Neutral Citation Number: [2023] EWHC 1242 (Admin)

Case No: CO/3420/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2023

Before :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

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Between :

The King **on the application of** **Robert Sharp**	
	Claimant
- and –	
The Office of the Schools Adjudicator	**Defendant**
- and –	
Impact Multi Academy Trust	**First Interested Party**
- and –	
London Borough of Bromley	**Second Interested Party**
- and –	
The Secretary of State for Education	**Intervener**

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Mr Robert Sharp, Claimant appeared in person
Mr Alan Bates and Ms Rachel Sullivan (instructed by **Government Legal Department**) for the **Defendant**
Ms Miriam C Benitez for **Impact Multi Academy Trust** (instructed by **Veale Wasbrough Vizards**) for the **First Interested Party**
Mr Alex Line (instructed by **London Brough of Bromley**) for the **Second Interested Party**

Ms Claire Darwin KC (instructed by **Government Legal Department**) for the **Intervener**

Hearing date: 15 February 2023

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Approved Judgment

C. M. G. Ockelton :

Introduction.

1. This application for judicial review challenges a decision dated 15 August 2022, made by an adjudicator under the auspices of the Defendant, the Office of the Schools Adjudicator. The claim is concerned with what matters an adjudicator may and must take into account in determining whether a school's admission arrangements are "fair".

2. There is a considerable history leading up to the decision under challenge. During the course of his submissions, and in writing, the Claimant has made detailed reference to that history, including at various stages his own express or implied comments on aspects of it. The history itself, however, is not in reality in dispute in these proceedings, and could not reasonably be in dispute. Further, because these proceedings challenge only the decision of the adjudicator, I am not concerned with the motivation for, or any error in, decisions taken by others, save insofar as they had any impact on the adjudicator's decision. The history is as follows.

3. Impact Multi Academy Trust, the Second Interested Party, runs schools constituted as academies in the London Borough of Bromley. Its organisational history is part of the background of these proceedings, but is not otherwise relevant, because although by statute the Academy Trust is the admission authority and is responsible for setting a school's admissions policy, the policy is set school by school, regardless of who the admission authority may be. The Local Authority has an obligation to secure adequate educational provision in its area, so that although it is not the admission authority for the academies, it is affected by the admissions policy of the academies (because those not admitted to the academies will require education in other schools). Thus, it appears in these proceedings also as an Interested Party.

4. Amongst the Impact Multi Academy Trust's schools are Langley Park School for Boys, Langley Park School for Girls, and Langley Park Primary School. In the period before 2022, the Trust was called Langley Park Learning Trust. Prior to that, the Trust was called Langley Park Academies Trust. The registered company number of the Trust (and therefore the legal entity) did not change throughout this period, and each change of name was registered with Companies House. In 2018 (that is to say, after the opening of the primary school), Langley Park School for Boys joined the Trust, which was when it was renamed Langley Park Learning Trust.

5. Langley Park School for Girls and Langley Park School for Boys are and have been regarded as "good" schools and are oversubscribed. That is to say, in each year when

there is the statutory opportunity for those responsible for children in the London Borough of Bromley to select the schools which they wish their children to attend, those schools do not have the capacity to accept all those whose first choice of school they are. The admissions policy for each of the schools thus determines who will, and who will not, be admitted, out of the larger group of those who wish to be admitted. The fact that a school is oversubscribed means, as is well known, that parents will take what steps they can to secure places for their children; hence the (partly fallacious) concept of "school catchment areas" beloved of estate agents.

6. Such was the position when the Langley Park Primary School was first projected by Langley Park Academies Trust in 2013. The school's first intake was a reception year intake in September 2016, at which point the school was operating from temporary premises. The planning application for the construction of the new school was approved in late 2017, and the school was built, and continues to occupy, part of the site already occupied by Langley Park School for Girls and Langley Park School for Boys. The first children, admitted in 2016, reached the first year 6 in September 2022, and so will move to secondary education from September 2023. Thus, for the first time, the Langley Park Primary School has pupils who may be affected by the admissions policy of secondary schools, in particular the Langley Park School for Girls and the Langley Park School for Boys. The decision under challenge is a consideration of an objection to the admission arrangements for Langley Park School for Girls and Langley Park School for Boys for the current year, taking effect by admissions in September 2023.

7. When the idea for the primary school was being developed, and during its first months of operation, a number of statements were made, both public and private, impliedly or expressly indicating that children who attended the new primary school would be favoured in applications to Langley Park School for Girls and Langley Park School for Boys. This was the case even though, at the time, the Trust was not responsible for the management of the latter. Thus, early advertising included an assertion that the foundation of the primary school would "bring the quality that is associated with the Langley Schools to even younger children and will enable us to raise expectations and standards by developing our own transition curriculum". The word "transition" may be regarded as particularly telling. The application to the Department for Education to approve the new primary school as a free school described the new school as a "through school" and stated that children who attended it "will have the option of joining the Langley Park secondary schools". One of the groups supporting the foundation of the primary school stated, apparently without any objection, that the new school "will act as a feeder primary school to the already established Langley Park Boys' School and Langley Park Girls' School". When the application for planning permission for the new school was considered, the officers' report indicated that local consultation had identified "benefits to young children in their seamless progress through the stages of their education, development and progress into the Langley Park Secondary Schools". In 2016 and 2017 there were meetings for new intake parents and prospective parents and the Head Teacher of the primary school was asked whether those attending that school would be entitled to places at the Langley Park Secondary Schools. The answer, given in writing, was as follows:

> "It is the intention of Langley Park Academies, the Multi Academy Trust to which LPPS [Langley Park Primary School] and Langley Park School for Girls belongs and which is the admissions authority for the schools within the Trust, to go out to consultation in the autumn this year to ring-fence a number of places for those attending a primary school within the Trust – including LPPS. Langley Park School for Girls currently admits 240 girls into year 7 each year, largely on proximity basis. Many of you live near enough to be in the catchment area. For those who do not we are proposing a change to our admission criteria. We will be consulting on this in October. We intend to ring-fence a proportion of places for children in the Trust's member primary schools to ensure that they have a better chance at coming to Langley Park School for Girls. Langley Park School for Boys is not yet part of our Trust and at the moment they decide on their own admissions policy. So parents will need to refer their queries to the school and its governing body"

8. That statement, unlike some of the previous statements to which I have referred, does properly distinguish between what could be said on behalf of Langley Park School for Girls and what could (not) be said on behalf of Langley Park School for Boys. It is not quite clear how in the course of that statement the Head Teacher of the primary school is able to refer to those who will make decisions as to the admission to the secondary schools as "we"; but the meaning of the statement is clear.

9. As well as these statements, clearly made in public, there is substantial evidence of parents having been given individual assurances to the same effect. Some of the parents who decided to send their children to the Langley Park Primary School in its very early years, when it had no established reputation, had to travel a considerable distance to the school, and have said that they did so only because of their understanding that they would be securing their children a place at one of the Langley Park secondary schools. As a simple matter of fact, there is really no room for doubt that that was the case. Indeed, at a later stage in the history, the Trust commissioned an independent company to investigate complaints which had by then been made to the Trust by some of these parents. The investigation concluded, according to its own summary, that:

> "The potential feeder school status was for [the parents] a pivotal factor in their decision to send their children to LPPS. In a number of cases parents rejected perfectly good schools more local to them because they were persuaded by what they had been led to believe was the feeder/through school status of LPPS."

10. As the Head Teacher of the primary school had indicated, a change to the admission arrangements for the Langley Park School for Girls to enable pupils of the primary school to have any preference, would require consultation, and as she also indicated, he could not speak for the Langley Park School for Boys. When the Langley Park School for Boys joined the Trust in 2018, the Head Teacher of the boys' school wrote in its new brochure that the new Trust "gives us a fantastic opportunity to create a

seamless and exciting curriculum for students from the age of 4 – 18 in the local community". Again, it may be appropriate to draw attention to the word "seamless". In any event, however, it appears that at that stage there were some at least who still thought that special arrangements would be made for children coming from the Langley Park Primary School. But the Trust itself did not take the same position. In December 2018 the CEO of the new Trust wrote to all parents and carers as follows:

> "I am writing to clarify the issue of admissions to Langley Park School for Girls for children from LPPS. In a letter sent to LPPS parents dated 7 July 2017 it was stated that Langley Park Academies (the Trust that LPPS was then part of at the time) was proposing to consult in autumn 2017 on a change to the Trust's admissions policy. This consultation would propose ring-fencing a number of places for children attending a primary school in the Trust, i.e. LPPS at Langley Park School for Girls in Y7. As you know, Langley Park Academies no longer exists and LPPS is now part of the Langley Park Learning Trust. This new Trust was formed in September 2018. Just after the letter dated 7 July 2017 was sent out, negotiations began between Langley Park Academies and Langley Park School for Boys to create a new Trust. Part of these negotiations included the understanding that there would not be any change to the Trust's Admissions Policy. As a result of this, the consultation to change the admissions policy did not take place so there are no ring-fenced places for LPPS children at Langley Park School for Girls. Please note this also applies to places at Langley Park School for Boys. I hope this clarifies the situation for you. Thank you for your ongoing support of LPPS."

11. The response to that letter was the formation of a group of parents who described themselves as "angry at being misled" about the availability of places at the secondary schools for their children. It was that group that complained to the Trust, resulting in the investigation to which I have already referred. The Trust responded to the findings of the investigation by telling the parents' group that "the complaint that the Trust made promises and assurances to families about transition to the Langley Park secondary schools is upheld for the period 2014 to July 2017. For the period January 2018 onwards, the complaint is not upheld." The significance of July 2017 is that that is when the parents were told that consultation would take place on the changes to admission arrangements.

12. As I have said, there was no consultation about a change in admission arrangements on the formation of the new Trust, but in the winter 2019 - 2020 the Trust consulted on changes to the admission arrangements for September 2021. That consultation suggested options for including the primary school, perhaps with other primary schools, as nominated feeder schools as part of the admissions policy. 88% of the responses disagreed with the introduction of the feeder schools and the Trust decided not to change the admissions policy.

13. The parents' group continued its pressure, and the Trust consulted again in the winter of 2021 for admissions in September 2023. The consultation's proposal was that the

primary school be named as a feeder primary school for two years, to accommodate those children who had joined the school in its first two years (that is to say, before 31 August 2018). For two years also the published admission number (PAN) for each of the schools would be increased by a whole class each. The consultation document set out the history in brief and stated that "nobody currently involved in the management of the Trust or its schools was involved in making these commitments but the position remains that the Trust believes that it is very likely that some parents of children in the top two year groups at Langley Park Primary School (those due to start year 7 in September 2023 and September 2024) chose to send their child to Langley Park Primary School because they had been advised that this would give their children priority in admissions to the two Langley Park secondary schools."

14. 82% of the responses to that consultation opposed the change in the admissions policy, and 66% opposed the increase in the PAN. The Trust's decision was not to change the admissions policy, with the result that children from Langley Park Primary School have no special advantage amongst those seeking admission to either of the secondary schools.

15. It is perfectly clear that none of the assurances that were made to the parents and prospective parents of children at the primary school could have legal effect. That has been made clear at a number of stages. A preference for children from Langley Park Primary School could operate only in the context of admissions arrangements for the secondary schools specifically containing that criterion. Nobody who made the assurances could undertake that the necessary changes to the existing admission arrangements for the secondary schools would be made. Although it must be accepted that parents and prospective parents received those assurances, and some acted on them, they were mistaken, ill-advised, or simply wrong in thinking that the assurances had any real value. Further, and this is an important part of Mr Sharp's case, there is another group of parents, perhaps not as readily identifiable, who, having received similar assurances, appreciated that they were not valid and therefore did not act on them by inconveniently sending their children to a new and distant school, but who, as a result of their having recognised the true and lawful position, do not now have the advantage which appears to have accrued to the credulous or ill-advised parents who are now recognised as having been "misled".

The Law

16. The legal provisions governing the arrangements and policies for admission to maintained schools are to be found in Chapter I of Part III of the School Standards and Framework Act 1998 (as amended), chiefly in sections 84 to 88M, the School Admissions (Admission Arrangements and Co-ordination of Admission Arrangements (England) Regulations (SI 8/2012) (as amended), and the Schools Admissions Code 2021 ("the Code"). The Code is made by the Secretary of State under section 84 of the 1998 Act, which requires those involved with setting and applying arrangements for schools' admissions to comply with it. It encompasses the relevant statutory and regulatory provisions and it is convenient to set out the law in general terms by reference to it.

17. Every school is required to have admission arrangements that clearly set out how children will be admitted, including the criteria that will be applied if there are more applications than places at the school. The arrangements have to be determined

annually: this does not mean that they have to be different for every year, but it does mean that admission arrangements as determined are applicable only for a single year. The admission authority (the Trust, so far as these proceedings are concerned), must set the PAN, by publishing the number of places available in the year (or years) in which admission to the school normally takes place. So far as these proceedings are concerned, that means year 7, the year in which secondary education normally begins in the London Borough of Bromley. All schools must set out in their admission arrangements the criteria against which places will be allocated at the school when there are more applications than places, and the order in which the criteria will be applied.

18. If the school is not oversubscribed (that is to say, if the number of applications is less than the PAN) all those who apply must be admitted. If the school is oversubscribed, the oversubscription criteria will be applied, in order. The highest priority must be given to looked after children and previously looked after children. The fixing of other criteria is a matter for the admissions authority subject to the restrictions set out in the Code. It is usual to give some priority to siblings of pupils already in the school, and the children of staff teaching at the school. In practical terms, the final criterion needs to be a gradated one, so that the division between those admitted and not admitted depends on the extent to which they meet the final criterion, rather than any absolute characteristic. The admissions authority may include previous attendance at one or more specified schools as part of the oversubscription criteria, but only by naming the school or schools in the criterion as a "feeder school". The selection of a feeder school or schools as an oversubscription criterion "must be transparent and made on reasonable grounds" (paragraph 1.15 of the Code).

19. The Code contains narrative and prescriptive provisions setting out overall requirements for the admission arrangements. Paragraph 12 indicates that the purpose of the Code is to ensure that school places are "allocated and offered in an open and fair way".

20. Paragraph 14 requires admission authorities to ensure "that the practices and the criteria used to decide the allocation of school places are fair, clear and objective." In section 1, "Determining Admission Arrangements", paragraph 1.8 requires oversubscription criteria to be "reasonable, clear, objective, procedurally fair, and [compliant] with all relevant legislation, including equalities legislation."

21. There are tight time limits. Admission authorities have to determine their admission arrangements, including their PAN, by 28 February in the relevant year. The arrangements must be published by 15 March.

22. Following the publication of the arrangements, there is an opportunity for objections to be made about the arrangements. Such objections have to be made to an adjudicator appointed under section 25 of the 1998 Act. An objection must be made no later than 15 May in the determination year. The schedule 5 to the 1998 Act makes further provision about adjudicators; section 88H provides for objections or referrals to be made. Chapter 6 of the 2012 Regulations sets out some procedural matters and some restrictions on the jurisdiction of the adjudicator. As the Code puts it at section 3, paragraph 3.1, the task of the adjudicator is to "consider whether admission arrangements referred to the school's adjudicator comply with the Code and the law relating to admissions." The adjudicator is required by section 88H(4) to

decide whether and if so to what extent the objection should be upheld. Section 88K(2) makes the adjudicator's decision binding on the admission authority. It follows that, if an objection is upheld, there may be a late change to the admission arrangements. Any change required by an adjudicator's decision must be made within two months of the decision unless the adjudicator fixes a different timescale.

23. In summarising the legal provisions regulating admission arrangements, I have deliberately omitted the requirements for consultation. The legislation at all levels has detailed provisions requiring consultation both if there is to be a change in the admission arrangements from those applicable in earlier years, and on a regular basis every seven years if no changes are made. In the course of his submissions, the Claimant made a number of comments about the process of consultation, the responses to consultation, and the extent to which the eventual outcome, following the adjudicator's decision, did not correspond to the outcomes of the various consultations. Those are not matters with which these proceedings are concerned. There is no challenge to any decision or act by the Trust, or to the legality or effectiveness of any consultation. The consultation (which is not said by the Claimant to have been vitiated by any legal defect) is simply part of the background against which the decision under challenge was made.

<u>The objection and the decision.</u>

24. The oversubscription criteria for Langley Park School for Girls and Langley Park School for Boys have remained the same since the new Trust. They can be summarised as follows:

    1. Looked after and previously looked after children.
    2. Siblings of students.
    3. Children of staff members at the specific secondary school.
    4. All other applicants by distance from the school.

25. Members of the Parents' Action Group objected to the proposed arrangements for 2023 and 2024. The objection was made to the Office of the Schools Adjudicator. Apart from the substantive complaint, the objections raised two relatively minor procedural issues. The first is that, as I have said, those who raised the objections were concerned about the arrangements for both of the affected years. The adjudicator can, however, only consider the arrangements relating to the selection process taking place in the current year, so formally could consider only the position for 2023, although it is acknowledged that similar considerations apply for 2024. Secondly, some of the objections were received out of time. They were, however, able to be treated as referrals, so the adjudicator took into account everything said by and on behalf of the objectors and those who had made similar objections, albeit out of time.

26. Individual objectors set out something of their personal history and assurances that they said had been made to them. The objectors typically claimed that the decision not to favour children from the Langley Park Primary School was unlawful, and they cited the doctrine of promissory estoppel. They also complained that the most recent consultation, including the proposed increase in the PAN, had not properly explained that it was different from the previous consultation, and that many of the respondents may not have appreciated that the increase in PAN would wholly offset any

disadvantage to those who would not have been admitted if there was a preference for the primary school children whilst the admission number remained the same.

27. After setting out the history, the adjudicator, Ann Talboys, considered the case and gave her conclusions. I need to set out the decision at some length.

> "Consideration of case.
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> 30. It is clear that everyone involved in this case understands the situation and accepts that parents were made promises, in writing and face to face and by a range of 'official bodies', that if they applied to send their children to a new school then those children would be able to progress to one of the secondary schools on the same site. These promises were made by the then trust, staff from both secondary schools and the primary school and were contained in documents relating to the new school and its creation. These parents accepted these promises in good faith and had difficult decisions to make; the school was not built and therefore had no background or history of success; the school was housed in temporary accommodation for a period of time until the buildings were completed. The children were admitted into the primary school in 2016 and 2017.
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> 31. The trust and the independent reviewer of the parents' group's complaint made it clear that those who made promises of automatic progression from the primary to the secondary schools were not in a position to do so and they have said that the only promise that could have been made would be to consult on changes to allow this to happen. This is accurate; no-one can promise the outcome of any consultation on admission arrangements in advance; any changes to admission arrangements must be consulted on and admission authorities are required to determine the arrangements annually. However, the parents did not know this and it is understandable that they took the word of trusted education professionals at face value.
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> 32. The objections and referrals say that, given the above, 'they consider that the decision to deny priority entry to the affected children is unlawful under promissory estoppel and the refusal to fulfil the promise so unreasonable that no reasonable person acting reasonably could have made it.' Promissory estoppel is a legal doctrine. A finding in respect of this can be made only by a Court. I can understand why the objectors and referrers have referred to this, but it is not relevant to my consideration of the arrangements. My jurisdiction is restricted to the functions assigned to the Schools Adjudicator under the Act and concerns whether the arrangements conform with the relevant legislation and Code and if they do not so conform in what way they do not conform. The remedy an adjudicator can offer comes in the form of a finding that admission arrangements must be revised because the arrangements are unfair, as opposed to the enforcement of a promise.
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> 33. In this case, I have tested the objections and referrals against paragraph 14 of the Code. Paragraph 14 provides, so far as is relevant here, that

"admission authorities must ensure that the practices and the criteria used to decide the allocation of school places are fair, clear and objective." First, I have looked at whether or not the arrangements are fair for this group of affected children. As an adjudicator my first question would ordinarily be 'if this child is not successful in applying for the school, are there other schools which would be available to the child and which are within a reasonable distance from their home.' The DfE website names over fifteen other secondary schools within three miles of the school's campus and therefore unsuccessful applicants are able to be accommodated in other suitable secondary schools. Evidence from the local authority confirms this.

34. However, I do not on the particular facts of this case consider that the fact that there are other schools available makes these arrangements fair. I consider instead that the admission arrangements as determined for both secondary schools disadvantage this small group of children, namely the children whose parents applied for admission to the new school in 2016 and 2017 after hearing assurances that there would be progression to the secondary schools and does so in a way that is unfair to them. All school admission arrangements advantage some children and disadvantage others; they are designed to do so.

35. The question for me is whether the disadvantage to this group is unfair. In determining this question, ordinarily I would conduct a balancing exercise to determine whether the advantage to one group in giving them priority would be outweighed by disadvantage to another group of children who might be 'displaced' as a result. In this case, however, I do not need to conduct such a balancing exercise. My view is that the arrangements in neglecting to give priority to applicants attending the primary school are unfair. However, because it would be possible to change them in a way that delivered the promised benefits to a group of parents without creating any unfairness to other children, the balancing exercise is unnecessary.

36. The number of children who would need to apply for feeder school priority in order to secure a place at the school is low. Many of the children in Y5 and Y6 in September 2022 in the primary school will be able to gain entry to the secondary schools anyway because they live near enough to the schools. Others may not in any case make the boys' or girls' secondary school their first preference because they prefer another school or do not wish to attend a single sex school. Over the past three years, according to the local authority's figures, the maximum distance for admission to the girls' school has been 1.49 miles and to the boys' school the distance has been 1.25 miles. The corresponding shortest distance has been 1.46 miles for the girls' school and 1.14 for the boys'. I understand that when the new school was created it was not oversubscribed and therefore children were accepted from a greater distance than is now the case. I have seen figures from the last three years of entry to show that the primary school is now also oversubscribed and that for 2022 the furthest distance a child admitted to the school under the distance criterion lived from the school was 1.63 miles.

37. Prior to the second consultation, the trust investigated the precise number of children who were affected by the failure to give priority to children attending the primary school and found that there are 16 children in what will be Y6 in September 2022 and 24 children in Y5 in 2022 who would not be expected to gain a place at the secondary schools on the basis of where they live. These children applied for and were admitted to the new primary school in 2016 and 2017 on the understanding that there would be automatic progression to the secondary schools for them if their parents so wished. The chief executive explains that the proposals in the second consultation were carefully considered. The proposal was that, for two years only, the primary school became a named feeder primary school and that the number of places offered at the schools in each of September 2023 and 2024 would be increased by a greater number than the number of children who would be admitted from the primary school but who would not have been expected to secure a place on the basis of where they lived. The trust hoped that this would assure other parents that no child would be disadvantaged as a result of the benefit of feeder status being given to children at the primary school. The Chief Executive explains that the trust's hope was that this approach would address the extremely hostile response which was received in the previous consultation and would reassure parents/consultees that no children in those year groups who would have been allocated a place at the secondary schools without these changes would miss out on a place if the changes were made. She goes on to say, "Unfortunately, this strategy did not work and once again there was overwhelming opposition to the proposed changes."

38. I have seen the analysis of the responses to the consultation. There were nine key themes for opposing the proposals and I set these out below along with my brief analysis of and/or response to each;

> 1). Fairness. There is always perceived unfairness in the arrangements for oversubscribed schools because by their very nature there will be unsuccessful applications and disappointed families. The proposal to allow the affected children a place would be time limited and specific to these families. With an increase in PAN there would be no resulting additional unfairness in the admission arrangements for any other local family.
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> 2). Local schools for local children. I take this to be a concern from parents who live near to the school suggesting that their application would be unsuccessful because their 'place' would be taken by an affected pupil who lives further away. This would not be the case if the PAN were increased. Moreover, in any system where priority is based largely on distance from a school, quite how close it is necessary to live to gain a place will vary from year to year depending on how many other children seek a place and where they live. This in turn will depend on factors such as the number of children in a cohort, the number of looked-after and previously

looked-after children who must always have priority and in this case the numbers of siblings and children of staff. As I have outlined above, the distance for entry to these schools varies from year to year.

3). Siblings. Children admitted in 2023 and 2024 who would not ordinarily secure a place on the basis of distance may well have siblings who would fall under this priority in subsequent years. This is true. The trust suggests that this number would be small and spread over a number of years - equating to five additional siblings each year between the two schools. Given that the number of siblings admitted to the school in 2021 was 102 out of a total of 460 places, I am confident that the trust's estimates are reasonable in this regard.

4). The boys' school was not part of the trust when the assurances were given. This is true but the evidence is clear that the promises made to parents were made by staff at the boys' school even though it was not part of the trust at the time.

5). Feeder schools. If the primary school is named as a feeder school for two years, then, following consultation, the trust can remove any notion of feeder schools for admission in 2025. This is true, subject to the trust complying with the relevant requirements on consultation.

6). Transport and traffic issues. These matters are not within my jurisdiction, but the trust said in its analysis of the consultation that "it is likely that this proposal would increase the traffic coming into an already very congested Hawksbrook Lane at peak time, but the increase would be unlikely to be significant".

7). Parents being told different things at different times by different people. The trust has accepted that this group of parents were made assurances about progression when they were deciding on a YR place for their children.

8). Quality of education. The trust believes that a temporary increase in the PAN would not impact negatively on the quality of education as increasing the PAN also brings in additional income and enables economies of scale. I too do not consider that operating with PANs of 270 (for the girls' school) and 250 (for the boys' school) would negatively impact the quality of education the schools are able to offer. These sizes are well within the normal range of sizes of secondary schools.

9). Trust. It is clear that various groups of parents are finding it difficult to have confidence in the trust; certainly, the groups of objectors and referrers but also the parents who are against any element of priority for children who attend the primary school. There is a suggestion in some responses to the consultation that this

> proposal is the "thin end of the wedge", and that feeder schools and increased numbers may become the norm in the future when the trust determines the arrangements. The trust is clear that this would not be the case. In any case, any further change to the arrangements including in relation to potential future feeder schools would require consultation and could be the subject of objections to the adjudicator at that time.

39. The objectors and referrers were satisfied with the proposals in the second consultation because it provided a short-term remedy for the promises made without disadvantaging any other group of prospective applicants. They believe that this was not communicated effectively to the wider consultation group and in sufficient detail to allay their fears and therefore many respondents simply believed it was a repeat of the first consultation and provided negative responses. I have studied the consultation papers and the trust made it very clear that the proposals were specifically for the affected group of children and that the increase in PAN would mitigate any adverse effect on the admission of other local children. It is clear from the vast majority of responses that very many people were unhappy with the proposed proposals. I cannot know why that was the case, but I am clear in my view that the proposed arrangements – had feeder status been introduced for two years only with a commensurate increase in PAN - would not have caused the disadvantage to other local children that appears to be feared by so many.

40. The local authority's response to the consultation was positive about the increase in PAN and said that it "understood the rationale for the addition of the criterion to admit children from Y5 and Y6 from LPPS" but questioned a cut-off date of September 2018 as this would disadvantage any Y6 child who joined the primary school after this date unless the families have been party to the rationale as to why some Y6 pupils are given priority and other are not. The local authority suggested that the school is likely to require clear evidence of this for any future appeal defence.

41. I am of the view that this small group children are disadvantaged unfairly by the current arrangements. I find that the arrangements do not conform with the Code. It is for the admission authority to decide how to amend its arrangements in response to my determination. I am sure that in doing so they will wish to ensure that other children are not potentially being disadvantaged unfairly by being displaced. I observe that it is open to the trust to increase the PAN for 2023 and 2024. Such a change is permitted by paragraph 3.6 of the Code and does not require consultation or the approval of the Education and Skills Funding Agency.

Summary of Findings.

42. Based upon the information before me, I have concluded that the arrangements are unfair to those children attending the primary school who are there because their parents were misled. Whilst those who made promises to those parents had no authority to make the promises they did,

> nevertheless the parents in question believed those promises and applied for their children to be admitted to the primary school directly as a result of them. It was reasonable for those parents to have formed the belief they had and acted as they did.
>
> 43. The trust has acknowledged this unfairness and taken steps to remedy it by consulting upon naming the primary school as a feeder school and increasing the school's PAN by a small amount for two years to enable the children who have been disadvantaged unfairly to secure places at the secondary school.
>
> 44. The responses to the consultation indicated a large-scale disagreement to the proposals, and therefore the trust decided not to proceed with them. The trust will now need to revise the school's arrangements to rectify the unfairness I have identified. In doing so, the trust will be mindful to ensure that it does not unfairly disadvantage other children who may no longer secure places if priority is now given to children attending the primary school. Increasing the PAN for the school for the limited period and by the small number as was proposed and consulted upon by the trust would have the effect of redressing the unfairness whilst not causing an unfair disadvantage to these other children."

28. The Trust, as admission authority for the two secondary schools, gave effect to the adjudicator's decision, as it was bound to. It did so by nominating Langley Park Primary School as a feeder school as an oversubscription criterion before distance from the school, and by increasing the PAN by a whole class size in each school (25 for Langley Park School for Boys, and 30 for Langley Park School for Girls) in the admission arrangements for the September 2023 intake. The expectation is that the same will apply for 2024 but, subject to consultation, not thereafter.

29. These proceedings were issued on 20 September 2022. Permission was refused on the papers. Following a renewed permission hearing, David Locke KC sitting as a deputy judge of this Court granted permission, made a costs capping order limiting costs payable by either party to the other to £3,000 plus VAT (if applicable) and made various procedural directions. Lang J granted the Secretary of State for Education's application to intervene and made consequential procedural orders.

30. The Defendant had originally objected to these proceedings on the grounds that the Claimant had no standing, but that objection has not been maintained and Mr Locke decided that the Claimant has sufficient standing to bring these proceedings.

Judicial Review on an Adjudicator's Decision

31. The Defendant has also made submissions about the role of the Court in considering an application for judicial review of a decision made by a school's adjudicator. The Claimant has responded that the adjudicator is amenable to judicial review. In R (Governing Body of Drayton Manor High School) v Schools Adjudicator [2008] EWHC 3119 (Admin), Stephen Stewart QC (as he then was) indicated at [30] that he considered it right to approach the challenge in that case with "an appropriate degree of caution". He drew that phrase from the words of Baroness Hale in AH (Sudan) v SSHD [2008] 1AC 678 at [30]. It was there pointed out that the Asylum and

Immigration Tribunal was "an expert Tribunal charged with administering a complex area of law in challenging circumstances", and that "it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right". AH was an appeal against a judicial Tribunal, and it may be thought that the advice there expressed applies with even greater strength to the supervisory jurisdiction of the Court in judicial review. Jurisdiction cannot, however, be excluded by this cautionary principle. The adjudicator has a statutory function which will involve assessment, evaluation and balance. On judicial review it would not be appropriate for the Court to attempt to perform those functions itself. If, however, the adjudicator is found to have misunderstood her role, or to have performed her task in an unlawful manner, the Court may and should intervene.

32. This approach is entirely consistent, with the authorities, for example R (Metropolitan Borough of the Wirral v The Chief Schools Adjudicator [2000] EWHC 635 (Admin), where we read Ouseley J saying (at [15], [39], [42], [43] respectively) that "The court's power in relation to an adjudicator's determination is of course limited to review on conventional public law grounds. However, the adjudicator's jurisdiction is limited to dealing with admission arrangements. … Of course, insofar as something falls outside the scope of admission arrangements, it falls outside the scope of the adjudicator's jurisdiction. … This view of fairness is plainly a view over which people can legitimately disagree strongly. However, it cannot be irrational to conclude [as he did]. … [O]nce unfairness has been found, the fairness of the corrective mechanism to be applied is for the adjudicator."

33. Thus the fact (if it be a fact) that a different adjudicator might reach a different view, relied on by the Claimant by reference to another decision of an Adjudicator in a different case, ADA 3900, is nothing to the point. If the assessment made by the adjudicator was open to her as a matter of public law, it is unassailable in this Court.

The Claimant's Challenge

34. The Claimant's grounds had been distilled by the Defendant following the decision of Mr Locke granting permission. The Claimant accepts the Defendant's summary, which sets out four questions, as follows:

> "a) whether the adjudicator asked herself the wrong question through considering whether the arrangements were unfair to a specific group, rather than considering fairness to all affected children;
>
> b) whether the adjudicator erred through assuming that no balancing exercise was needed;
>
> c) whether the adjudicator erred in concluding that there would be no unfairness to other children;
>
> d) whether the adjudicator's approach to fairness was flawed more generally through giving weight to assurances which could not lawfully be made."

35. As the Claimant said in his written skeleton argument, although he accepts that those are the four areas in which he seeks to challenge the adjudicator's decision, they are interlinked. In the course of the hearing before me it became clear that there are in truth two discrete grounds of challenge. The first is that the adjudicator erred in considering that unenforceable promises made to various parents, or misleading them in any way, could give rise to an unfairness sufficient to give substance to those parents' objections to the existing oversubscription criteria. The second is that, having found in favour of the parents, the adjudicator erred in considering that it was not necessary to look more widely at what the effect of upholding their objection would be on other admissions to the schools, with the result that the outcome was an amended policy which was itself unfair.

36. I heard oral submissions from Mr Sharp, the Claimant, who was not represented. I also heard oral submissions from Mr Bates on behalf of the Defendant, Ms Benitez on behalf of the Trust, Mr Line on behalf of Bromley, and Ms Darwin KC on behalf of the Secretary of State. All those who spoke in court assisted me in my understanding of the legal structures and the facts. I intend no discourtesy by not repeating all their submissions here. I trust that this judgment demonstrates that I benefitted from the help they gave me.

37. So far as concerns parents' expectations, the Claimant argues that the Adjudicator was simply wrong to think that failing to give effect to an unenforceable promise could be unfair. In making the decision she did, which by statute was an enforceable decision, she had in reality given validity to the invalid. In doing so she had acted in contravention of a basic rule of public law, that a donee of a statutory power cannot be bound by an ultra vires undertaking because that would have the dual effect of unlawfully extending the statutory power and destroying the ultra vires doctrine by permitting public bodies arbitrarily to extend their powers. He draws that principle from the judgment of Sedley J (as he then was) in R v Ministry of Agriculture, Fisheries and Foods ex parte Hamble (Offshore) Fisheries Ltd [1995] 1 CMLR 533, itself citing the words of Lord Greene MR in an unreported decision, Minister of Agriculture and Fisheries v Hulkin.

38. The Claimant further argues that fairness in allocating a fixed or limited resource (such as school places) demands that any prioritisation of one group over another must have a good justification. It is possible to be fairly disadvantaged by such a ranking. In his submission, any set of arrangements is fair or unfair: the division is binary. Further, the question whether a scheme is fair or unfair should be determined without regard to how it could be ameliorated if it turns out to be unfair. As he put it, a fair scheme could not demand a PAN increase. It followed, in his submission, that the Adjudicator's decision must be flawed because the PAN increase was part of the process for making the scheme fair in her view. If there was going to be a PAN increase it should be available to all, or (to put it the other way around) an unfair scheme could not become a fair scheme by an unequal allocation of extra places.

Decision

39. The concept of fairness is crucial to this claim. Despite the vigour and elegance with which he pursued them, I do not accept either of the Claimant's principal arguments on the meaning and implications of fairness as it applies to this claim.

40. As he points out, "fairness" is not defined. That is not a defect in the system: it simply means that the word, and the concept, bear their ordinary meaning rather than a meaning delimited by the legislation. No doubt fairness is not easy to define. It is, as Lord Wilson remarked, speaking of procedural fairness, in R (Moseley) v London Borough of Haringey [2014] UKSC 56 at [24], "a protean concept, not susceptible of much generalised enlargement". It seems to me that an assessment of fairness will have at least the following two features. First, it will respond to claims based on facts and perceptions that have a variety of levels of objective recognition and may sometimes have to take into account considerations that are wholly subjective. Secondly, it will not take into account only the position of those who object to a particular arrangement and claim it is unfair to them but will balance those claims against other claims actual or possible in order to reach a solution that has a measure of equality.

41. An assessment of fairness is different from an assessment of rights. A person who comes to a decision-maker asserting a right is entitled to have the right recognised if it meets the relevant objective standard, even if that has a wholly detrimental impact on others. If there are opposing rights, it may be necessary to undertake a balancing process in order to assess what interference with the rights on one side is necessary and justifiable in order to allow the exercise of the rights of the other side. But where there are rights to be recognised, the subsidiary notion of the perceived fairness of the outcome can have little role. Broadly speaking, rights trump fairness.

42. This approach is very far from being inconsistent with the doctrine enunciated by Sedley J in the Hamble Fisheries case, cited above. On the contrary, as the learned judge noted in his survey of the authorities in that case, the legitimate expectation that might give rise to an enforceable right is to be distinguished from other superficially similar situations. In particular, in Council for Civil Service Unions v Minister for the Civil Service [1985] 1AC 374 at 408-9 Lord Diplock drew a contrast between a legitimate expectation and a reasonable expectation:

> "I prefer to continue to call the kind of expectation that qualifies a decision for [Judicial Review] a "legitimate expectation" rather than a "reasonable expectation," in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences."

43. Where, therefore, a legislative scheme seeks or incorporates an assessment based on fairness, it may be assumed that the determinant is not intended to be limited to the recognition of rights. To be sure, rights will have to be recognised, but the claims of those who seek fairness cannot be limited by the argument that they have no legal right to what they attempt to gain. If the scheme was to be limited to the recognition and balancing of rights it would say so and would not need to invoke fairness.

44. None of this means, of course, that where rights are in issue the assessment of rights can or should lack the characteristics of fairness. Procedural fairness is necessary to render any assessment just and acceptable. But procedural fairness has the same features. It needs to respond to perceptions as well as to rights, and it needs to

balance all relevant issues and secure equal treatment. The Code requires both that the allocation of places be fair and that it be procedurally fair: see above at paras [19] and [20].

45. In the present case the adjudicator decided that although the objectors had no legal right to preference, the adopted admission arrangements were unfair to them. The first part of that conclusion was correct in law. The second part was permissible in law. Nothing argued by the Claimant begins to show that if it was permissible in law it was a conclusion the adjudicator was otherwise not entitled to reach.

46. The second feature recognised above – the process of balance – emphasises that fairness is a concept that embraces more than one side of a question, and that arrangements have to be seen as a whole in order to assess their fairness. Any mature assessment of fairness must take into account everybody affected by the situation in question, not only those who complain that "it's not fair". Otherwise, the risk is that a solution that pleases the complainants will cause justified complaints by others, and that looked at in a holistic and non-partisan way the outcome will be no more fair than the starting position was.

47. It is true that the statutory process of making objections to, and obtaining the decision of, an adjudicator runs the risk of engendering what may be called "secondary unfairness" of this sort. For the process is for the objections to be made by objectors, and there is no specific requirement to allow others, who may wish the arrangements to remain as they are, to have a say. There are, however, other considerations mitigating or removing this risk. First, as well as there being an obligation on the relevant admission authority to provide certain information if requested by the adjudicator, I was told by Ms Darwin KC on behalf of the Secretary of State that the Local Authority will supply the adjudicator with all the background and contextual material relating to other pupils and other schools, so that the objection can be seen and evaluated in its full context. Secondly, as noted by the adjudicator in the present case at paragraph 35 of her decision, an adjudicator has to determine whether a disadvantage is unfair and will normally do so by considering the disadvantage to any other group who might be displaced if the objection is upheld.

