Neutral Citation Number: [2021] EWHC 2513 (Admin)

Case No: CO/2181/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

17th September 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

THE QUEEN (on the application of CHF and CHM)	**Claimants**
- and -	
(1) THE HEADTEACHER AND GOVERNORS OF NEWICK CE PRIMARY SCHOOL	
(2) EAST SUSSEX COUNTY COUNCIL	**Defendants**

- -

The Second Claimant appeared in person (assisted by a McKenzie Friend)
Jonathan Auburn QC (instructed by East Sussex Legal Services) for the **Defendants**

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Hearing date: 27th July 2021

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Approved Judgment

- -

THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Part 1: Introduction

1. This judicial review case arose out of disputed events involving three children who were each aged 6 and at primary school and, more specifically, out of the way in which the Defendants – "the School" and "the Local Authority" – responded. The case has raised questions of law including whether and what power schools and local authorities have to impose what I will call "Mandatory Off-Site Schooling" (see §3 below), other than by means of an "exclusion" decision by a headteacher pursuant to section 51A of the Education Act 2002 ("the 2002 Act") or as a "behaviour-improvement" response by school governors pursuant to section 29A of the 2002 Act. The Defendants say there is power to impose Mandatory Off-Site Schooling by way of what I will call a "Safeguarding Separation" (see §4 below), which is what they say happened in this case. The Claimants say – among other things – that what really happened was an unlawful, backdoor exclusion. A key issue in this case involves identifying the appropriate scope for judicial determination in this case, in the light of two things. First, there was only ever limited permission for judicial review, which the Claimants have remained keen to expand. Secondly, the School made a post-permission section 51A exclusion decision, which the Defendants say renders all the issues academic and unsuitable for judicial determination. My task is to decide what to make of all of this.

Anonymity

2. When, on 27 July 2020, Linden J ("the Judge") granted limited permission for judicial review, he made a direction for anonymity: ordering that the children in the case should be identified only by letters of the alphabet. The Claimants maintained, from the start, that all parents' names should also be anonymised. The Court of Appeal extended the anonymity order to cover the Claimants' names: [2021] EWCA Civ 613 at §33. I extended it, at the start of the substantive hearing, to cover the parents of the other children. There has been no application to anonymise the School, which remains identifiable (see [2021] EWCA Civ 613 at §24). There was at one time an application by the Claimants for a private hearing, but that application was wisely not pursued. The mode of hearing was an in-person, public hearing at the Royal Courts of Justice. I record that, informed that this is what had happened before DHCJ Smith and in the Court of Appeal, and there being no objection from the Defendants, I decided it would make better use of court time if the Claimants' McKenzie Friend (B's grandmother) spoke to me direct rather than in the ear of the Second Claimant who then repeated the content to me. That course was and is not intended to set any wider precedent. In response to this judgment in draft, the Claimants invited me to use the "oao" instead of "on the application of", and "CHF and Others" instead of "CHF and CHM", to fit with an Order of Warby LJ (3 March 2021). That was a provisional Order which lapsed according to its terms and, in any event, I am satisfied that the case heading is clear and appropriate.

"Mandatory Off-Site Schooling"

3. This phrase is my shorthand to mean action mandating that a child – against the wishes of the child's parents – must attend off-site education at another school. Two things can immediately be made clear. The first is that Mandatory Off-Site Schooling can be

imposed – in an appropriate case, in an appropriate way and within certain parameters – by a headteacher as a "disciplinary" response, by means of an "exclusion" decision by the headteacher under section 51A, with applicable parameters, procedural rights and obligations, and a mechanism of independent review. The second is that Mandatory Off-Site Schooling can also be imposed – in an appropriate case, in an appropriate way and within certain parameters – by school governors as a "behaviour-improvement" response, under section 29A of the 2002 Act.

"Safeguarding Separation"

4. This phrase is my shorthand to mean action physically to separate school children from one another, which action is taken for the purpose of safeguarding the welfare of a relevant child or children. The idea of Safeguarding Separation is one which can be illustrated by reference to the Department for Education statutory guidance entitled "Keeping children safe in education" (September 2018 edition) ("the National KCSE Guidance"). It can also be illustrated by reference to the Local Authority's own "Protocol for Managing Peer on Peer Harmful Sexual Behaviour in Schools, Settings and Colleges" (December 2018 edition) ("the Local Protocol"). It is appropriate that I make clear that the 2018 editions to which I refer are the ones which were placed before the Court.

   i) The National KCSE Guidance constitutes statutory guidance for the purposes of section 175(1) and (2) of the 2002 Act. That means schools and local authorities are under a legal obligation to have regard to the guidance, in the exercise of their statutory duty – imposed by Parliament by section 175 – of ensuring that education functions are exercised with a view to safeguarding and promoting the welfare of children who are pupils at a school.

   ii) The National KCSE Guidance (see §35 below) describes the situation where there is a "report of sexual violence" and the issue of "children sharing a classroom", describing what a school should do immediately while it "establishes the facts of the case and starts the process of liaising with children's social care and the police" (see pp.66-67). The Guidance, which makes clear that the school should consider "the proximity of the victim and alleged perpetrator and considerations regarding shared classes, sharing school … premises and school … transport", says this of actions which keeps the children "apart": "These actions are in the best interests of both children and should not be perceived to be a judgment on the guilt of the alleged perpetrator". This is all explained in a context (see §252) where the school is concerned with the "welfare of a child" and acting "in the bests interests of the child", and addressing "how best to support and protect the victim and the alleged perpetrator" as well as "any other children involved/impacted". The Guidance later describes, in equivalent terms, the "ongoing considerations" after "next steps" have been "decided" (pp.73-74).

   iii) The Local Protocol (see §36 below) provides detailed local guidance on how schools should respond to incidents of sexual harassment, sexual violence or harmful sexual behaviour as those terms are defined in the National KCSE Guidance (see §1.1). It describes risk management plans (§5.1, Apx 2) and multi-

agency risk management meetings (§7). It speaks of "measures … which will reduce the likelihood of the children involved coming into contact" (§5.4) and "to ensure any potential contact between the child alleged to have displayed the behaviour and the child who was targeted is managed carefully" (§7.2), and cases where "the ongoing level of risk from the child who has displayed the behaviour to another child at school may be so great that it is not possible to manage the risks safely within the school environment" (Apx 2 §1.4).

An Introductory Overview

5. In this paragraph I will set out my own introductory overview of some of the events which took place, from which these legal proceedings have arisen. I do so in order to set the scene for my discussion of the shape of the case. I make clear that I am not here seeking to encapsulate all of the features or events which the parties would for their part, and from their different perspectives, wish to emphasise, or the descriptions which they would use.

   i) The end of the summer term in the 2018/19 academic year at the School was Friday 19 July 2019. Three weeks before the end of term, on Friday 28 June 2019, words were spoken ("the Verbal Altercation") between three pupils (alphabetically: B, O and P), said to have been overheard by a fourth (W). B was a 6 year old boy and the son of the Claimants. O, P and W were 6 year old girls. They were in the same class. The Verbal Altercation arose out of events during the autumn term 2018 ("the Autumn Events").

   ii) On Monday 1 July 2019 (which I will call "day 1", using an equivalent shorthand for subsequent school days) the School's head teacher Natalie Alty ("the Headteacher") made a referral to Children's Services at the Local Authority. The Local Authority convened a Strategy Meeting at 13:30 on Wednesday 3 July 2019 (day 3). Meanwhile, the Headteacher implemented an arrangement (from day 1) whereby B was removed from class and supervised individually on-site at the School. That arrangement continued until Friday 12 July 2019 (day 10).

   iii) The Strategy Meeting (day 3) was chaired by Jo Elsey, Social Worker Manager within the Family Support Team (FST) at Lewes. It was attended by the Headteacher and others which, according to the documents, included Mandy Watson (Chair of the Governing Body at the School) ("the Chair of Governors"), Catherine Dooley of SLES (Standard and Learning Effectiveness Service at the Local Authority), Victoria Wells of ESBAS (the Education Support Behaviour and Attendance Service, part of Inclusion, Special Educational Needs and Disability Services at the Local Authority), Joe Dove from SWIFT (a specialist family service used by the Local Authority), Jo Nash from MASH (Multi-Agency Safeguarding Hub) and the allocated social worker Kaycee Upward. The FST's documentation of the Strategy Meeting records, as actions for safety at school in respect of the 3 children discussed (B, O and W): the School implementing a risk reduction and safety plan, with SWIFT and Vicky Rowe working with the School.

iv) A school-based Safeguarding Risk Reduction Plan document dated Thursday 4 July 2019 (day 4) records that it was developed by the Headteacher with the Deputy Head Teacher (Amy Clarke) and Vicky Rowe, and that it was to be reviewed with Joe Dove (SWIFT) on Tuesday 9 July 2019 (day 7). The Plan set out "details of the precautions required" including supervision of B. It included a risk assessment addressing child protection issues. The Plan was updated on Monday 8 July 2019 (day 6) by Amy Clarke. On Wednesday 10 July 2019 (day 8) there was a Professionals Meeting chaired by Catherine Dooley, at which the attendees included the Headteacher, the Chair of Governors, Victoria Wells, Jo Elsey, Kaycee Upward, Joe Dove and Jo Nash.

v) On Friday 12 July 2019 (day 10) there was a Strategy Meeting chaired by Jo Elsey, at which the attendees included the Headteacher, Kaycee Upward and James Brown (from MASH). The FST record of that meeting states that ESBAS were to inform the Claimants that B would be "moving placement next week", ESBAS having "agreed he would be educated off-si[te]". It also records as actions various steps including the school to implement a "risk reduction and safety plan in respect of the safety of all children discussed at the previous strategy discussion and in consultation from Joe Dove (Swift) and ESBAS". During the final week of term from Monday 15 July 2019 (day 11) to Friday 19 July 2019 (day 15) B was educated off-site.

vi) On the final day of term Friday 19 July 2019 (day 15) the Headteacher sent an email to the Second Claimant ("B's Mother"), copied to Victoria Wells (ESBAS) and to the head teacher at another school ("the Other School"). That email was headed "[B]'s placement for September". It began: "I am writing to formally tell you that [B]'s education will be directed off-site to [the Other School] from 4th September 2019 under section 29A Education Act 2002". It went on to refer to a support package from ESBAS and transport costs met by the Local Authority.

vii) The autumn term of the new academic year 2019/20 began in early September 2019. On Wednesday 4 September 2019 at 12:30 B's Mother sent a detailed email to the Headteacher, responding to the email of 19 July 2019 and the reference to section 29A of the 2002 Act. The Headteacher replied at 14:26 stating that she had forwarded the email to the Local Authority and to the Chair of Governors. On the same day B's Mother wrote a detailed letter to the Governors. Within what B's Mother wrote at 12:30 was that she was intending to bring B back to the School, "where he is lawfully enrolled as a pupil", on Thursday 5 September. Within what the Headteacher wrote at 14:26 was that: "As a Head Teacher and a governing body we have the legal right to not admit [B] into [the] School". On Thursday 5 September 2019 B's Mother brought B to the School. The School did not admit B.

viii) An undated letter from the Chair of Governors which the Claimants say was delivered to them on Friday 6 September 2019 began: "I am writing to inform you of the governing body's decision to direct [B]'s education off-site under section

29A(1) of the 2002 Education Act". The Claimants wrote to challenge the validity of that undated letter, by a letter to the Governors on 9 September 2019.

ix) On 18 September 2019 Nathan Caine, head of ISEND (Inclusion, Special Educational Needs and Disability Service) at the Local Authority wrote to B's Mother, a letter beginning: "I enclose a notice issued under section 19 of the Education Act 1996". The enclosure was headed "Notice to parent requiring a child to attend alternative provision where the local authority has deemed it is necessary to make arrangements for people to attend education otherwise than the school pupil is registered at". It stated: "This notice hereby requires you to cause the above-named child to attend at the alternative provision set out below", and identified the Other School.

The Autumn Events

6. There have been two very different descriptions of the Autumn Events:

i) What is recorded in the Headteacher's note of a meeting on 3 July 2019 with the Claimants is that: "[B] had to pass a test. The result was they had to all show each other's privates". In the Claimants' 4 September 2019 letter to the Governors there is a detailed description, the essence of which written description – as I see it – can be encapsulated as follows. The Autumn Events involved B being subjected to a concerning so-called 'game'. O and P asked B if he wanted to play the 'game'. B was new to the school. O and P took B to the bottom of the field and explained that their game was a 'test'. B became a victim, being preyed upon to engage in O and P's 'game'. This was peer on peer – child on child – abuse suffered by B, a newcomer who was keen to fit in. B was succumbing to pressure. The Verbal Altercation on 28 June 2019 was that O and P again wanted to play their 'game' and B refused, after which they coerced and threatened B: that if he did not partake in the 'game', they would 'tell'. He did not yield to their threats, which they carried out by 'telling'.

ii) The FST record of the Strategy Meeting on 3 July 2019 contains a description of what was being said to have been reported to the Headteacher and Amy Clarke by the parents of O and P, the essence of which recorded description – as I see it – can be encapsulated as follows. This was what was being alleged. B had taken O and P down to an area at the School. B had asked them to kiss and lick each other on their genitals touching with fingers. He had then pushed in his fingers and dug in his nails (a description recorded as being thought to be 'pinching and scratching rather than penetration'). B asked O and P to reciprocate with his genitals and his mouth. O said it was 'both holes'. This had continued over a course of about 6 weeks. B made threats and was angry and aggressive when O and P refused and tried to walk away.

A Small School

7. It is appropriate to record that the School is a small one, physically and as to the number of pupils. There are just over 200 pupils on the roll. There is one class for each year group. There is one corridor.

Part 2: What issues should this Court determine?

The claim for judicial review: courses of action impugned

8. These judicial review proceedings were commenced on 18 June 2020. The claim for judicial review sought to impugn two courses of action:

    i) "Exclusion". The claim impugned the Headteacher's "exclusion decisions" which were described as "ongoing". Reference was also made to the Governing Body, to the use of section 29A, and to the non-use of exclusion powers (section 51A).

    ii) "ICPC". The claim impugned "initial child protection conference" (ICPC) decisions of the Local Authority. Reference was made to a "stage two" ICPC decision (30 January 2020) and the claim also sought a quashing order in relation to earlier (16 October 2019) ICPC action. As to this second course of action (ICPC), everybody agrees that permission for judicial review was refused. The Claimants did not attempt before me to reopen that refusal. I heard no submissions in relation to the ICPC aspects. They do not feature in the rest of this judgment.

The claim for judicial review: grounds put forward

9. The claim for judicial review identified six grounds for judicial review. The sixth ground was really in the nature of a 'shield' against a claim which the Defendants might make in relation to the other five grounds. The 'shield' was the claim that this case involves "exceptional public interest" for the purposes of section 31(2B) and (3E) of the Senior Courts Act 1981, which should prevent the Court from refusing judicial review – if otherwise minded to do so – on the basis that it was highly likely that the outcome would not have been substantially different. The other five grounds related on some points to the "exclusion" course of action (§8i above), on some points to the "ICPC" course of action (§8ii above), and on some points to both courses of action. I can identify the nature of the five grounds in the following way:

    i) Ground 1 (illegality) sought declarations in relation to 21 listed 'transgressions'. Within the list of 21 were the following, by way of example (I am not going to list all 21): (a) the lawfulness of the Headteacher's decision to conceal the allegations from B and the Claimants, so as to obstruct and prevent the right to be heard; (b) breach of the principles of natural justice in deciding B's guilt at the strategy meeting on 3 July 2019 and the decisions at strategy meetings held in July 2019 and on 27 September 2019; (c) the use of section 29A of the 2002 Act as the means to implement the Headteacher's permanent exclusion decision; (d) the failure of the Headteacher to follow section 51A statutory powers and procedures for her exclusion decision; (e) the use of internal exclusion and isolation from peers for the period 1 July 2019 to 12 July 2019 as punishment of B; (f) the failure to consult

and involve the Claimants before making decisions at the July strategy meetings and taking actions affecting the children and family; (g) the lawfulness of the direction of B's education off-site for the period 15 July 2019 to 19 July 2019; and (h) the lawfulness of the Headteacher's decision to prohibit B's entry to and attendance at the School from 5 September 2019.

ii) Then there were Grounds 2-5, which were as follows. Ground 2 was breach of natural justice in relation to the decisions in July 2019 in September 2019. Ground 3 concerned breach of UNCRC on the part of the Headteacher. Ground 4 alleged procedural impropriety in relation to both the purported use of section 29A and the ICPC decisions. Ground 5 alleged unreasonableness (irrationality) in relation to both the 'core' decisions (exclusion) and the ICPC decisions.

The permission-stage responses

10. Acknowledgements of service were filed by the School and the Local Authority. Various reasons were given why the Court should refuse permission for judicial review. Prominent in those reasons was delay in bringing the claim. So far as concerned the "ongoing exclusion", the School submitted that there was no "exclusion", but rather a Safeguarding Separation: a precautionary measure in accordance with the National KCSE Guidance. The point was also made that the section 29A actions of the School had been overtaken by the section 19 notice issued by the Local Authority.

The limited permission for judicial review

11. The claim documents and the acknowledgements of service came before the Judge who on 27 July 2020 granted limited permission for judicial review. The Judge made a carefully worded Order and made detailed observations. In the Order, the Judge granted permission for judicial review:

> ***in respect of the Claimants' challenge to the Second Defendant's notice pursuant to section 19(1) Education Act 1996, dated 18 September 2019; and, so far as relevant, the decisions of the First Defendants pursuant to section 29A(1) Education Act 2002, dated on or about 19 July 2019.***

The Judge added: "For the avoidance of doubt, permission is refused in respect of all other claims and complaints of the Claimants". In the observations, the Judge first explained why he was not granting permission in relation to the ICPC course of action (§8ii above). He then made these key points:

i) First, the Judge then made a point about issues relating to "B's schooling" and delay. He said: "As far as the issues relating to the schooling of Child B are concerned, I consider that all complaints other than those in respect of which I have given permission are out of time given that the events complained of took place on or before 18 September 2019. I do not consider that it is in the interests of justice for an extension of time to be granted in respect of those complaints".

ii) The Judge next made observations about B's "current position", identifying three issues of law. These concerned [i] section 29A of the 2002 Act, [ii] section 19 of

the Education Act 1996 ("the 1996 Act") and [iii] exclusion 'in substance'. The paragraphs inserted in square brackets are mine. The Judge said:

> ***However, I am concerned about the current position of child B who is registered at [the School] but has been required by the Defendants to attend [the Other School]. He has attended neither and, I am told, has not received any formal education this academic year. [i] My understanding is that the Defendants no longer contend that the governing body of [the School] had a power to impose this requirement under section 29A Education Act 2002. [ii] It is also reasonably arguable that the Second Defendant did not have a power to do so under section 19 Education Act 1996 either, because arguably this section establishes a duty on the part of the Second Defendant to provide education rather than a right to require child be to move schools. [iii] It is also arguable that in substance child B has been excluded from [the School] since 19 July 2019 in any event.***

iii) The Judge next made an observation about delay and the three issues of law which he had identified as relating to B's "current position". He said this: "I agree that it is a concern that the claim in respect of the issues identified … above was not filed far sooner but nevertheless consider that permission should be granted, specifically in relation to these issues and no others. However, this does not preclude the Defendants relying on delay in relation to relief".

iv) Finally, the Judge made an observation about expedition. He said: "I have … directed that the trial take place next term as it seems to me that there is a degree of urgency, albeit the delay in filing the Claim has meant that I am not prepared to list the matter as vacation business".

12. The Judge's clear purpose in granting judicial review was to resolve issues of law which were relevant to B's "current position". The Judge clearly had in mind that it could be appropriate for the judicial review Court to grant a remedy if there were an unlawfulness as to that "current position". He identified three issues of law, each being relevant to the "current position": [i] the applicability of section 29A of the 2002 Act ("so far as relevant": the Judge's "understanding" being that this was "no longer" relied on); [ii] the applicability of section 19 of the 1996 Act; and [iii] whether B's position was that he had been "in substance … excluded". These three issues were recognised in the Claimants' skeleton argument (see §14 below). The Judge made plain that he was not granting permission for judicial review in relation to anything else. That included, for example, historic questions regarding "B's schooling" (for example, the on-site arrangement in days 1-10 and the off-site arrangement in days 11-15). It included, for example, grounds relating to natural justice and procedural impropriety; grounds relating to the UNCRC; and the various declarations sought regarding other of the 21 transgressions. The Judge was identifying three issues of law, all relevant to B's "current position".

13. When the Claimants issued their notice of renewal (3 August 2020) inviting the expansion of the scope of the grant of permission for judicial review (see §15(1) below), they rightly described permission for judicial review as having been granted on a "narrow" basis. They sought to expand the scope of permission for judicial review to include grounds such as: "Neither child B (nor his parents) were informed of allegations made against child B on 1 July 2019; they never knew the evidence against child B and

child B never had any opportunity to be heard". The Defendants for their part also recognised the narrow scope of the permission for judicial review. Their pleaded detailed grounds of resistance (30 September 2020) said: "The sole issue on which permission has been granted concerned the then current status of child B, when he was excluded from [the School], and the legal basis for him being, at that time, required to not attend [the School], and the Claimants being informed that at that time education was available for him to access, at [the Other School]".

14. In their skeleton argument for the substantive hearing before me, the Claimants identified three issues as being before the Court, based on the Judge's limited grant of permission to appeal and his three issues of law [i]-[iii] (§12 above). (1) The first issue concerned the applicability of section 29A as invoked by the School, which the Claimants called "the section 29A issue". (2) The second issue concerned the applicability of section 19 as invoked by the Local Authority, which the Claimants called "the section 19 issue". (3) The third issue concerns exclusion in substance since 19 July 2019, which the Claimants called "the 2019 illegal exclusion issue".

Three unsuccessful attempts to expand the scope of permission for judicial review

15. After the Judge granted limited permission for judicial review the Claimants made three unsuccessful attempts to expand the scope of the permission. (1) They issued a notice of renewal (3.8.20) which was unsuccessful at an oral hearing (6.10.20) before Deputy High Court Judge Tim Smith. (2) They then sought permission to appeal to the Court of Appeal, which was refused by Warby LJ (3.3.21) (except for a point extending the anonymity order, which succeeded before the full Court of Appeal: see §2 above). (3) They then applied to reopen the refusal of permission to appeal, which was refused by Warby LJ (15.3.21).

Grievances

16. A strong and unmistakeable feature of this claim for judicial review was that the Claimants wished to convey – and ensure that the Court had understood – the breadth and depth of the grievances which they hold against the School and the Local Authority for the way in which the situation was handled. It is very often the case that there is a picture, a story, which lies behind a case. Judicial review often encounters the creative friction between the legal shape which a case must take in Court – to engage the legal issues which it is the function of the Court to determine – and the concerns and objectives of those who bring the case. It can be appropriate – especially in witness evidence – to ensure that the Court is aware of what lies behind a case, and to allow those whose case it after all is to ensure that their story has been told, their truth revealed and not suppressed. In this case, the Claimants – through their McKenzie Friend – well aware, and reminded by the Court, of the issues on which permission had been granted (see §§11-15 above), were steadfast in their resolve in using substantial amounts of the court time available to them, to ensure that the Court had understood the nature, breadth and depth of their underlying grievances. It became increasingly clear that the Court was being asked to deal with these grievances in the Court's judgment, expanding the scope of permission for judicial review (see §17 below). What I will do below is to set out my own encapsulation of some key features of the grievances which the Claimants expressed

to me at the hearing. I do so, recording that the Claimants' position is that orders at earlier stages of the proceedings, regarding disclosure and permission to file further witness statements, meant that the Court was not aware of all the facts and evidence and the truth had not been revealed but suppressed. Here is my encapsulation:

> ***B is innocent. The actions taken in this case by the School and then the Local Authority were based on what was being reported to the School by the parents of O and P, from allegations which had been elicited by P's mother at a sleepover at P's house. O and P were labelled from the start as "victims". B was labelled from the start as "perpetrator". Primacy was given to O and P. There was a taking of sides, and a rush to judgment. There was never an investigation into the propriety of veracity of the allegations. As has been pointed out in an intervention report (7 February 2020) written by the assessor Verity Wilde: "There … appear to have been some flaws in this process, in that a formal account of the alleged incidents was not taken from the female pupils and [B] for 12 and 18 days respectively". The Headteacher decided, very early on, that she wished to effect B's exclusion; and she achieved precisely that. B and the Claimants were not given basic information as to the substance of the allegations, nor afforded an informed opportunity to be heard. The process was unfair and incompatible with human rights. The decisions were unreasonable and disproportionate. The Defendants labelled, stigmatised, ostracised and publicly defamed B and B's family. From the very first strategy meeting on 3 July 2019 the Headteacher and the other attendees: proceeded, without any enquiry or investigation as to how O and P had knowledge of harmful behaviour outside what is expected of 6 year old girls; jumped to uninformed and unsubstantiated conclusions (including that adults in O and P's households were above reproach or enquiry); and sat as judge, jury and executioner condemning B to extreme and draconian punishment without any investigation or enquiry into the false and unsubstantiated allegations. B has been being punished ever since. The whole process has been deeply unfair and stigmatising. B has been treated in a manner inconsistent with this key principle in the NSPCC Operational Framework: "It is vital that young people are not labelled or stigmatised unnecessarily as a result of the identification of [harmful sexual behaviours]". He has been treated in a manner inconsistent with provisions of the UN Convention on the Rights of the Child ("UNCRC"), article 16.1 of which protects a child from "unlawful attacks on his or her honour and reputation" and article 28.2 of which requires "all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in accordance with the present Convention" (including article 16.1). The stigma in this case needs to be removed, by the Court. B needs, and should receive, "judicial exoneration".***

A further attempt to expand the scope of permission for judicial review

17. At the hearing before me the Claimants identified their underlying grievances, including those key points which I have endeavoured to encapsulate (§16 above). They asked me to address those points. They relied on their grounds for judicial review (§9 above), in relation to the exclusion course of action (§8i above). They strongly submitted that the standards of public law and human rights protection cannot be excluded or ignored by the Court; that the rule of law, natural justice; international law obligations and the Human Rights Act 1998 cannot be ignored; that the Court is itself a "public authority" under the 1998 Act; and that 'lawfulness' includes reasonableness and unfairness, and that reasonableness has a 'process' element. I accept all of that. But the answer is that none of these things have been ignored by the Court. The grounds put forward by the Claimants have been dealt with, by the Judge; by DHCJ Tim Smith; and by Warby LJ (twice). The Court's power to grant limited permission for judicial review, having considered the arguability of judicial review grounds which are being put forward, and having considered objections such as delay, is an important one. The rights to challenge the restricted scope of permission for judicial review, at a hearing in the High Court and

by seeking permission to appeal from the Court of Appeal, are also important rights. It is important that public authority defendants know the scope of the case that they have to meet. Procedural rigour is an important feature of judicial review proceedings. No change of circumstances justifies extending the scope of the issues for resolution by the Court. There was and is, in my judgment, no justification for doing so.

Issue [i] is resolved

18. The Judge recorded his "understanding" as being "that the Defendants no longer contend that the governing body of [the School] had a power to impose this requirement under section 29A Education Act 2002". That was why he referred to issue [i] as being "so far as relevant". In their pleaded Detailed Grounds of Defence (30.9.20) the Defendants expressly disavow section 29A as an applicable power in this case. They accept that this was not "behaviour-improvement" action. That this has been confirmed as clear and common ground disposes of the Judge's issue [i]. Section 29A did not provide power for the position in which B was – including the "current position" as it was at the time of permission for judicial review – and the Defendants accept that. The Claimants had rightly said in their email of 4 September 2019 to the Headteacher: "Section 29A is a statutory power which is only exercisable when the intention is to 'improve behaviour'. You have not identified or explain the behaviour that you allege requires improvement". They were also right in their letter (9.9.19) to the Governors, when they pointed out that "the school governors' section 29A power … can only be used when the intention is to improve behaviour". The Claimants submitted that the Court should grant a declaration to reflect the inapplicability of section 29A. In my judgment it is neither necessary nor appropriate to do so. There is no need to clarify that section 29A(1) is applicable only for the purpose of improving the behaviour of the pupil: that is what the section already says. Issue [i] is thus resolved. What is left, within the scope of the grant of permission for judicial review, are issues [ii] (whether section 19 provided the applicable power) and [iii] (whether B was in substance excluded).

The exclusion decision (3.9.20)

19. On 3 September 2020, after the Judge's grant of limited permission for judicial review, the Headteacher wrote a decision letter to the Claimants in which she explained that she had revisited the issue of whether B should still be a pupil on the roll at the School and had determined that she was "left with no alternative other than now to decide on the balance of probabilities whether the principal allegations against B occurred as alleged and what sanction should flow from any finding she made". The decision letter acknowledged that this decision was being made during the currency of these ongoing judicial review proceedings. It explained that the Headteacher had decided now to permanently exclude B pursuant to section 51A of the 2002 Act, on the basis of deciding "on the balance of probabilities that on dates unknown prior to 1 July 2019 he engaged in harmful sexual behaviour against two other female pupils including sexual touching of the genital areas of the two young girls, that he was the child who instigated this behaviour rather than the girls themselves and that he threatened to cause serious harm to the girls if they told anyone". Following receipt of the decision letter the Claimants invoked their right to make representations about the exclusion to the Board of Governors and, having been unsuccessful in having done so, invoked their right to seek an

independent review pursuant to the statutory scheme applicable to exclusions. The independent review is pending.

This judicial review claim does not extend to the decision to exclude B

20. There was no application before me to amend the grounds for judicial review to challenge the decision (3.9.20) to exclude B. The Claimants were right not to make such an application. There are cases and situations in which a fresh decision by a public authority can become a target for judicial review, and where it may be appropriate to seek permission to amend the grounds for judicial review in existing proceedings to challenge that fresh decision. But judicial review of the exclusion decision would, in my judgment, be clearly inappropriate. That is because there is an alternative remedy: the right to seek an independent review. At one point the Claimants submitted – as I understood it – that this Court could and should address B's current position as it is in light of the exclusion decision of 3 September 2020. But, for the same reason, that invitation is not one to which it is appropriate to accede. Issues relating to the exclusion decision are matters for the independent review, together – should the need arise – with any subsequent recourse arising out of that independent review.

21. In circumstances where the scope of this judicial review claim does not extend to the decision to exclude B, it is in my judgment important that this Court does not cut across the consideration that needs to be given to the exclusion under the Claimants right of independent review. Nothing which I say in this judgment is intended to have, or should have, any influence – either in support of the Claimants or in support of the Defendants – on those decision-makers who come to consider the question of B's exclusion and any questions relating to B's exclusion. They will need to consider the case, and evaluate the merits of the issues which arise for their consideration, independently and with an open mind. The Claimants and the Defendants are each entitled to that.

Where does the decision to exclude B leave issues [ii] and [iii]?

22. Developments which post-date the grant of permission for judicial review can cause the shape and scope of the issues before the Court to change. Sometimes a change of circumstances can cause the scope of the issues to become wider; sometimes it can cause the scope to of the issues in the case to become narrower. One example of the narrowing of the issues in this case is that the Defendants' confirmed position on section 29A being inapplicable has disposed of issue [i] (see §18 above). The Defendants submitted that, since B was excluded pursuant to section 51A (3.9.20) (see §19 above), issues [ii] and [iii] have become "academic" and there is no live issue of law within the scope of the grant of permission for judicial review, which it would be appropriate for the Court to determine. In response, the Claimants say the interests of justice – as well as the public interest – require that the issues be addressed by the Court. They emphasise that there is a utility and indeed a need to do so. They emphasise the "stigma" which the prior adverse decisions necessarily entailed for B. In relation to "stigma" they rely on the observations of Collins J in R (CR) v Independent Review Panel of Lambeth LBC [2014] EWHC 2461 (Admin) [2014] ELR 359 at §§63 and 64.

Case-specific questions about B's legal position prior to 3.9.20

23. In my judgment, it is not appropriate for this Court to rule on case-specific questions about B's legal position prior to 3 September 2020. That is for the following reasons.

    i) The Judge's clear purpose in granting permission for judicial review was so that this Court would consider legal issues relevant to B's "current position". That purpose was linked to the fact that, if this Court held that B's "current position" was that he was the subject of unlawful Mandatory Off-Site Schooling – because [i] section 29A was inapplicable and [ii] section 19 was inapplicable and/or [iii] B was in substance excluded – the Court would be resolving a present legal controversy and would be able to grant a practical and effective remedy having a present utility. That justified these issues being considered, notwithstanding the delay objections upheld in relation to all historic complaints.

    ii) All of that has changed since 3 September 2020. The "current position" does not involve any live issue relating to any of the three issues of law [i]-[iii]. There is no uncertainty as to B's "current position": B is excluded pursuant to section 51A. There is no basis on which this Court could or would say, declare or order that his position is anything else. Whether the exclusion is justified can be addressed through the alternative remedy of the independent review. In these circumstances, the question whether this Court should consider those legal issues which it would otherwise have considered, within the scope of the Judge's grant of permission for judicial review, become a question of judgment and discretion for this Court.

    iii) In my judgment, there is no, and no sufficient, utility – so far as concerns any practical and effective remedy – in this Court addressing any issue relating to B's legal position prior to 3.9.20. Furthermore, now that B has been excluded and the right of independent review arises, it is in my judgment appropriate that those considering the exclusion decision should have a clear pathway of doing so, based on their independent appraisal of all relevant issues and their consideration of all relevant circumstances. It would not be appropriate for either of the parties – the Claimants or the Defendants – to look to this Court for a 'head-start' in that independent review of the exclusion.

    iv) One helpful question to test the position is to consider what the position would have been, had the exclusion decision preceded the Judge's consideration of permission for judicial review. The key point is that the Judge would not have had the concern which he had about B's "current position" which was the essential underpinning of the grant of permission for judicial review. There would already have been an extant exclusion decision pursuant to a readily identifiable statutory power, making clear B's "current position", and accompanied by an extant alternative remedy. The Judge could not have given permission for judicial review for the reason and purpose that he did, and there is no reason to suppose that he would have granted permission for judicial review at all.

v) I emphasise, in the Claimants' favour, that this is not a question of an absence of jurisdiction. I accept that this Court has the jurisdiction, in an appropriate case, to consider issues which are no longer 'live' and the Court could in principle consider whether to grant a declaration of an 'historic' unlawfulness. It follows that this Court has the jurisdiction to decide whether, prior to 3 September 2020, the Defendants were acting unlawfully on the basis of an absence of power or on the basis that B was 'in substance excluded'. But the jurisdiction to give declarations about past unlawfulness is one to be approached with circumspection. The public law court looks primarily to decide issues which have present, practical impact; or issues which engage wider public interest imperatives. Circumspection in ruling on historic events and issues is especially appropriate where there is now a present, live controversy which is one which can, and will, be considered under a bespoke alternative remedy mechanism.

vi) This is not a case in which a declaration of an 'historic' breach would give rise to a remedy in damages. There was always a school available for B. That means there could be no damages for violation of the right to education: see Ali v Headteacher and Governors of Lord Grey School [2006] UKHL 14 [2006] 2 AC 263 at §§24-25, 61.

vii) In relation to "stigma", and the judgment in CR, B is now excluded pursuant to section 51A, and moreover by reference to the same underlying events. It is right to recognise that there is a stigma associated with an exclusion, as Collins J recognised in CR. CR was a judicial review of the independent review panel's decision in an exclusion case. The point in that case was that the parents were not seeking any reinstatement at the school, but were seeking to overturn the exclusion decision which went on the pupil's file. In the present case, exclusion arising out of these events is the very thing that can and will now be addressed, head-on, by the Claimants through their entitlement to independent review. If the challenge to the exclusion decision through the alternative remedy of independent review is successful, it will in consequence become a matter of record that exclusion of B arising out of these events was unjustified. If the challenge to the exclusion decision is unsuccessful, the consequence will be that exclusion will have been found to be justified and will remain on B's record. In my judgment, no stigma – from what the Claimants say was an 'in substance exclusion' – can justify the Court addressing historic issues within the scope of the Judge's grant of permission for judicial review.

viii) That leaves the question of the wider public interest. In my judgment, case-specific questions about B's legal position prior to 3 September 2020 do not engage a wider public interest question whose nature would justify the Court in addressing what are now historic issues, in circumstances where there is an exclusion decision and a right of independent review.

The vires issue (s.19) and the wider public interest

24. I have just explained my conclusion that case-specific questions about B's legal position prior to 3 September 2020 do not engage a wider public interest, justifying the Court in addressing historic issues, in circumstances where there is an exclusion decision in relation to B with a right of independent review. That, however, is not the end of the matter. As part of the claim, the Claimants squarely raised the question whether there is a power in section 19 to impose Mandatory Off-Site Schooling as a Safeguarding Separation. That question of vires falls squarely within the scope of the permission for judicial review, as a necessary part of the Judge's issue [ii]. It would always have involved this Court determining whether there was vires under section 19, or anywhere else. In my judgment, there is a strong public interest in this Court addressing the vires issue in this judgment. That is not because the conclusion may logically be that the Defendants lacked the power for their historic action in B's case, though that may be the consequence of the Court's analysis. Rather, the wider public interest arises because: this is an important, discrete point as to the scope of statutory powers; it does not involve detailed consideration of facts; it is a pure question of analysis of legal powers; and it can be expected to arise again. Addressing it leaves the questions relating to B's case and the exclusion decision for untrammelled consideration under the independent review, and gives no party a 'head-start' in that process. It is a pure point of law. The Claimants have raised it clearly. Legal arguments have been marshalled and presented. It arises in a context of considerable uncertainty. The Defendants for their part were, and remain, uncertain as to their powers. Viewed in this way, the Claimants have in the event promoted the public interest by raising the issue. I am satisfied in all the circumstances that there is a public interest in this Court addressing this question. That is what I will do in the remainder of this judgment.

Part 3: Vires, s.19 and Mandatory Off-Site Schooling as a Safeguarding Separation

General features of the legal landscape

25. It is appropriate to start the analysis of the vires issue by setting the legal scene. (1) Local authorities have a statutory duty to establish and maintain schools (1996 Act s.16). (2) Parents have a statutory duty to cause their school-age children to receive efficient full-time education by regular attendance at school or otherwise (1996 Act s.7). (3) Local authorities, in exercising or performing their powers and duties under the Education Acts, are required 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 efficient instruction and training and the avoidance of unreasonable public expenditure (1996 Act s.9). (4) Pupil registration is governed by the Education (Pupil Registration) (England) Regulations 2006. The proprietor of every school is obliged to keep an admission register and an attendance register (reg.4). The admission register contains details regarding all pupils at the school (reg.5). The attendance register records presence and absence (reg.6). There are prescribed grounds for deletion from the admission register including registration as a pupil at another school (reg.8(1)(b)), notified parental home-schooling (reg.8(1)(d)), unknown whereabouts (reg.8(1)(f)), unfitness to attend school by reason of ill health (reg.8(1)(g)), and permanent exclusion (reg.8(1)(m)).

Exclusion (s.51A)

26. A headteacher has a power to "exclude" a pupil, for a fixed period or permanently (2002 Act s.51A(1)), for the purposes of which power "exclude" means "exclude on disciplinary grounds" (s.51A(10)). In the context of exclusion there are statutorily-required regulations governing prescribed information to parents, duties on schools to consider reinstatement, and local authority arrangements for independent review by a panel (s.51A(3)). In the context of exclusion, the pupil will remain on the admission register for the school (see §25(4) above) unless and until there is a permanent exclusion and the review process – if invoked – has been exhausted (2006 Regulations reg.8(1)(m)(4)(d)). Exclusion decisions involve reasoned notifications to parents (see the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 reg.5) applying a civil standard of proof (reg.10). Fixed-period exclusion cannot be used to achieve long-term exclusion: there is a prescribed maximum of 45 days a year of fived period exclusions (reg.4). The prescribed processes for exclusion involve the decision by the headteacher, followed by reconsideration by the governing body (reg.6) and the review arrangements in the case of permanent exclusion (reg.7-8). There is a statutory duty to have regard to statutory guidance (reg.9). It is clear that exclusion can mean the imposition of Mandatory Off-Site Schooling (§3 above). In the case of a fixed period exclusion the governing body has a statutory duty to make arrangements for suitable full-time education for the excluded pupil (Education and Inspections Act 2006 s.100). There is also a gap-filling obligation (see §32 below) owed by the local authority to make provision for an excluded pupil, which comes into play in the case of a permanent exclusion. It means the local authority must identify the arrangements for full-time education to enable the headteacher to give to the parent(s) a prescribed notice as to the place at which the provision is being made (2006 Act s.104; Education (Provision of Full-Time Education for Excluded Pupils) (England) Regulations 2007 reg.7). Accordingly, the actions of the local authority and the headteacher are intended to be coordinated. In the interim, the notified parent(s) of the excluded pupil have a statutory duty to ensure that the pupil is not present in a public place during school hours during the 5 days between exclusion and the beginning of the alternative provision (2006 Act s.103). One of the places which a local authority may make available for excluded pupils is a specially organised pupil referral unit (1996 Act s.19(2) and Sch.1). It follows from all this that there is a carefully designed statutory framework in relation to exclusion. Exclusion is deliberately framed as an action taken on disciplinary grounds. On the one hand, exclusion triggers rights: the right to the statutory notification with the prescribed information; the right to a decision applying a prescribed civil standard of proof; the right to reconsideration by the governing body; the right to the independent review panel; the right not to have fixed period exclusion used indefinitely denying independent review. On the other hand, exclusion may involve an identifiable stigma, which remains on the pupil's record, and which may be particularly undesirable – if avoidable – in the case of a young child.

Behaviour-improvement (s.29A)

27. Section 29A of the 2002 Act empowers a governing body to make educational provision for improving a pupil's behaviour. This allows Mandatory Off-Site Schooling (§3 above), by way of action which would prevent the pupil from attending the school on

whose admission register they are, and would require them to attend another place. Section 29A(1) provides as follows: "The governing body of a maintained school in England may require any registered pupil to attend at any place outside the school premises for the purpose of receiving educational provision which is intended to improve the behaviour of the pupil". That provision was inserted into the 2002 Act in 2010. It requires that regulations are made prescribing the information to be given where the governing body imposes such a requirement; and requiring the governing body to keep the imposition of that requirement under review (s.29A(3)). Such regulations can provide for statutory guidance to which regard must be had, and on the maximum number of days to which an imposition can be applied (s.29A(4)). The Education (Educational Provision for Improving Behaviour) Regulations 2010 duly makes provision for prescribed information (reg.3) and review (reg.4) and statutory guidance (reg.8). The prescribed maximum duration is the final school day of the academic year (reg.3(5)). Implications of these arrangements are that there are statutory rights and protections, including reviews and the maximum duration of the end of the current academic year, for mandatory imposition of off-site education for the purpose of improving the pupil's behaviour, without having used any power of exclusion.

The Vires Question

28. The question of vires is whether a school, governing body or local authority can impose Mandatory Off-Site Schooling as a Safeguarding Separation. What brings the question into focus are: (i) the absence of a bespoke statutory power, unlike in the cases of exclusion (s.51A) and behaviour-improvement (s.29A); (ii) the importance of not cutting across the express powers, parameters and safeguards applicable to exclusion (s.51A) and behaviour-improvement (s.29A); (iii) the practical realities in securing pupil welfare, including for example those which arise in the context of a school which cannot move a pupil into another class, because the school is small and only has one class per year; and (iv) the high thresholds likely to apply in order for protecting pupil welfare to become a positive obligation under section 6 of the Human Rights Act 1998.

My Answer to the Vires Question

29. In my judgment, a school and local authority have the power to impose a Safeguarding Separation involving Mandatory Off-Site Schooling, as collaborative and coordinated action taken for ensuring, and each having due regard to the Government statutory guidance provided for the purposes of ensuring, that the educational functions of the local authority and the functions relating to the conduct of the school are each exercised with a view to safeguarding and promoting the welfare of children who are pupils at the school (2002 Act s.175(1)(2)), which action involves: (a) the local authority exercising its section 19 power; (b) the school exercising its general management powers; and (c) each of them discharging their public law duties.

My Reasons

30. There are four key steps in the analysis. First, the principled starting point is section 175(1)-(2) and (4) of the 2002 Act. It provides as follows:

Duties of local authorities and governing bodies in relation to welfare of children

> ***(1) A local authority shall make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children.***
> ***(2) The governing body of a maintained school shall make arrangements for ensuring that their functions relating to the conduct of the school are exercised with a view to safeguarding and promoting the welfare of children who are pupils at the school.***
> ***(3) …***
> ***(4) An authority or body mentioned in any of subjections (1) to (3) shall, in considering what arrangements are required to be made by them under that subsection, have regard to any guidance given from time to time (in relation to England) by the Secretary of State …***

That is an overarching provision. It is mandatory, for both the local authority and for the governing body of the school. So is the statutory duty to have regard to the Secretary of State's section 175 guidance. It is an overarching provision within the same statutory scheme containing the exclusion power (s.51A) and the behaviour-improvement power (s.29A). Section 175 shows that Parliament contemplated local authorities discharging education functions, and governors discharging functions relating to the conduct of the school, in order to safeguard and promote the welfare of pupils at a school. It also shows that Parliament envisaged detailed statutory guidance from the Secretary of State describing welfare-based action, to which schools and local authorities would be required to have regard. Parliament also contemplated that there could be local arrangements (s.175(1)), such as a local Protocol. In this way, Parliament contemplated that detailed provision could be made within policy documents: to promote due process and protect against arbitrariness; and to secure appropriate liaison, collaboration and coordination.

31. Secondly, the headteacher and governing body of a school have important "general management powers" in relation to the conduct of the school. Those general management powers fall within the phrase "functions relating to the conduct of the school" which, in the case of the governing body, were expressly described in section 175(2) of the 2002 Act. It follows that the general management powers are interwoven into the section 175 duties, informed by statutory guidance and any relevant local authority arrangements. It would fall well within the powers of "general management" of the school for a headteacher to inform parents of some situation constituting a pressing reason why a pupil, or a group of pupils, or for that matter a class, year-group or even the entire body of the school, should not attend the school and will not be admitted. That action, in principle, may be necessitated by safeguarding the welfare considerations relating to the pupil not being admitted to the premises, or to others who are being admitted to the premises. This approach to the general management powers finds powerful (albeit obiter) support from high judicial altitude. In the Ali case, Lord Hoffmann, speaking in the context of the imposition of what he called an exclusion for a precautionary reason in the interests of the education and welfare of the people and others in the school (see §36), identified the possibility that the school "as part of its general powers of management" would have "the right to exclude a pupil on precautionary grounds" (§42). As Lord Hoffmann also explained (§42), that action does not fall foul of statutory provision to the effect that "exclusion" may not be imposed other than in accordance with the statutory exclusion provisions. It does not do so, because the "exclusion" thus prohibited is an exclusion "on disciplinary grounds". That exercise of those general powers of management to decline to admit a pupil or pupils to the premises, for reasons of

safeguarding and promoting the welfare of children who are pupils at the school, makes obvious sense.

32. Thirdly, this raises the question of what is to happen if, for reasons of Safeguarding Separation, a pupil or group of pupils is not being admitted to the school pursuant to the general management powers. Educational provision would need to be made. The state has a duty to secure the right to education – the right to a school to attend – protected by the Human Rights Act 1998. There would be a gap if educational provision were not provided and, given that parents may decline consent, if it could not be imposed. The general statutory duty on local authorities about pupils being educated in accordance with the wishes of their parents (see §25(3) above) does not preclude such imposition: it is a duty to have regard to a general principle; and it applies only when compatible with the provision of efficient instruction and training. The gap would not have arisen by virtue of an "exclusion"; it would have arisen "otherwise". Section 19 provides the power. What Parliament has done in section 19(1) of the 1996 Act is to impose a duty on a local authority, framed as follows:

> ***Each local authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.***

Section 19(1) arrangements may include "full-time education" (s.19(3A)(a)). There is, as Parliament envisaged (s.19(4A)) separate statutory guidance (Department for Education: Alternative Provision: Statutory guidance for local authorities, January 2013 §§28-39). Parliament has by section 19(1) required a local authority to fill a 'gap', whether it arises "by reason of illness", or whether it arises "by reason of … exclusion from school", or whether it arises "otherwise". Section 19(1) action can be Mandatory Off-Site Schooling. That is the case in a case of "exclusion". But it is also the case in an "otherwise" case, which may be a Safeguarding Separation case. That approach to section 19 finds powerful support (again, albeit obiter) from high judicial altitude. In R (G) v Westminster City Council [2004] EWCA Civ 45, Lord Phillips MR for a Court of Appeal (whose other members were Arden LJ and Dyson LJ as they then were) described (at §48) the sort of exceptional situation which could be envisaged where the local authority could come under a duty under section 19 to make alternative arrangements. The example he gave was the:

> ***… situation which 3 other children in the school facing criminal charges, which they denied, of sexually assaulting that child. In such circumstances it might not be reasonably practicable for the child to continue to attend the school. The local education authority would then come under a duty under section 19 to make alternative arrangements.***

This is a situation which envisages what the National KCSE Guidance calls a 'victim' being the subject of s.19 educational provision. But "not … reasonably practicable for the child to continue to attend the school" could equally apply to what that Guidance calls an 'alleged perpetrator'. What matters is that section 19 is, in principle, applicable in the context of Safeguarding Separation and Mandatory Off-Site Schooling. And the Mandatory Off-Site Schooling is imposed by the local authority, under section 19, in

circumstances where the pupil is not permitted to attend school by reason of the exercise of the school's general management powers.

33. This analysis promotes and reflects the relationship of coordination and liaison between school and local authority, which is surely needed in a Safeguarding Separation context, especially when the strong action is being contemplated of maintaining a refusal to allow admission to the school premises, and where any question of Mandating Off-Site Schooling is on the radar. That coordination and liaison, unsurprisingly, is seen in the National KCSE Guidance, the statutory guidance for section 175 of the 2002 Act. Coordination and liaison are required in the context of exclusion, including the provisions relating to notices that are provided to parents as to the alternative school which an excluded pupil must attend (see §26 above). It is true that there is no express, bespoke statutory regime dealing with Safeguarding Separation, or with Mandatory Off-Site Schooling as Safeguarding Separation. But it is unsurprising that the statutorily-recognised "otherwise" category might involve a situation in which general management powers are being exercised. There might indeed be a whole range of situations in which a school cannot safely admit a student or group of students or the entirety of the student body to the premises and a gap could arise.

34. The fourth key point is that principles of public law are applicable and important. They are the backcloth against which Parliament legislates. They can assume particular prominence in circumstances where there is an absence of a bespoke statutory power, and in a context where there are carefully calibrated safeguards and limitations of other statutory powers. As Lord Hoffmann put it in Ali, the use of the general management power (§31 above) would be limited "by the need that it should be reasonably exercised" (Ali §42). Lord Hoffmann spoke in terms of that as being the "only" limitation but, by that, he will have been describing the substantive justification for the exercise of power and the suite of standards associated with common law reasonableness. Reasonableness would here itself include the duty not to exercise general powers to frustrate or circumvent the limits of relevant and interrelated statutory powers. Public law standards will also require procedural fairness. No school or local authority should regard itself as being free from the need to act procedurally fairly, including listening and explaining, and to act in a reasonable – including a reasonably proportionate – manner. Safeguarding Separation could not be used for an extraneous purpose, such as: to put parents under pressure to agree to enrol a child elsewhere; or to get a pupil 'off the roll' in order to protect academic attainment statistics. Absent a suitable alternative remedy, the judicial review court – in proceedings properly and promptly pursued – supervise the exercise of the power by holding the relevant authority or authorities to those standards.

35. By way of a reference-point, it is helpful to see the overarching duties in section 175 of the 2002 Act (§30 above) alongside the statutory guidance which has been promulgated by the Secretary of State (s.175(4)). The National KCS Guidance (see §4i-ii above) is statutory guidance from the Department for Education pursuant to section 175. It discusses Safeguarding Separation and contains detailed guidance about a collaborative approach. What follows is my encapsulation of some of the key content in the statutory guidance.

i) The statutory guidance explains that safeguarding and promoting the welfare of children is of fundamental importance (p.5) and there are mechanisms for school referral to the local authority and if appropriate the police (see §§8, 22-36), and work with those agencies (§§66-71). One specific safeguarding issue in education concerning sexual abuse of children by other children (§§45 and 48), including sexual assault and sexual harassment (pp.85-86), and there is guidance (§§241-262) as to how schools should respond to such reports (§95), in what are likely to be complex situations requiring difficult professional decisions, often made quickly and under pressure (§242). It identifies effective safeguarding practice and principles (§243) for decisions for a school to make on a case-by-case basis using professional judgment supported by other agencies such as the local authority and police (§244). The guidance addresses what a school should do where a report has been received, including an immediate risk and needs assessment (§§248-250). Important considerations include the wishes of the 'victim'; the nature of the alleged incidents; the ages and developmental stages of the children involved; any power imbalance between them; whether the 'alleged incident' is a one-off for a sustained pattern; whether there are ongoing risks to the 'victim', other children, or school staff; other related issues in the wider context (§251); how to deal with 'victims' (pages 86-87); the starting point that sexual violence and sexual harassment is not accepted and will not be tolerated (§253); discussion with relevant agencies including local authority and the police, including to discuss next steps on how the 'alleged perpetrator' is to be informed of allegations, none of which should stop the school taking immediate action to safeguard children where required (§254). The guidance addresses ongoing steps: safeguarding and supporting the 'victim' (§§255-261); safeguarding and supporting the 'alleged perpetrator' (§262).

ii) The statutory guidance explains that one important element of action following reports of sexual violence or sexual harassment in a child on child case concerns separation of the children: dealing with the position where children share a classroom; the step of removing the 'alleged perpetrator' from any classes they share with the 'victim'; considering how best to keep the 'victim' and 'alleged perpetrator' a reasonable distance apart on school premises; immediate consideration of shared classes and shared school premises; as "actions … in the best interests of both children [which] should not be perceived to be a judgment on the guilt of the alleged perpetrator" (pp.66-67). Similarly, in the context of the ongoing response, the guidance explains that the question must be revisited as to the 'victim' and the 'alleged perpetrator' sharing classes and sharing space at school; which inevitably involves complex and difficult professional decisions, including considering the duty to safeguard children and the duty to educate them; each case being considered on a case-by-case basis and risk assessments updated as appropriate; that the best interests of the child should always come first and the school should follow general safeguarding principles in the guidance; that consideration should be given about separation and appropriate support provided to both 'victim' and 'alleged perpetrator', with consideration given to sharing

classes and potential contact as required on a case-by-case basis; and that schools should record and be able to justify their decision making (pp.73-74).

iii) The statutory guidance addresses the important consideration of safeguarding and supporting the 'alleged perpetrator' (§262). Four principles are identified, based on effective safeguarding practice: (1) Balancing of the need to safeguard the 'victim' and the wider pupil body and the need to provide the 'alleged perpetrator' with an education. (2) Consideration of the age and developmental stage of the 'alleged perpetrator', the nature of the allegations and the impact as a result of being the subject of allegations and any negative reactions by peers. (3) Consideration of the proportionality of the response, on a case-by-case basis, addressing the unmet needs of an 'alleged perpetrator', alongside any potential risk of harm that they may pose to other children, with advice taken as appropriate from local authority and police. (4) If the 'alleged perpetrator' moves to another educational institution, making that new institution aware of any ongoing support needs and where appropriate potential risks to others.

iv) The statutory guidance says that if the trauma of the 'victim' means they are unable to be provided with necessary support to remain in the school, alternative provision to move to another school should be considered to enable them to continue to receive suitable education, but only at the request of the 'victim' following discussion with their parents or carers (§260).

36. Added to this – as illustrative of a local authority arrangement (s.175(1)) – there is the Local Protocol (see §4iii above), produced for East Sussex schools by the SLES Safeguarding Team, Swift specialist services, SPOA, MASH and Early Help. It uses the phrases 'child who displayed the behaviour' and 'child who has been targeted'. Again, it is no more than a reference-point, in considering the issue of vires.

i) The Local Protocol provides detailed local advice on how school should respond to incidents of sexual harassment, sexual violence or harmful sexual behaviour as defined by the National statutory guidance (§1.1). It sets out a process for initial responses (§3.4). It describes the process where cases are referred to children's services (SPLA) (§4) and the ongoing role of the school. It describes the risk management plan as immediate action to safeguard all of the children involved when it comes to light that an incident of peer-on-peer harmful sexual behaviour involving children may have occurred on or off the school site (§§5.2, 5.4). It describes the need to arrange a multi-agency professionals meeting so that relevant agencies can share information and assessments, discuss concerns and level of risk and agree a risk management plan, within 10 working days of the incident coming to light (§5.3). It describes the appropriateness of professionals from agencies working with the children involved being invited to the meeting (eg. a social worker), and the appropriateness of inviting the parents of the child who has displayed the behaviour unless there are identified concerns why that would not be appropriate (§7.1). It describes as an aim of the meeting consideration of the evidence of the risks the child may pose, review of the risk management plan to

ensure that any potential contact between children is managed carefully, and to consider support as well as sanctions on a planned and assessed case-by-case basis, following effective safeguarding principles and with appropriate professional advice where specialist assessments are required (§§7.2-7.3). It describes the need throughout the process for the school to maintain open communication with the parents of all children who have been involved (§8.1). It sets out a flowchart (Apx 1) for school to follow in a case of peer-on-peer harmful sexual behaviour which has come to light, including the referral to SPOA and the appropriateness of the school following advice from SPLA.

ii) The Local Protocol gives detailed guidance for formulating a school-based safeguarding risk reduction plan (SRRP), emphasising the appropriateness of using the guidance, of it being reviewed at the multi-agency risk management meeting, the need for the plan to be proportionate to the assessed level of risk, the key points to which consideration should be given and key factors needing to be considered (Apx 2). A template SRRP is also provided (Apx 5). The guidance on SRRPs (Apx 2 §1.4) identifies factors in relation to potential contact between the children, including this: "Is it possible to separate the children involved during the school day? A child is likely to feel safer if he or she knows there is a plan in place which will restrict the contact he or she has with the other child involved. It is important that the measures which are put in place to restrict the contact are shared with both the child who displayed the behaviour and the child he was targeted. This will enable the child he was targeted to be alert to any behaviour/actions which may not have been part of the agreed SRP." It continues: "In some cases … the ongoing level of risk from the child who has displayed behaviour to another child at school may be so great that it is not possible to manage the risks safely within the school environment. In such cases refer to section 7.3 and 7.4 of this guidance". §§7.3 and 7.4 are a discussion of considerations at the multi-agency risk management meeting, which describe the need for support as well as sanctions being assessed and planned for it on a case-by-case basis with appropriate advice. They are alongside §7.2, which discusses the question of potential contact between the children and the need to consider the risks within the school community.

37. It is appropriate, always, to test the analysis by considering practical realities, in the important context of pupil welfare. It is obvious that it will be very often the case that a school will be able to, and should, accommodate any Safeguarding Separation within the school. The statutory guidance clearly focuses on in-school arrangements when discussing Safeguarding Separation. It is also obvious that it will very often be the case that any Mandatory Off-Site Schooling by way of Safeguarding Separation may be a short-term, possibly very short-term measure. The question of vires can properly be tested by supposing a situation where the practical realities are assessed as making the position impossible, unsustainable and damaging, at least for a short time. It would be a serious lacuna if in those circumstances it were legally impossible – however serious and pressing the concerns – to implement effective ongoing educational provision. The fact is that necessary ongoing effective educational provision may require off-site provision for one or other others of the pupils concerned.

