Neutral Citation Number: [2024] EWHC 1305 (Admin)

Case No: AC-2024-LON-000743

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/06/2024

Before:

MR JUSTICE MACDONALD

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Between:

THE KING on the application of GH (a child, by her father and litigation friend, KL) and three others	**Claimants**
- and –	
THE MAYOR OF LONDON	**Defendant**

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Stephen Broach KC and Alice Irving (instructed by **Rook Irwin Sweeney LLP**) for the **Claimants**
Dan Squires KC and Katy Sheridan (instructed by **Transport for London Legal**) for the **Defendant**

Hearing date: 23 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice MacDonald:

INTRODUCTION

1. The Claimants seek permission to apply for judicial review of the decision of the Defendant, the Mayor of London, to extend his Universal Free School Meals scheme (hereafter 'the UFSM scheme') for the academic year 2024-2025 but to continue to confine the scheme to state-funded primary schools.

2. Permission was refused on paper by Eyre J on 26 April 2024. On 2 May 2024 Lang J granted the Claimant's application to expedite the oral renewal hearing and listed it with a time estimate of 2 ½ hours. In addition to the extensive Statement of Facts and Grounds, Summary Grounds of Defence and Reply, the court has had the benefit of closely argued Skeleton Arguments from leading and junior counsel, supported by comprehensive oral submissions from leading counsel. The anonymity order granted by Eyre J on 26 April 2024 until further order remains in place.

BACKGROUND

3. The Claimants are each Charedi (Orthodox Jewish) children. The Claimants belong to the Chasidic group of the Charedi community, following specific customs and cultural traditions and speaking the Yiddish language. The Chasidic community of which the Claimants belong is primarily located in Stamford Hill in the London Borough of Hackney.

4. The Claimants attend Charedi independent schools and assert that such schools are key institutions for preserving Charedi culture. Not all Charedi children attend independent schools. However, the Claimants contend that, for reasons deeply rooted in history and in religious and cultural identity, the only option for a majority of Charedi families is to send their children to independent schools and that to do so is, therefore, not a choice. In the Charedi community in Stamford Hill 97.2% of children attend independent schools.

5. The Claimants' schools have fees ranging from £2,080 to £4,056 per annum. Families are, however, not required to pay fees if they are unable to afford them. None of the Claimants' families pay school fees in circumstances of financial hardship and reliance on support from their community and charities. The Claimants contend, and the Defendant recognises, that the Stamford Hill Charedi community is likely to experience poverty at a greater level than families in London generally and that the community is likely to experience a higher-than-average risk of food insecurity.

6. On 20 February 2023, the Defendant announced that he intended to introduce a UFSM scheme in London. The UFSM scheme was described as a £130M emergency scheme to help around 270,000 primary school children with the cost-of-living crisis. That figure was based on the sum of the number of children in Years 3-6 in state-funded primary schools, Pupil Referral Units and state-funded special schools who were not eligible for state-funded free school meals under the statutory free school meals scheme. Like the statutory scheme, the Defendant's proposed UFSM scheme was limited to state-funded primary schools. It did not extend to independent schools. Funding was allocated through the Mayoral Budget for 2023-2024 on 29 March 2023.

On 11 July 2023, the Defendant approved Mayoral Decision 3146 (hereafter "MD3146") for funding of up to £129M to deliver UFSM within London for the 2023-2024 academic year to Key Stage 2 (hereafter "KS2") children in state-funded primary schools who are not eligible under the statutory scheme.

7. Prior to taking his decision on 11 July 2023, the Defendant had received representations by way of pre-action letters on behalf of the Claimants on 5 May 2023 and 22 May 2023 (the Claimants being supported by two organisations, Interlink and Chinuch UK). The letters highlighted the impact of the cost-of-living crisis on Charedis, that the majority of Charedi children attended independent schools in circumstances where such schools were considered integral to religious identity and sought the extension of the Defendant's UFSM scheme to Charedi independent schools.

8. MD3146 was accompanied by an interim Equality Impact Assessment (hereafter "EqIA"), together with a document entitled "Supplementary analysis on London School sector". The latter comprised an analysis, based on publicly available data, of London independent schools registered with the DfE and meeting the requirements of the Education (Independent Schools Standards) Regulations 2014. The analysis considered the extension of the UFSM scheme to independent schools and the representations made on behalf of the Charedi community. It provided the following information to the Defendant regarding the Charedi community and independent schools in London generally:

    i) The majority of Charedi children in London attend independent faith schools and members of the Charedi community consider attending faith schools integral to their religious identity and beliefs.

    ii) Independent Charedi faith schools are charitable institutions funded partly by parents and the community. They charge lower fees than other independent schools. Admission is not generally denied to families unable to pay fees, as many families are not. School meals are not always provided to pupils as part of the package of benefits.

    iii) The average Charedi household size is almost two-and-a-half times the size of the average household in the UK. The cost of Kosher food is over two-and-a-half times the cost of non-Kosher equivalents.

    iv) Families in the Charedi community often have minimal savings and receive housing benefits and tax credits. Such families are facing financial hardship due to the cost-of-living crisis.

    v) There is no reliable data to assess the socioeconomic background of the children who attend Charedi independent schools and from which to evaluate the impact the cost-of-living crisis as between Charedi children and children attending other independent schools, including children from lower socio-economic backgrounds on means tested scholarships.

    vi) Independent schools do not generally receive state-funding. They are not bound to follow the National Curriculum and certain other regulatory requirements governing state-funded schools.

vii) There is no central record of school fees charged and not all advertise fees. Most independent schools offer bursaries and/or scholarships for pupils from lower socioeconomic backgrounds.

viii) There is no central register listing whether an independent school is a limited company or a charity. It is therefore difficult, accurately, to further categorise the independent sector.

ix) There is no central register for independent schools showing inclusion of meals in school fees. Sample method analysis indicates that most (but not all) independent schools include the costs of meals in their fees and that the majority of children attending independent schools are provided with a school meal included within the fees. Data is lacking for catering costs at independent schools.

x) Income profiles of the households to which the pupils in independent schools belong are missing. It is therefore not possible to ascertain whether pupils would be more or less likely to be eligible for the statutory scheme.

xi) The DfE data does not include the rates of free school meal eligibility for independent schools. Assuming similar rates of eligibility for independent schools as for state-funded schools is unrealistic and risks presenting an unreliable estimate of costs and impacts.

xii) Inequality and poverty are higher amongst pupils attending state funded schools compared to children in the independent sector.

xiii) The Defendant makes other support available to families affected by the cost-of-living crisis, including Charedi families, comprising dedicated funding for Holiday Hunger, the Robust Safety Net Mission and Kitchen Social. In addition, Hackney has put in place a package of financial support to help families, including Charedi families.

9. MD 3146 sets out the reasons for the Defendant deciding in July 2023 not to extend the UFSM scheme beyond state-funded primary schools to independent schools. Namely:

i) The decision not to extend UFSM to independent schools is consistent with the statutory scheme, which does not provide free school meals to independent schools, and the scope of the UFSM scheme is in line with the parameters set by national policy.

ii) There is a limited fund, insufficient to cover every child in London. The policy identifies children in state-funded schools as most in need above those independent schools who charge fees or receive alternative income for pupils that can be used to pay for meals.

iii) The policy is required to use the limited fund of money in the most efficient manner. This requires funding to reach as many pupils as possible as quickly as possible. A UFSM scheme for state-funded schools additional to the statutory scheme, and extending that scheme in line with national policy,

allows children to benefit quickly from an emergency measure. Extending the policy to the non-state funded independent sector would undermine the deliverability of the UFSM scheme.

iv) A decision to extend the UFSM scheme to independent schools would result in implementation being significantly more complex, likely causing the scheme to be delayed. It would add additional and extensive burdens on boroughs and officials where relationships do not readily exist between local authorities and independent schools, where there are no readily available sub-categorisations of the independent sector enabling identification of families in poverty and where there are no national food standards for independent schools.

v) Due to their methods of funding and governance, and the limited availability of data on pupils, there is a lack of evidence to support funding for free school meals in independent schools.

vi) Alternative approaches to address the needs of the Charedi community are in place (in December 2023 the Defendant approved expenditure of £450,000 in grant funding to the London Borough of Hackney for onward grant to organisations within the Charedi community in Stamford Hill to alleviate food insecurity and to complement the Holiday Hunger programme).

10. On 12 July 2024, the Director of Communal affairs for Interlink was invited to participate in a consultation concerning the UFSM with officials. The Claimants sent further a pre action letter on 8 August 2023, proposing a method for targeting the UFSM scheme only at certain independent schools charging low fees, for example £5,000 per year, or with discretionary fees. That proposal was considered by the Defendant but, for reasons set out in a letter dated 12 August 2023, was not considered operationally viable or consistent with the policy aims of the UFSM scheme. The Claimants' sent a fourth pre action letter on 25 August 2023.

11. On 18 January 2024, the Defendant approved Mayoral Decision 3224 (hereafter "MD3224") to continue to fund the UFSM scheme in state-funded primary schools in London for the 2024-2025 academic year. MD3224 was accompanied by an Integrated Impact Assessment (hereafter "IIA") completed in November 2023 (accessible via a link in the MD3224). The IIA referred to the interim EqIA and the "Supplementary analysis on London School sector" completed in July 2023. The IIA further referred to the Defendant's internal EqIA framework and guidance having been updated in 2023 and stated that those updated tools were used to form the equalities conclusions of the IIA. The IIA also referenced the Defendant's assessment around the feasibility of extending the policy's scope to independent schools and appended the "Supplementary analysis on London School sector".

12. The Defendant's decision on 18 January 2024 dealt again with the question of extending the state funded UFSM scheme to independent schools, including the further representations advanced on behalf of the Charedi community. MD 3224 sets out the reasons for the Defendant deciding in January 2024 again not to extend the continuing UFSM scheme beyond state-funded primary schools to independent schools:

i) Given the funding available is limited and not sufficient to provide meals for all primary age pupils, the policy prioritises children from within less affluent families.

ii) Whilst there is no bespoke mechanism, attendance at state-funded schools has been considered to be a reasonable and practicable proxy for targeting less affluent families.

iii) As the scheme is additional to the statutory scheme, it has been developed in line with the parameters set by the national policies for free school meals covering state-funded schools only.

iv) Non-state schools are more likely to charge fees or receive alternative income for pupils which could be used to pay for meals.

v) Relationships do not readily exist between the local authorities and independent schools. As such, wholly different, more time consuming and costly methods for implementation would need to be devised.

vi) There are no readily available sub-categorisations of the independent sector that would ensure that only families in poverty or who are suffering financial hardship would be able to benefit.

vii) There are no national food standards for the independent schools and no existing commissioning or contracts between local authorities and independent schools.

viii) Details of implementation contracts sit with local boroughs not the Defendant.

13. The Claimants now seek permission to judicially review the Defendant's decision of 18 January 2024. In summary, the Claimants assert that it was irrational and discriminatory for the Defendant to confine the UFSM scheme to state-funded schools.

LEGAL FRAMEWORK

14. Schools maintained by local authorities are defined by s. 20 of the School Standards and Framework Act 1998 as community schools, foundation schools, voluntary schools, community special schools and foundation special schools. Maintained schools are state funded. That state funding is wholly or substantially provided by local authorities. Pursuant to s.80 of the Education Act 2002, maintained schools must follow the National Curriculum and, pursuant to s.5 of the Education Act 2005, are inspected by Ofsted.

15. Although independent of local authorities, academy schools are likewise state funded. That state funding is provided directly by central government, pursuant to arrangements made under s.1(1) of the Academies Act 2010. Academies are not required to follow the National Curriculum but, pursuant to the s.1A of the 2010 Act, must have a balanced and broadly based curriculum satisfying the requirements of s. 78 of Education Act 2002. Pursuant to s. 5 of the Education Act 2005 academy schools are inspected by Ofsted.

16. Independent schools, which pursuant to s.463 of the Education Act 1996 are schools at which full time education for five or more pupils of compulsory school age and which are not maintained by a local authority, do not receive direct state funding (although individual children educated in independent schools can, in certain circumstances, receive funding from the state for special educational provision, wraparound care, early years provision and milk). Independent schools are not required to follow the National Curriculum but are subject to regulation and inspection pursuant to Part 4 of the Education and Skills Act 2008.

17. The Education Act 1996 s. 512(1) confers on local authorities the discretion to provide a registered pupil at any maintained school, or other persons who receives education at such a school, with milk, meals and other refreshments. Where meals are provided by maintained schools or a Pupil Referral Unit, the food is required to comply with the Requirements for School Food Regulations 2014/1603. Pursuant to s.512A of the 1996 Act and the Education (Transfer of Functions Concerning School Lunches etc.) (England) (No.2) Order 1999/2164, the duty to provide school meals pursuant to s.512(3) has been transferred to the governing body of each maintained school with a delegated budget. Pursuant to s.49 of the School Standards and Framework Act 1998, every maintained school must have a delegated budget.

18. Pursuant to s.512(3) of the Education Act 1996, the discretion to provide meals conferred on local authorities by s. 512(1) and delegated to the governing body becomes a duty where the pupil makes a request for free lunches, is eligible or it would not be unreasonable for the school to provide the lunch, and meets any prescribed requirements. In such circumstances, the pupil *must* be provided with a free school meal. Pursuant to s.512ZB(2) of the 1996 Act, and in summary, the pupil is eligible for free school meals if they are in KS1 or if they are in KS2 and their parents are in receipt of universal credit and have a yearly income below £7,400. With respect to academies, funding agreements must include an equivalent obligation on proprietors to provide free school lunches to eligible pupils, pursuant to s.512B and s.512ZB of the Education Act 1996.

19. Finally, with respect to the relevant legal framework, the Greater London Authority (hereafter "the GLA") is a body corporate established under s.1 of the Greater London Authority Act 1999, which exercises functions conferred on it by the 1999 Act and by any other Act. The GLA comprises the democratically elected Mayor of London and the London Assembly. Pursuant to s.30(1) of the 1999 Act, the GLA, and, pursuant to s.32(5) of the 1999 Act, the Mayor acting on behalf of the GLA, is empowered generally to do anything which will further one or more of its principal purposes set out in s.30(2) of the 1999 Act. In exercising the general power, pursuant to s.30(4) of the 1999 Act regard must be had by the GLA to the effect which the proposed exercise of the power will have, *inter alia*, on the health of persons in Greater London and health inequalities between persons living in Greater London. Pursuant to s.30(5), the general power must be exercised by the GLA in the way it considers best calculated to promote, *inter alia*, improvements in the health of persons living in Greater London and to promote the reduction of health inequalities between persons living in Greater London. This includes, pursuant to s.30(6A), mitigating any increase in health inequalities which would otherwise be occasioned by the exercise of the power. Pursuant to s.33(1) of the 1999 Act, in exercising the general power,

the GLA must have due regard to the principle that there should be equality of opportunity for all people.

DISCUSSION

20. For the Claimants to succeed in obtaining permission for judicial review, the court must be satisfied that there is an arguable ground for judicial review having a realistic prospect of success and that there is no discretionary or other bar to bringing the claim (see *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780). Having considered carefully the evidence and detailed submissions in this case, I am not satisfied that the Claimants have met the threshold for permission. Accordingly, permission must be refused. My reasons for so deciding are as follows.

Ground 1a

21. By Ground 1a. the Claimants contend that prior to taking the decision on 18 January 2024, and having regard to his statutory duty to consult pursuant to ss.30 and 32 of the 1999 Act, the Defendant failed to take reasonable steps to acquaint himself with relevant information (the Claimants no longer pursue their contention that the Defendant failed to ask himself the right question prior to taking his decision). The Claimants emphasise the urgent nature of the decision in July 2023 to implement the UFSM scheme. They contend that in the less urgent circumstances of deciding in January 2024 whether to extend the scheme for a further academic year, no rational mayor could have concluded he had enough information to decide whether there was a feasible means of extending the scheme to students in need in independent schools or in Charedi independent schools.

22. In the context of the general duty under the 1999 Act, the Claimants further assert that no reasonable Mayor could have failed to ask the Charedi community or the local authorities who serve them whether it would be feasible to extend the UFSM scheme to independent schools whose pupils were impacted by food insecurity. The Claimants rely in particular on what they contend was a failure by the Defendant to consult on the proposal advanced on behalf of the Claimants whereby a threshold for independent school fees of £5,000 would be used as a tool for identifying independent schools at which children suffer financial hardship or food insecurity. In this latter regard, the Claimants assert there was no further consultation with the Charedi community after July 2023.

23. I do not consider that Ground 1a. is an arguable ground for judicial review having a realistic prospect of success.

24. In discharging his *Tameside* duty, the obligation on the Defendant was to take such steps to inform himself as were reasonable to enable him to arrive at a rational conclusion. It was for the Defendant to decide on the manner and intensity of the enquiry undertaken. The court will not intervene merely because it considers that further enquiries would have been sensible or desirable but, rather, only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision (*R (Balajirari) v SSHD* [2019] EWCA Civ 673, [2019] 1 WLR 4647 at [70]).

25. The Claimants do not assert that no rational mayor could have decided he had enough information before first deciding in July 2023 to *implement* the UFSM scheme as applying to state-funded schools only. The information then available from the interim EqIA and the "Supplementary analysis on London School sector" included the scope of the statutory scheme put in place by Parliament that the UFSM scheme was intended to top up; detailed information on the nature and extent of administrative complexities in delivery, monitoring and compliance were the UFSM Scheme to be extended to independent schools, including Charedi schools; the extent of the funds available to the UFSM scheme; the relative inequality and poverty of pupils attending state funded schools compared to children in the independent sector; the socio-economic difficulties affecting the Charedi community in London; and the nature and extent of other support available to families in London affected by the cost of living crisis, including Charedi families.

26. In reaching his decision to *extend* the scheme in January 2024 the Defendant again had available to him that information. Whilst much of the information was gathered ahead of the scheme being implemented in July 2023, the matters it concerned were largely static and remained relevant at the time of the decision to extend the scheme. In addition, the Defendant had the information in the IIA. The decision whether it was appropriate to extend the UFSM scheme to independent schools was a complex policy decision falling to be taken at a high level of generality. The decision required was whether it was appropriate to extend the state funded UFSM scheme to all or some non-state funded independent schools in London. The decision involved a democratically elected office holder making a decision as to the allocation of public funds in the realm of economic and social policy.

27. In the foregoing circumstances, I do not consider there is an argument with a realistic prospect of success that no reasonable mayor could have been satisfied on the basis of the enquiries made that he possessed the information necessary to decide whether there it was feasible to extend the UFSM scheme to students in need within all or some independent schools.

28. As to the specific points regarding consultation, the duty of the decision maker to call to his or her own attention considerations relevant to the decision, which in practice may require the decision maker to consult outside bodies with particular knowledge or involvement, stems not from procedural fairness but from the duty of the decision maker to inform himself so as to arrive at a rational conclusion. As such, the court can intervene only if no rational decision maker could have taken the decision taken by the Defendant without further consultation (*R (Balajirari) v SSHD* at [70]).

29. The decision required the Defendant to consider whether it was appropriate to extend the UFSM scheme to all or some independent schools in London. The Defendant indicated he would consider representations made on behalf of the Charedi community and did so. This included the Claimants' proposal for the use of a threshold for inclusion within the Scheme being independent schools that charged £5000 or less to be used as a tool for identifying independent schools at which children suffer financial hardship or food insecurity. The Defendant had also commissioned data gathering and analysis on the position of independent schools in London which included consideration of the representations made by the Charedi community in the context of the nature and extent of the administrative complexities in delivery, monitoring and compliance were the UFSM Scheme to be extended to

independent schools. In circumstances where feasibility was not the sole issue informing the decision, the information available to the Defendant concerning the scope of the statutory scheme put in place by Parliament that the UFSM scheme was intended to top up, the extent of the funds available to the UFSM scheme, the relative inequality and poverty of pupils attending state funded schools compared to children in the independent sector and the nature and extent of other support available to families affected by the cost of living crisis, was also relevant to the question of whether the UFSM should be extended to Charedi independent schools.

30. In the circumstances, I likewise do not consider there is an argument having a realistic prospect of success that no rational mayor would have taken the decision not to extend the UFSM scheme to independent schools without further consultation with the Charedi community.

Ground 1b

31. By Ground 1b the Claimants contend that the decision not to extend the UFSM scheme to independent schools was outside the range of reasonable decisions open to the Defendant. Specifically, they contend that no rational mayor could have decided to limit the UFSM scheme to state-funded schools in circumstances where the UFSM scheme extends free school meal provision to schools where those most in need already benefit from the statutory scheme, and where the UFSM scheme will also benefit pupils from affluent families, while excluding children of less affluent families in London who do not have a choice but to attend independent schools for religious reasons. The Claimants further contend that there is demonstrable flaw in the Defendant's reasoning, arguing that the stark line drawn by the Defendant between state-funded schools and independent schools is misconceived, in circumstances where academies are not required to follow the National Curriculum and independent schools do receive state funding in the form of special educational provision, wraparound care, early years provision and free milk, and ignores his duties under the Greater London Authority Act 1999.

32. I do not consider that Ground 1b. is an arguable ground for judicial review having a realistic prospect of success.

33. The object of the UFSM scheme is to ameliorate the cost-of-living crisis for children in London by allocating funding to children from less affluent families. In circumstances where there is a finite amount of funding available to achieve that objective, the UFSM scheme has to have some criteria for eligibility and, absent detailed information on the financial circumstances of every family in London, this requires a proxy for identifying such families. Almost by definition, no proxy is going to fully replicate the target population. Further, by the statutory scheme, Parliament has decided that it is appropriate to limit state-funded free school meals to state-funded schools. In circumstances where the UFSM scheme supplements the statutory scheme, in deciding the scope of that scheme the Defendant was plainly entitled to take account of the distinction drawn by Parliament limiting state-funded free school meal provision to state-funded schools.

34. In this context, whilst the purpose of the UFSM scheme was to go beyond the statutory scheme in terms of the numbers of children helped, the decision to limit the scheme to state-funded schools was plainly within the range of reasonable decisions

open to the Defendant. The contention that no rational Mayor making a decision as to the allocation of public funds in the realm of economic and social policy could have reached the same conclusion when deciding to top up the statutory scheme is not an argument having a realistic prospect of success. The fact that academies are not required to follow the National Curriculum, that some children attending independent schools with particular needs do receive state funding and that a majority of Charedi families feel compelled for religious reasons to send their children to independent schools does not act to change that conclusion.

Ground 2

35. By Ground 2 the Claimants contend that the Defendant failed to comply with the Public Sector Equality Duty (hereafter "PSED") in breach of s.149 of the Equality Act 2010 in that, in the context of a stark equalities issue, he failed to undertake a substantial, rigorous and open-minded consideration addressing the class of persons obviously affected, particularly in the context of the obligations under the Greater London Authority Act 1999.

36. Specifically, the Claimants contend that the Defendant failed to make further inquiries into the feasibility of extending the UFSM scheme to some independent schools notwithstanding that the IIA and interim EqIA were out of date in January 2024 and where, subsequently, the Defendant had received more information on food insecurity in the Charedi community and the school fee arrangements for Charedi schools. The Claimants further assert that although the Defendant states that he reconsidered these matters afresh in making the January 2024 decision, no contemporaneous evidence of this has been provided. In addition to the contended breach of the duty of inquiry, the Claimants contend that the Defendant failed to have due regard to the mandatory considerations of the need to advance equality of opportunity of the Charedi religious community, to remove or minimise disadvantages suffered by that religious community, and to take steps to meet the needs of the Charedi religious community which were different from non-religious communities.

37. I do not consider that Ground 2 is an arguable ground for judicial review having a realistic prospect of success.

38. The Defendant was required to exercise the PSED under s.149 of the Equality Act 2010 in substance, with rigour, and with an open mind (*Bracking v SSWP* [2013] EWCA Civ 1345, [2014] Eq LR 60 at [25]-[26]). The Court of Appeal has repeatedly made clear, however, that a realistic and proportionate approach to compliance with the PSED should be taken by the court in circumstances where the PSED is concerned with process not outcome, that the court should not be drawn into micro-managing the exercise of the duty and the court should only interfere where the approach adopted by the Defendant to the PSED is unreasonable or perverse (see the authorities summarised in *R(SG) v SSHD* [2016] EWHC 2639 (Admin) at [313]). It will not be possible to say that the PSED has not been complied with because it is possible to point to one or other piece of evidence which might be considered relevant which was not specifically identified in the EIA (*R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), [2012] HRLR 13 at [87]) and decision makers "are to be discouraged from applying the degree of forensic analysis for the purpose of an EIA and of consideration of their duties under s.149 which a QC might deploy in court" (*R (Bailey) v Brent LBC* [2011] EWCA Civ 1586,

