CO/ 2017

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

BETWEEN

THE QUEEN
On Application of
AGAINST BORDERS FOR CHILDREN ("ABC")
(By [redacted])

Claimant

- and -

THE SECRETARY OF STATE FOR EDUCATION

Defendant

CLAIMANT'S DETAILED STATEMENT OF FACTS AND GROUNDS

References in [V/Tab/Pg] are to the 2-volume Permission Bundle. Volume 1 contains the court documents, witness evidence and correspondence. Volume 2 contains the relevant statutory and case materials.

A. Decision Under Challenge

1. This application for judicial review raises an issue of considerable importance for the 8.67 million school-aged pupils aged 5 to 19 in schools (whether state-maintained, grant-funded or independent) in England. In short it concerns the Defendant Secretary of State for Education's systematic collection and storage of sensitive personal data about children's nationality and country of birth from individual pupils through the School Census which takes place three times each school year. The most recent School Census took place in the autumn, on 5 October 2017 in pursuance to the School Census 2017 to 2018 Guide[1] with the next one due to take place in a month on 18 January 2018.

2. Schools are under a statutory duty to comply with this systemic collection of sensitive personal data from school children through the Education (Pupil Information) (Miscellaneous Amendments) (England) Regulations 2016 ("the 2016 Regulations") made pursuant to the Defendant's powers under the Education Act 1996. The 2016 Regulations added to the list of individual pupil information to be collected from school children in the School Census three categories of information: (i) proficiency in speaking, writing and reading English; (ii) nationality and (iii) country of birth. Prior to the introduction of the 2016 Regulations, and

[1] The current School Census Guide is version 1.3 issued in October 2017. **[V2/F19]**

since the school census started in its current form in 2002, the Defendant had already collected data on children's first language, including English as an Additional Language.

3. The Defendant contends that collecting such sensitive personal data about children's nationality and country of birth is for the purposes of understanding how effective the education sector is for foreign nationals and to target support to children with English as an Additional Language. However, whilst the Defendant has identified whether a child speaks English as an Additional Language and his proficiency in the English language as explicit funding markers for the purposes of improving school standards, curriculum and raising children's educational attainment, children's nationality and country of birth information are not designated funding markers and do not in this way or otherwise inform allocation and distribution of funds for educational purposes. Information about pupils' nationality and country of birth is also not anonymised and is collected and stored in conjunction with all other information obtained via the School Census as information capable of identifying an individual child in a national data base. There is no long-stop time limit to how long the information will be held for and no mechanism for review and assurance that the data held is brought up to date to reflect the actual situation of the child and to ensure irrelevant data is removed from the database, an issue with the UK Statistics Authority has raised with the Defendant.[2]

4. By this Application for Judicial Review, the Claimant contends that the systematic collection and storage of sensitive personal data from individual children regarding their nationality and country of birth is not strictly necessary to advance children's educational attainment and , and not an effective and proportionate measure having regard to the overriding object of data protection being to protect the fundamental right of individuals to privacy with respect of the processing of their personal data, especially where children's privacy is concerned.

B. Standing of the Claimant

5. The Claimant, