evidence suggests that the total number of such pupils within the Defendant's administrative area is 31,493. Its evidence suggests that of that total figure 27,697 are White British children, 3661 are BME children and 135 are unknown. Of the total of 27,697 White British children, 1642 currently enjoy free transportation to and from school as a consequence of the Defendant's current policy. The number of BME children who enjoy free transportation as a consequence of the current policy is 270.

57. The Defendant accepts that of the 1642 White British pupils who enjoy free transportation under the current policy 527 attend faith schools. The number of BME children enjoying free transportation under the current policy who attend faith schools is 254.

58. 1115 pupils enjoying free transportation under the Defendant's current policy attend Welsh medium schools. 16 BME children enjoying free transportation under the current policy attend Welsh medium schools.

59. The Defendant is content to accept that 90% of pupils currently receiving free school transport and who attend faith schools do so by virtue of the current policy. Under the amended policy, therefore, it is reasonable to assume that there will be a 90%

reduction in the numbers of pupils travelling free to and from such schools so that the number of white British pupils will reduce to 53 and the number of BME children will reduce to 25. Under the amended policy it is anticipated that the numbers of White British children and BME children attending Welsh medium schools will remain the same.

60. In the light of these figures the Defendant calculates that the number of pupils receiving discretionary free school transport under the amended policy will be a total of 1,168 which equates to 4.2% of the total number of white British pupils within the pool. The number of BME children receiving such transport will be 41 which represents 1.15% of the total number of BME children within the pool. The Defendant's approach, of course, provides a comparison between those advantaged by the amended policy.

61. It is to be noted that the evidence served on behalf of the Claimants suggests slightly different numbers for pupils attending faith and Welsh medium schools to those produced by the Defendant. Nothing turns on the differences and, accordingly, no useful purpose would be served by setting out, in detail, the same analysis but with the Claimant's figures substituted for those of the Defendant.

62. Mr Williams QC submits that a differential of 3.1% - the difference between 4.2% and 1.15% - is not such as to lead this court to conclude that the amended policy has put BME children at a significant disadvantage within section 19(2)(b) of the 2010 Act. Mr Williams QC submits that the Claimants cannot show that children sharing the relevant protected characteristic (BME) are at a particular disadvantage when compared with children who do not share it (White British).

63. The Claimants' statistical analysis contains an assessment based upon the same pool for comparison as that adopted by the Defendant – see paragraphs 11 to 16. Much the same percentage differential is obtained albeit the last stage of the analysis compares those within the pool who are disadvantaged as opposed to those who are advantaged by the amended policy. However Ms Rose QC's submission about the conclusion to be drawn from the statistical analysis is markedly different from that of Mr Williams QC. She points out that if the percentages derived from the analyses are expressed as a ratio i.e. 3.65:1 the consequence is that a BME child is 3.65 times more likely to be disadvantaged than a white British child. She submits that this constitutes a particular disadvantage for BME children.

64. I have already referred to the support which Miss Rose QC claims to derive from the speech of Lord Walker in *Rutherford*. At paragraph 61 he approved the following observations of McCullough J in the judgment given by the learned judge in *R –v- Secretary of State for Employment ex parte Seymour-Smith* [1994] IRLR 448 when that case was before the Divisional Court:

> "My conclusion is that, in considering whether there is considerable disparity, the court should look both at the relative percentages of those who meet the requirement and at the relative percentages of those who do not. Of these the more important group will be those who qualify. The following example makes the point. If 98% of men qualify and 2% do not, and if 96% of women qualify and 4% do not it would not

> be right to conclude that the disparity was considerable. But if only 4% of men and only 2% of women qualified the opposite conclusion might well be correct."

65. In the light of the observations of McCullough J as approved by Lord Walker it seems to me that that the Claimants are correct in their assertion that that BME children will be at a particular disadvantage as compared with White British children as a consequence of the amended policy even on the basis of the most favourable statistical analysis open to the Defendant. In summary 4.2% of White British children will enjoy the benefit of the amended policy compared with 1.15% of BME children; alternatively 95.8% of White British children will be disadvantaged by the amended policy compared with 98.9% BME children. The percentage difference in these scenarios - 3.1% - means that a BME child is 3.65 times more likely to be disadvantaged than a White British children.

66. In the Defendant's Note on Statistical Analysis those pupils who qualified for free transport to and from school by virtue of section 3 of the Measure (those pupils to whom the Defendant owed a duty to provide free transportation) were left out of the pool for comparison. It suffices that I say that if this done (and it seems clear to me that it would be very difficult to argue that pupils who are receiving free transportation as of right have an interest in a policy related to discretionary provision of free transport) the percentage differential widens to 3.86% with a consequent significant increase in the ratio of BME children disadvantaged.

67. I should stress, however, that Miss Rose QC does not accept the validity of either of the Defendant's analyses. Her primary case is that the Defendant has based its analysis on a pool for comparison which is demonstrably wrong.

68. Miss Rose QC submits that the pool for comparison should be confined to all those pupils who would qualify for discretionary free school transport but for the amended policy i.e. all those who qualified for discretionary free school transport under the current policy. She submits that these children are the only pupils who would have a genuine interest in the amended policy and, accordingly, it is these children who, logically, and in conformity with the reasoning of Baroness Hale in *Rutherford* should constitute the pool for comparison.

69. Having reflected upon these submissions it seems to me that they are correct or, at least, substantially correct. It is of course possible that the numbers of pupils who have an interest in the amended policy may be greater than those who benefit from the current policy. I can accept that this must be open to argument. However there is no means by which those numbers can be ascertained and, in any event, of course, there is the practical consideration that attendance at Welsh medium schools and faith schools is governed, ultimately, by the number of available places. It seems to me that the pool for comparison cannot be substantially more than those who genuinely aspire to attend the faith and Welsh medium schools.

70. Accordingly, I have reached the conclusion that the pool for comparison urged in this case by Miss Rose QC is the pool which is most closely aligned with the principles elucidated in *Rutherford* and the other cases to which I referred earlier in this judgment.

71. If the pool for comparison is taken to be as Miss Rose submits then the percentage of White British children who are disadvantaged by the amended policy is 29.17% whereas the percentage of BME children is 86.23% i.e. the percentage of BME children who are disadvantaged by the amended policy is almost three times greater than the percentage of White British children who are disadvantaged -see paragraphs 3, 4 and 5 of the Claimants' statistical analysis. On that basis there can be no doubt that the Claimants have demonstrated that BME children suffer a particular disadvantage as a consequence of the amended policy.

72. I appreciate that some of the base figures used in this part of the Claimants' statistical analysis may not be agreed but even if the Defendant's figures are substituted the ultimate conclusion would remain virtually identical i.e. that the percentage of BME pupils disadvantaged by the amended policy is almost three times greater than the percentage of white British pupils who are disadvantaged.

73. As I have said the Claimants' case was not based upon a detailed statistical analysis when it was opened to me. Miss Rose QC was content to rely upon the fact that under the current policy 1642 White British children and 270 BME children receive discretionary free transport whereas under the amended policy the predicted numbers are 1211 White British children and 33 BME children respectively. As Miss Rose QC points out the amended policy would exclude almost all of the BME children currently being provided with discretionary transport whereas there would still be a very significant number of White British children who qualify for such transport.

74. I am not prepared to decide, definitively, that this approach is appropriate in this case tempting as it is to simplify the case as much as can be done reasonably. I say that since, as is obvious, there is material in this case upon which a detailed statistical analysis can be undertaken. Lady Hale in *Homer* acknowledged that a statistical analysis might not be necessary in cases where no statistics exist but I do not read her paragraph 14 as removing the need for a statistical analysis where all the necessary information exists upon which such analysis can be undertaken (see paragraph 43 above).

75. Can the Defendant demonstrate that the particular disadvantage which the amended policy will cause to BME children is a proportionate means of achieving a legitimate aim? The Defendant submits that it can; it relies upon the "costs plus principle". Mr Williams QC points out that section 10 of the Measure imposes a duty upon the Defendant to promote access to education and training through the medium of the Welsh language when exercising its functions under the Measure. He submits that the saving of costs taken in conjunction with the duty to promote access to education through the medium of the Welsh language constitutes the legitimate aim and he submits that the amended policy is a proportionate means of achieving that aim.

76. I have already concluded that I am bound by the costs plus principle. Accordingly, the first issue is whether the promotion of access to education through the medium of the Welsh language is capable of being a legitimate aim. In the Claimants' Skeleton there is the suggestion that that this aim cannot be legitimate within section 19. However, as I understood her, Ms Rose QC did not take that position in her oral submissions. She did not address any submissions to me to suggest that the promotion of access to education through the medium of the Welsh language is not or could not be capable of being a legitimate aim within section 19 of the 2010 Act. Rather the

stance taken by Miss Rose QC is that the Defendant cannot demonstrate that the amended policy is a proportionate means of achieving the legitimate aim.

77. As of 30 July 2014 the Defendant had not addressed its mind to the issue of justifying the discriminatory nature of the amended policy. As the history of the decision-making process demonstrates the Defendant did not consider that the amended policy was discriminatory and its starting point was that no change of any kind would be made to the current policy as it related to the provision of free transport to pupils attending Welsh medium schools. It is true that there appears to have been some assessment of whether means testing in relation to the provision of free transport, generally, was a viable option but it does not seem to me that the Defendant ever addressed the issue of means testing in the context of justifying a provision which was discriminatory, albeit indirectly.

78. Since July 30 2014 the Defendant has had the opportunity to investigate whether steps can be taken to mitigate the discriminatory impact of the amended policy which are, nonetheless, consistent with achieving the legitimate aim identified in this case. I have scrutinised the evidence adduced by the Defendant with care including its letter of 26 February 2015 and I have also considered the points made in the Defendant's skeleton argument. It does not seem to me, however, that the Defendant has, in truth, undertaken any investigative steps to assess whether there are measures open to it which could mitigate the effects of the amended policy yet respect the Defendant's aims of promoting access to education through the medium of Welsh and saving costs.

79. The Claimants submit that there were obvious measures which the Defendant could have investigated. It could have investigated means testing so that the burden of making payment for transport to faith schools for those least able to afford it was removed or alleviated; it could have investigated whether the introduction of charging for pupils attending both faith schools and Welsh medium schools could have been pitched at such a rate that it was generally affordable.

80. I have applied the three-stage test suggested as appropriate by Mummery LJ in *Elias.* My conclusions are these. First, in my judgment the twin objectives of costs saving and promoting access to education through the medium of Welsh is sufficiently important to justify limiting a fundamental right. Second, the provision under consideration – the amended policy – is rationally connected to the objective. Third I am not satisfied that the evidence establishes that the means chosen by the Defendant are no more than is necessary to accomplish the objective. I am not satisfied that the amended policy is a proportionate means of achieving a legitimate aim. In reaching that conclusion I have taken account of the submission made by Mr Williams QC to the effect that in order to justify its amended policy the Defendant does not have to establish that there was no other way of achieving its objectives – see paragraph 81 of the skeleton. This proposition is founded upon the decision in *Hardy.* Mr Williams QC's submission may be correct; however the Defendant must still demonstrate that its amended policy is reasonably necessary and in the absence of a clear appraisal of alternatives that does not seem to me to be possible in the instant case.

81. It follows that I am satisfied that the Claimants have made out ground 1 of their challenge and, in those circumstances, and subject to precise formulation of the

relevant order the Claimants are entitled to an order quashing the Defendant's decision of 30 July 2014.

82. By way of footnote I should stress that the Defendant did not press an argument to the effect that no statistical analysis was possible because it would be based upon a snap shot in time. The case proceeded on the basis that the figures adduced in evidence and the assumptions made were properly representative.