[2012] BLGR 530 at [102]). With respect to the duty of inquiry, the PSED requires Wednesbury compliant enquiries such that the PSED will be breached for lack of inquiry only where no reasonable decision-maker would have failed to gather further material (*R (AD) v London Borough of Hackney* [2019] EWHC 943 (Admin), [2019] PTSR 1947 at [83]). What is required to comply with the PSED is a fact sensitive matter (*Bracking v SSWP* at [25]-[26]).

39. With respect to inquiry, when taking the decision, the Defendant had available to him the interim EqIA and the IIA completed in November 2023 which drew on the EqIA in drawing its own equalities conclusions. The IIA was completed in November 2023, two months prior to the decision in January 2024, and after further information was provided by the Claimants. The interim EqIA detailed the composition and distribution of faith schools in London, dietary needs by faith, children living in low-income households, cost of living (including Kosher food), food security and eligibility for free school meals. In addition, the Defendant had the supplementary analysis of the London independent school sector, which dealt specifically with the Charedi community with respect to attendance at faith schools based on religious identity and belief, dietary needs, household income and financial hardship and the cost of living (including Kosher food). Again, whilst much of that information was gathered ahead of the scheme being implemented in July 2023, the matters it concerned were largely static and remained relevant and available to the Defendant at the time of the decision to extend the scheme. The Defendant had also examined equality issues specific to the Charedi community when deciding in December 2023 to approve £450,000 of grant funding to alleviate food insecurity in Charedi communities. The contention that the Defendant failed to make further inquiries into the feasibility of extending the UFSM scheme to some independent schools is dealt with under Ground 1a. above.

40. In these circumstances, I do not consider there is an argument having a realistic prospect of success that no reasonable decision-maker would have failed to gather further material and, thus, that the Defendant has breached the PSED for lack of inquiry. It follows that it is not arguable that a failure to complete a new EqIA in January 2024 breached the PSED.

41. With respect to the Claimants case on "due regard", when deciding to extend the UFSM scheme for a further academic year on 18 January 2024 the Defendant had the benefit of the interim EqIA and the IIA, each of which sought to identify and assess the potential impacts and effects, and areas for mitigation, for people sharing one or more relevant protected characteristics, including religion. The Defendant was also directed to consider the decision implementing the UFSM scheme in July 2023, which gave consideration under the equality comments to whether the scheme should be extended to some independent schools in circumstances where some Charedi families are unable to pay school fees, live in larger than average families and receive housing benefits and tax credits. Although determining not to take that course, the implementation decision further explored mitigating measures for the Charedi community in recognition that the cost-of-living crisis impacted on communities with the protected characteristic of religion.

42. The decision made on 18 January 2024 also referenced the "Supplementary analysis on London School sector". That analysis, commissioned by the Defendant ahead of the implementation of the UFSM scheme, specifically considered with respect to the

Charedi community attendance at school based on religious identity and belief, dietary needs, household income and financial hardship and the cost of living when considering whether it was appropriate to extend the UFSM scheme to some independent schools. The decision taken on 18 January 2024 identified the equality objectives contained in s.149 of the Equality Act 2010 and recorded that, in deciding whether to continue the scheme, the Defendant had considered the representations of the Charedi community as to the manner in which they were disadvantaged by disproportionate attendance at independent schools due to religious observance and acknowledged that certain children with protected characteristics, including Charedi children, are more likely to attend independent schools.

43. In the circumstances, whilst in making the decision not to extend state-funded free school meals to all or some independent schools the Defendant elected not to take a course that may have more effectively advanced the matters set out in s.149(1) of the 2010 Act with respect to the Claimants, I am not satisfied that there is an argument having a realistic prospect of success that in reaching that decision the Defendant failed to pay "due regard" to those matters.