48. The adjudicator's decision was that the unfairness to a smaller group of children could be remedied by the proposed class increase without disadvantage to any other children. Details of the figures were given at the hearing, but the adjudicator's statement of the position is accurate. Under the most recent consultation proposal, involving the increased PAN, the small group of children who were the subject of the objection, would express a preference for one of the Langley Park secondary schools, and would not be admitted under the admission arrangements because they lived too far away, would be admitted. But they would not displace any other children, because the PAN increase of a whole class in each secondary school would provide more than enough places; it would provide additional places for others who also would otherwise not have secured admission because they lived too far away. Thus, if the PANs were increased as the schools had suggested, the advantage to the objectors would result not in a disadvantage to others but in an advantage to others as well.

49. The Claimant says that fairness or unfairness cannot be assessed in this way. The remedy for unfairness cannot be part of the assessment of whether there is an unfairness. I do not think this quite encompasses the adjudicator's duty. That duty is

to determine whether the arrangements are fair, taking all relevant factors into consideration. One of those factors, in the present case, was that the schools were prepared to increase the PANs in the way indicated if, but only if, the Primary School was to become a feeder school for the period necessary to accommodate the objectors. This was not a case in which inclusion of some children would automatically result in the exclusion of others. Although whether to increase the PANs was a matter for the admission authority, not for the adjudicator (and is therefore not under review here), the realistic position was that she was comparing the scheme adopted with a viable alternative. She was entitled to decide, as she did, that the objectors were treated unfairly by the decision not to adopt that viable alternative. That is in my judgment the true force of paragraph 35 of her decision. The balancing of one group included against another group excluded is unnecessary because of the availability of a choice between one scheme that excludes the objectors and another that includes the objectors, does not exclude anybody, and incidentally gives an advantage to a further group of as yet unascertained children.

50. The remaining question is whether the adjudicator took properly into account another group of people said to be affected. That is the group of people who were not misled by assurances given in 2016 and 2017 and so did not send their children to Langley Park Primary School with any hope of automatic progression to one of the secondary schools if they sought it. (Any who did send children to the Primary School despite not being misled are not part of this group, because although not objectors, the feeder school status of the Primary School for the relevant period applies to them as it does to the objectors.) The Claimant says that this group ought to have been taken into account in any assessment of fairness.

51. That argument has formidable difficulties. The first is that it is by no means clear that the group exists. The Claimant refers in his Statement of Facts and Grounds to 'the many' children in this group. It is true that the Claimant is able to point to some consultation objectors who said that they had either been given contrary information, or had not been misled. But that does not begin to show that there are many or indeed any in the category in question, which is a category of children (a) whose parents decided not to send them to Langley Park Primary School for some reason including the lack of assurance of progression to the Secondary Schools and (b) whose parents would have sent them to the Primary School if that assurance had been given or if they had believed it and (c) at the time of admission to the secondary schools in 2023 or 2024 would have chosen one of the secondary schools and (d) are not going to obtain admission to one of the secondary schools either under the admission scheme originally set or as a result of the adjudicator's decision. The group could of course theoretically exist. The Claimant did not, I think, demonstrate that there is any person who even meets criterion (d): those consultation objectors who cited these factors may be people whose children will obtain entry to one of the secondary schools anyway but who resist the objectors' case in principle or because of the increase in the PAN. The Claimant gave no indication of any viable process for determining whether criterion (b) or (c) was met in any individual case. It might be easier to discover whether criterion (a) was met, but that is obviously not enough in itself. The fact that the possible existence of this group of people was one of the factors taken into account in making decisions in 2021 and 2022 does not assist the Claimant: the adjudicator was making her own decision, not reviewing the admission authority's decisions.

52. The second difficulty is that even if this group exists, it does not appear that there was anything in the material before the adjudicator to cause her to think of it as an actual finite body of children whose admission or non-admission had to be taken into account. This is essentially the same difficulty as the first, but it is focussed on whether this adjudicator was at fault rather than on whether there was any material that any adjudicator might have considered.

53. The third difficulty is that no member of this group has suffered any disadvantage by the upholding of the objection. They are certainly no worse off than they were. Some of them may be the beneficiaries of the increase in PAN. It was not incumbent on the adjudicator in dealing with an objection and balancing the objection against any disadvantage to others to hunt around to see if there were others for whom a new advantage could be found.

54. The fourth difficulty is that insofar as the possible existence of this group could be taken into account, she did take it into account. At paragraph 38(7) she recognised that different things seem to have been said to different people. The Claimant points out that she then seems to have taken account only of what was said to the objectors, but, as noted above, nobody else is shown to have been disadvantaged. More to the point, at paragraph 38(9) she notes the concerns expressed by those "against any element of priority for children who attend the primary school". On the state of the material before her, she had no evidential basis for going any further than that, and no requirement to do so.

55. I therefore reject the Claimant's claim on both the principal grounds on which he advanced it. In my judgment, in considering fairness, an adjudicator is not restricted to giving effect to legal rights, but may take into account factors that do not give rise to legal rights. On the facts of this case the adjudicator was entitled to conclude that she did not need to balance the interests of the objectors against others who might be disadvantaged because there was an available scheme which disadvantaged nobody. She was not required to take into account a further hypothetical group who, if they existed, might have liked to secure an as yet unavailable advantage.

56. I therefore do not need to reach any conclusion about remedy, a matter to which a considerable bulk of the submissions before me was devoted. The application for judicial review is dismissed.