Ground 2

83. Miss Rose QC accepts that Schedule 3 Part 2 paragraph 11(e) of the 2010 Act precludes a claim that the Defendant's amended policy indirectly discriminates against the Claimants on the ground of religion or belief. That is because paragraph 11E provides that section 29 of the Act, so far as it relates to religious or belief-related discrimination, does not apply in relation to anything done in connection with transport to or from school.

84. In the face of this obstacle the Claimants assert that the amended policy amounts to indirect discrimination under the European Convention on Human Rights. Article 14 of the Convention provides:-

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 2 of the First Protocol to the Convention provides:-

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions"

85. The United Kingdom has entered a reservation in respect of Article 2 of the First Protocol. It provides:-

> "At the time of signing the present (First) Protocol, I declare that, in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure."

Section 9 of the Education Act 1966 provides that in exercising or performing all of 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. It seems clear that the reservation entered by the United Kingdom in relation to Article 2 of the First Protocol chimes with this statutory provision.

86. The primary submission of Mr Williams QC is that Article 2 of the First Protocol, properly interpreted, does not apply to transport arrangements to and from school. For that submission he relies upon the decision of Wilkie J in *R (R and Others) –v- Leeds City Council* [2006] E.L.R 25. In that case the claimants were nine children who lived within the area of Leeds City Council, but who attended Orthodox Jewish schools in the Manchester area. Their parents wished them to attend schools in which the religious education provided was that of the Jewish faith to which they adhered. In a decision made on 29 September 2004 the defendant declined to provide transport to the schools in Manchester given the distances involved, the cost and its view that alternative suitable education was available at schools within its administrative area. The claimants brought proceedings for judicial review relying upon a number of grounds including the suggestion that the defendant was in breach of Article 2 of the First Protocol and, in consequence, Article 14 of the Convention. Wilkie J dealt with these points in the following passage of his judgment:-

> "**Article 2 of Protocol 1**
>
> 42 This Article enshrines the right to education, it provides:
>
> > "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical aims".
>
> 43. The UK has entered a reservation in respect of this Article in the following terms:
>
> > "In view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed I the second sentence of Article 2 is accepted by the United Kingdom only insofar as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure".
>
> 44. In respect of this Article the claimants seek to rely on their contention already referred to that the amount of expenditure involved is de minimis when compared with the defendants' total secondary school transport budget. It is contended by the claimants, therefore, that it cannot be said that this represents unreasonable public expenditure.
>
> 45. The defendant contends that this Article is neither engaged nor infringed. It contends that the provision is concerned with access to the educational institutions which the state makes available and places no greater obligation on the state than to acknowledge or take into account religious convictions. In the

> present case there is no suggestion that the defendant has sought to deny the claimants access to any of the educational institutions which are within its control. Nor has it failed to respect the right of the claimants' parents to ensure such education and teaching in conformity with their religious convictions. The right has been taken into account by the defendant and the parents of the claimants have exercised it, in that they have sent their children to Jewish schools in Manchester. In my judgment the defendant's contention is correct. This Article is not engaged, but even if it were, for the reasons already set out in respect of the *Wednesbury* challenge, the decision in question falls within the terms of the explicit reservation entered by the UK to this particular Article and so the claimant has no claim in this respect.
>
> **Article 14**
>
> 46. Article 14 provides:
>
> > "The enjoyment of the rights of freedom set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origins, association with a national minority, property, birth or other status".
>
> 47. The claimant says that as the facts of this claim fall within the ambit of Articles 8, 9 and Art 2 of Protocol 1, it is contended that Art 14 is engaged. In my judgment, for the reasons set out above, none of these provisions are engaged and accordingly Art 14 is not engaged either. "

87. Miss Rose QC submits that the Leeds City Council case can be distinguished since there is evidence before me which suggests that if the amended policy is implemented children will be precluded from attending faith schools of their choice by reason of the inability of their parents to pay for transportation. Obviously, it is not open to me to doubt the possibility that this may occur in relation to some children but, in any event, I do not regard this as a true distinguishing feature. The obligation under Article 2 First Protocol is to respect the right of the parent to ensure education in accordance with his/her religious aims. It does not seem to me that this obligation extends to subsiding and/or paying the whole cost for transportation between home and school.