Ground 3

44. By Ground 3 the Claimants contend that the Mayor's decision to exclude all independent schools from the UFSM scheme for the 2024-25 academic year resulted in unlawful indirect discrimination contrary to Article 14 of the ECHR. They argue that the decision not to extend the UFSM scheme to independent schools is indirectly discriminatory because the majority of Charedi children attend independent schools in circumstances where they have no choice but to do so for religious reasons. The Claimants contend that Charedi children of primary school age are thus much less likely to benefit from the UFSM scheme than non-Charedi children of primary school age and that, accordingly, the decision not to extend the UFSM scheme to independent schools indirectly discriminates against Charedi children on the grounds of religion without justification.

45. I do not consider that Ground 3 is an arguable ground for judicial review having a realistic prospect of success.

46. In *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 at [49] the Supreme Court noted that indirect discrimination may result where a measure of policy based on an apparently neutral ground in practice causes a disproportionately prejudicial effect on a group characterised by a salient attribute or status. In *R (SC) v SSWP* at [53] the Supreme Court confirmed the approach to be taken in cases where the claim is one of indirect discrimination. The Claimants must demonstrate that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination, in this case religion, so as to give rise to a presumption of indirect discrimination. Once a *prima facie* case of indirect discrimination has been established by the Claimants, the burden then shifts to the Defendant to show that the indirect difference in treatment is not discriminatory. The Defendant can discharge that burden by establishing that the difference in the impact of the measure in question is the result of objective factors unrelated to any discrimination on the ground alleged. This requires the Defendant to demonstrate that the measure in question has an objective and reasonable justification, i.e. that it pursues a legitimate aim by

proportionate means. In assessing the proportionality of a particular measure to a legitimate aim, the court should generally be very slow to intervene in areas of social and economic policy given the wide margin accorded to the decision maker in these areas but, as a general rule, differential treatment on a "suspect" ground, such as religion, nevertheless requires cogent justification.

47. Assuming for the purposes of the permission stage that the Claimants can establish that the decision not to extend the UFSM scheme to independent schools affects a disproportionate number of Charedi children based on the protected characteristic of religion and, as such, indirectly discriminates against them (which proposition must be open to very significant doubt), it is plainly the case that the difference in the impact of the UFSM scheme being confined to state-funded primary schools is the result of objective factors unrelated to any discrimination on the ground alleged. The UFSM scheme pursued the legitimate aim of addressing the cost-of-living crisis by allocating funding to provide free school meals to children with less affluent families not eligible under the statutory scheme. In circumstances where there is a finite amount of funding available, the UFSM scheme had to have some eligibility criteria to ensure the fair and equitable distribution of those finite funds to those in need and to be capable of being administered efficiently to the same end. The decision to confine the state-funded UFSM scheme to state-funded primary schools, which was a high-level decision on a matter of social and economic policy, reflected the policy adopted by Parliament with respect to the provision of state-funded free school meals.

48. In the circumstances, and in the context of the substantial margin of appreciation accorded to the decision maker in the fields of economic and social policy and taking into account the increased intensity of review appropriate where "suspect" grounds are relied on, even if it could be established that the decision not to extend the UFSM scheme to independent schools or some of them affects a disproportionate number of Charedi children based on the protected characteristic of religion so as to indirectly discriminate against them (which, as I say, must be open to very significant doubt), in any event I am not satisfied that there is an argument having a realistic prospect of success that such indirect discrimination has no objective and reasonable justification.

Ground 4

49. By Ground 4, the Claimants contend again that the Defendant's decision results in indirect discrimination under s.19 of the Equality Act 2010. In light of my conclusions with respect to Ground 3, I am not satisfied that there is an argument having a realistic prospect of success that the decision indirectly discriminated against the Claimants for the purposes of s.19 of the Equality Act 2010.

CONCLUSION

50. None of the grounds advanced by the Claimants in order to demonstrate that the Defendant acted irrationally and in a discriminatory fashion by deciding not to extend the state funded UFSM scheme to all or some non-state funded independent schools amount to an arguable ground for judicial review having a realistic prospect of success.

51. Accordingly, I refuse permission to apply for judicial review. In the circumstances, the application for expedition of the substantive hearing does not fall to be considered. I will invite counsel to draft an order accordingly.