38. It follows, in light of my analysis, that the answer is not supplied by incidental powers necessary for the operation of a statutory power: cf. Ward v Commissioner of Police for the Metropolis [2005] UKHL 32 at §23. Nor is it supplied by the governing body's statutory power under section 29(3) of the 2002 Act to "require registered pupils to attend at any place outside the school premises for the purposes of receiving any instructional training included in the secular curriculum of the school". That was a power discussed by Lord Hoffmann in the Ali case at §41. I am prepared to accept that section 29(3) could apply to a single pupil. But as I see it, it is a provision requiring of the school an 'instruction or training' reason to send pupils to a place outside the school premises. In a case where the school has a safeguarding and welfare rationale why the pupil cannot be admitted to the premises, in my judgment the school's general powers of management are already squarely being invoked, and it makes much more sense that it is the local authority then who has the duty to make provision under section 19, rather than the school imposing attendance at another school. I also find it striking that the emphasis in section 29(3) is on "instruction or training", and such "instructional training" as is "included in the secular curriculum for the school". And if section 29(3) were an all-embracing power, then it is difficult to see why section 29A was needed.

Part 4: Conclusions and Consequentials

Outcome

39. Of the three issues in this case (see §§11ii, 12, 14 above): issue [i] has been resolved (§18 above); and I have determined the vires question raised by issue [ii] (§§24, 28 above), identifying section 19 as the power by which Mandatory Off-Site Schooling can be imposed as Safeguarding Separation (§§29, 32 above). I have concluded (see §23 above) that it is inappropriate to determine any case-specific questions falling within issues [ii] or [iii], for reasons which I was given. This judgment contains no finding – in favour of the Claimants or against them – as to whether B's position as it was at the permission-stage in this case (what the Judge called "the current position"), or for that matter at any stage prior to the exclusion decision on 3 September 2020, involved a lawful or unlawful exercise of section 19 powers by the Local Authority and/or of general management powers by the School. All relevant questions relating to the justification for the exclusion decision made on 3 September 2020 (§19 above) fall to be considered through the remedy of the independent review mechanism (see §§20-21, 23iii above), and it is to that mechanism that the Claimants must now turn. Meanwhile, it is an obvious and pressing imperative – which I record here – that the Local Authority and Claimants must liaise and ensure that B is attending another school.

No order

40. In the confidential draft of this judgment, as circulated to the parties, I said at this point: "Subject to any submissions made in writing by the parties on the question of what form of Order the Court should make, in the light of my judgment, I am minded to make no order on the claim for judicial review, save to record that it was disposed of by this judgment, and save for dealing with any contested consequential matter." I am satisfied that the Order, recording in a recital that this judgment was handed down, should say: "No order is made on the claim for judicial review, which is hereby finally determined."

Costs: now or later?

41. The question of costs was hotly contested. The first controversy concerned whether the Court should deal with costs now or later. The Defendants put forward a timetable for the serving of submissions by any party wishing to claim costs, followed by submissions in response and reply, with page limits, culminating in a consolidated bundle of submissions by 11 October 2021 for determination by me on the papers thereafter. The Claimants resisted that course, submitting that the Court should give a reasoned ruling on costs at the time of handing down judgment, being well placed to do so and the parties being well able to make their submissions. The Claimants pointed out that the Defendants had on 26 July 2021 filed a statement of costs (dated 23 July 2021 (totalling £28,621.60), and their own costs information (totalling £42,678.35) was provided by email that same day. In response to that resistance to their suggested deferral, the Defendants set out written submissions on costs as a fall-back position in case the Court was unwilling to defer. The Claimants replied to those costs submissions. I agree with the Claimants that it is appropriate for this Court to deal with costs at the time of handing down judgment and include a reasoned ruling on the issue of costs. Circulation of the confidential draft judgment (8 September 2021) gave ample time. The instructions on the draft judgment made clear that the Court wanted consequential submissions and wanted to be able to deal with them and make its order at the time of the judgment. There is every reason to strike while the iron is hot and resist kicking the can down the road for no good reason. No explanation was ever given by the Defendants as to why a position could not be taken, or why submissions could not be made. One was, and they were. The time is now.

Costs: submissions

42. The parties take diametrically opposing positions in relation to costs. The Claimants say they are the successful parties in the claim. The say they should have a costs order (£23,162.35) paid within 14 days, covering: their expenses (£923.35); their court fees (£2,235); and their legal costs originally calculated at two-thirds (£20,004) of the costs claimed by the Defendants. In the alternative the Claimants said they should recover the expenses and court fees (£3,158.35). The Claimants say that they succeeded in relation to issue [i] section 29A, as reflected in the judgment at §18. They say they succeeded in relation to issue [ii] (section 19), characterising the judgment as a precedent recognising "newly created" powers, creating a "new power", and a "new doctrine". They say it would be a "fiction" to pretend that these powers were exercised in September 2019, and that nobody could knew of the power until the Court's judgment. They say they "did not fail" on issue [iii] (exclusion in substance), because the Court declined to rule either way on that issue. They say that the Court has recognised their pursuit of the claim as having promoted the public interest, so far as concerns the vires issue: see the judgment at §24. The Claimants say that they should not be penalised and punished with an adverse costs order because, as they put it, a QC has been successful in creating new precedent, especially in circumstances where the Defendants did not know what powers they had.

43. The Defendants say that they should have a costs order on the basis that they have prevailed. They always maintained that they acted with legal power, and the Court has agreed, in particular as to section 19. The section 29A issue fell away in September 2019 when section 19 was invoked and was never relied on in the proceedings. In the

alternative, they say they should have their costs from one of three dates in September 2020: the date of the exclusion decision (3.9.20); the date of an email (16.9.20) which stated that in the light of that exclusion decision the judicial review "now academic" adding that "a court is likely to refuse to grant you relief" and "the local authority would be entitled to its legal costs, which would run into over £10k by that point, if not more"; or the date of the Detailed Grounds of Resistance (30.9.20) which adopted the clear position that the claim was now academic and ought to be stayed. The Defendants say that the claim was pursued, on issues which had become academic as the Court has recognised, and by reference to the Claimants' wish to ventilate points beyond the scope of permission for judicial review, none of which has been successful.

Costs: discussion

44. My reasoned assessment is as follows. (1) The starting point is that I have made no order on the application. (2) The open questions identified by the Judge, on which permission for judicial review was granted, and which were live at that time and remained live up to 3 September 2020, have not been resolved by this judgment. I have identified powers, but I have not concluded that they were, or were not, lawfully exercised in this case. What the Defendants have 'said all along' is that (a) they had powers (b) which they lawfully exercised. The judgment supports them on (a) but is neutral on (b). No party has been vindicated on (b). (3) On the issue of vires, there is no question of a "new" power being conferred by this Court, as the Claimants suggest. On the other hand, this Court's analysis is not – as the Claimants point out – reflected in any straightforward and clearly articulated response from the Defendants. The Defendants were unsure of their powers. In the event, they presented the Court with a 'menu' of powers and assisted with the analysis. The vindication which they can claim is limited. Added to that is the fact that resolution of the vires issue was addressed as promoting the public interest. (4) The Defendants' clearly articulated position in September 2020 was that the judicial review claim had become academic and should not be pursued to a substantive hearing, in circumstances where there was now an exclusion decision and an alternative remedy. I agreed with that position, so far as case-specific questions were concerned (judgment §23). The Claimants unsuccessfully opposed that position. There is force in the Defendants' invitation to award costs after September 2020. (5) I would not take any date before 30 September 2020 when the Detailed Grounds of Resistance and witness statement evidence had all been filed and served. There was an unmistakable link between the proceedings, the looming deadline for Detailed Grounds of Resistance, and the Headteacher's action taken to address the question of exclusion. The key question is whether the Claimants should pay the costs, or any portion of the costs, after 30 September 2020. (6) The Defendants were only partly-successful on the question of issues not being resolved as being academic. I agreed with the Defendants about not resolving the case-specific questions; but not as to vires (to which point (3) above applies). (7) In the light of all these points, all the circumstances of the case, and the points that have been made on both sides, the appropriate resolution in my judgment of the question of costs is that the Claimants should be liable for a portion of the Defendants' costs incurred after 30 September 2020. The Claimants ought to have recognised that the Court would not rule on historic case-specific questions, in circumstances where there was now an extant exclusion decision with an alternative remedy. Especially since the

Judge's concern "about the current position of Child B" was the clear basis of the grant of the limited permission for judicial review. The Defendants have incurred substantial costs, including after 30 September 2020, including preparations for the one-day hearing to meet historic case-specific questions. (8) As a fair reflection of these and the other features of the case, the just, appropriate and proportionate costs order is in my judgment that the Claimants pay a proportion of the Defendant's costs assessed at £3,000. That sum is a little over 10% of the Defendants' overall costs claim. As always, whether to enforce that costs order is a matter for the Defendants but, in my judgment, they are entitled to that costs order in all the circumstances.