88. At one point in her oral submissions Miss Rose QC came close to submitting that I should decline to follow the Leeds City Council case on the basis that Wilkie J's judgment in relation to Article 2 of the First Protocol and Article 14 of the Convention was wrong. I am not bound, strictly, by the judgment of Wilkie J but I should follow it unless I consider it to be wrong. Far from believing it to be wrong, I accept his reasoning.

89. Given my view of the *Leeds* case this ground must fail. Given the views which I have expressed in relation to ground 1 and the view I am about to express in relation to

ground 3 I do not propose to lengthen this judgment by dealing with other aspects raised by the parties in relation to this ground.

Ground 3

90. The report presented to the Full Council for its meeting on 30 July 2014 was very detailed. At pages 24 and 25 of the report (Trial Bundle 1 pages 308 and 309) the author of the report explained why, on the basis of advice received, the amended policy was not discriminatory or unlawful. The point was made that there was no unlawful discrimination on the grounds of religion or belief and then the report continued:-

> "In respect of the different treatment of transport to Welsh medium schools, the Learner Travel Operational Guidance 2009 states at paragraph 1.23:
>
> > "Neither the child's or parents language preference or mother tongue nor religious faith or conviction of a child or his or her parents have any bearing on whether a school is suitable. However the Measure (section 10) does require each Local Authority to promote access to education and training through the medium of Welsh when exercising their functions under the Measure."
>
> It is the view of the Education Department officers that travel assistance is required to meet the requirements to promote access to education and training through the medium of Welsh under Section 10 of the Measure, and therefore it follows that Welsh medium transport provision cannot be withdrawn.
>
> However there is no case in law on the interpretation of the provision in the Measure and the guidance and therefore any decision could be open to challenge by way of Judicial Review."

91. The reference to "Learner Travel Operational Guidance 2009" is a reference to guidance provided by Welsh Ministers. At the hearing before me there was a significant debate about whether the guidance issued in 2009 had been superseded by further guidance issued in 2014. That was the subject of written representations made on behalf of the Claimants and dated 25 February 2015. I should say at this point that although it seems clear to me that the 2014 guidance was intended to supersede the guidance issued in 2009 I do not consider it necessary to explore that point in any detail since it does not seem to me that, ultimately, it has any real bearing upon the conclusions which I have reached in this case.

92. Ms Rose QC submits that the paragraph beginning "It is the view of the Education Department officers……" contains a clear error of law. She submits that it was wrong to assert that travel assistance was required to be afforded to pupils attending Welsh medium schools (subject to the distance criteria) in order to satisfy the terms of section 10 of the Measure and it was equally wrong to assert that free transport (subject to distance criteria) could not be withdrawn.

93. Despite the valiant attempts of Mr Williams QC to resist the Claimant's challenge on Ground 3 I am firmly of the view that it succeeds. The paragraph under consideration did mis-state the law. It is true that in a number of reports and briefing papers prepared for the Defendant's cabinet and or other council members in the months preceding 30 July 2014 the legal position was stated with a greater degree of accuracy – see for example the material referred to at paragraph 12 above. However I do not see how that can avail the Defendant. The plain fact is that the report which was to be considered by the Full Council was a very important tool in the decision-making process. It contained a material error of law which was not corrected at any time before the decision was taken by Full Council. There is no suggestion, for example, that any of the Defendant's officers present at the meeting drew the members' attention to the error and corrected it during the course of the meeting. It is not permissible for me to infer that all the members present were aware of earlier more accurate advice upon the legal position and aware, too, that it was the advice contained in the most up-to-date report that was wrong.

94. I accept the submission of Miss Rose QC that this error of law vitiates the decision taken by the Defendant on 30 July 2014. I cannot accept the suggestion made on behalf of the Defendant that the error of law was immaterial. In my judgment the fact that members were advised that they had no option but to continue with the provision of free transport to Welsh medium schools provided the distance criteria were met was likely to be a consideration of some significance in their deliberations. I cannot accept that had the true legal position been explained to members their decision would nonetheless have been the same. Accordingly, I would quash the decision of 30 July 2014 on this ground as well as ground 1.

Grounds 4, 5 and 6

95. In order to ensure that the hearing was completed within the allotted two days there was no oral advocacy in relation to these grounds. The parties agreed that they would rely upon their respective skeleton arguments. At the time this seemed the appropriate course to take. However, had I been minded to reject the Claimants' case on grounds 1 and 3 I would have been very inclined to call for further oral submissions in particular on grounds 5 and 6. However, that course is unnecessary in the light of my conclusions on grounds 1 and 3 and that being the case I intend to deal with the remaining grounds very briefly.

96. Ground 4 is the Claimants' assertion that the Defendant failed to discharge its duty under section 149 of the 2010 Act. Section 149(1) provides:-

> "A public authority must, in the exercise of its functions, have due regard to the need to –
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it……"

The relevant protected characteristics are those which are identified in section 4 and section 19 of the Act.

97. As I have said throughout the decision-making process leading to 30 July 2014 the Defendant produced draft EIAs. The final version of the EIA was annexed to the report to Full Council for its meeting on 30 July 2014.

98. The fact that a public body has produced an EIA in appropriate form in advance of the decision in question is, usually, convincing evidence that it has had regard to its public sector equality duties when making the relevant decision.

99. The complication in this case is that I have found that the Defendant's amended policy is unlawful on the grounds that it is indirectly discriminates against BME children and although the policy has a legitimate aim it is not a proportionate means of achieving that aim. Further the stance of the Defendant has always been that it did not regard its amended policy as discriminatory. The EIA says, in terms, that the amended policy's impact upon race is neutral. Obviously, in the light of this judgment, that view was erroneous.

100. This is the first time I have been confronted with the situation where a public authority clearly did have regard to the need to take account of its public sector equality duties when making a decision but, as I have found, they fell into legal error in so doing. Does that mean that the authority has, in substance, failed to have regard to its duties? I do not find this issue entirely straightforward but, perhaps fortuitously, I need not make a definitive decision about this ground of challenge. I say that for this reason. If my decision on ground 1 is correct this ground adds nothing to the substance of the Claimant's challenge. If, conversely, I have fallen into error in relation to ground 1 it is difficult to conceive of any circumstances in which the Claimant could nonetheless succeed on Ground 4.

101. Ground 5 is an assertion that the report prepared for the meeting on 30 July 2014 lacked certain critical information which was needed to make the decision and, further, contained demonstrably erroneous statements on matters of fact. Relying upon the decision of *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 at 1065, the Claimants submit that the deficiencies in the report were such that the Defendant failed in its duty to take reasonable steps to acquaint itself with relevant information prior to reaching a decision and accordingly the decision should be quashed. The Claimants' skeleton argument relies upon three discrete points. First it asserts that the report did not provide adequate information about the costs savings associated with the amended policy. The second complaint is that no attempt was made in the report to assess the environmental impact should parents of children travelling to faith schools take them by private means once free transport was removed. Third there was no attempt to analyse the viability of faith schools if the amended policy was implemented.

102. Challenges to decisions taken by local authorities on the basis of the inadequacy of reports presented to members occur in many contexts. Perhaps most often they appear in the context of the planning law. In *Oxton Farms and Another* –v- *Selby District Council* [1997] EWCA Civ 404 Judge LJ (as he then was) in a short concurring judgment had this to say about such challenges:-

> "The report by a planning officer to his committee is not and is not intended to provide a learned disquisition of relevant legal principles or to repeat each and every detail of the relevant facts to members of the committee who are responsible for the decision and who are entitled to use their local knowledge to reach it. The report is therefore not susceptible to textual analysis appropriate to the construction of a statute or the directions provided by a judge when summing a case up to the jury.
>
> From time to time there will no doubt be cases when judicial review is granted on the basis of what is and what is not contained in the planning officer's report. This reflects no more than the courts conclusion in the particular circumstances of the case before it. In my judgment an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of a planning committee before the relevant decision is taken. "

103. I accept of course that this decision was made in the context of planning law but it seems to me that the essential point made by Judge LJ is material in all cases when it is sought to be said that a decision should be quashed on account of deficiencies in a report upon which the decision-maker clearly relied. As I see it, the essential point is that the overall effect of the report must significantly mislead the members about material matters which thereafter are left uncorrected at the meeting if a decision based upon the report is to be quashed.

104. I have already concluded that this report contained a material error of law which did mislead members and this error was left uncorrected at the meeting. However I do not regard the omissions in the report, as identified by the Claimants, as having the same significance. I do not regard the effect of the omissions to be that overall the report was significantly misleading to the members.

105. Even if, in reaching this conclusion, I am applying too narrow a test it cannot be the case that there was any obligation upon the author of the report to specify each and every point that was, potentially, material to the decision to be made. The points raised by the Claimants were, no doubt, potentially material but, in my judgment, none of them were likely to have escaped the attention of the members and, of course, it was for the members to determine what weight, if any, they should give to all the points which had a bearing upon their decision. I am not persuaded that the omissions from the report identified by the Claimants had such an effect upon the decision-making process that the decision should be quashed. Nor do I consider that the Defendant failed to discharge its *Tameside* duty. I do not consider that ground 5 is made out.

106. During the course of the meeting of the Full Council three of the members who participated in the debate asserted that the faith schools had reserves which could be used to pay for school transport. This assertion had not been referred to in the report

and it had not been part of any discussion which had occurred between representatives of the faith schools and the Defendant's officers. Ground 6 is an assertion that it was unfair that this point should have been raised, for the first time, at the meeting of the Full Council especially since the representatives of the Claimants who were present had no opportunity to comment upon the assertion or rebut it. It is noteworthy that the Defendant's skeleton in response to this ground is very brief. With respect to Mr Williams QC it does not provide an answer to the complaint of unfairness (other than to deny it). The main point taken on behalf of the Defendant in response is that the decision would have been the same regardless of what was said.

107. In my judgment there is some substance in this complaint. However whether I would have been prepared to grant a quashing order had this been the only ground available to the Claimants is quite another matter. Had I resolved all the others grounds against the Claimants I would have convened a further hearing at which this ground could have been debated in more detail and the appropriateness of a quashing order could have been considered in depth. Since, however, I have reached the clear conclusion that the Claimant succeed on grounds 1 and 3 and that I should make a quashing order as a consequence no useful purpose would be served by a further exploration of this ground.

Conclusion

108. I am persuaded that grounds 1 and 3 have been made out. In these circumstances it seems to me that I should grant the Claimants the substantive relief which they seek (subject to any debate about the precise formulation of the order).

Directions

109. I will hand down this judgement at 12.30pm at the Cardiff Civil Justice Centre on Friday 22 May 2015. There need be no attendance by lawyers or the parties at the hearing. I am sure that the parties can agree an appropriate order consequent upon my judgment but if they cannot I will receive short written submissions on the issue of substantive relief and costs which must be filed electronically with my clerk in accordance with the following timetable. Claimants shall provide a draft of order including a provision for costs by 12.30pm Wednesday 20 May providing short reasons in support. The Defendant shall reply by 12.30pm Thursday 21 May providing short reasons in opposition if so advised.

110. If the Defendant wishes to appeal against this judgement it should do so by making an application direct to the Court of Appeal within the time specified for making an application in the CPR. That direction should be included in the order which the parties are asked to agree or which I will determine. I make this direction as a way of preventing further delay in this case. I apologise for the delay in producing this judgment; my only excuse is pressure of work.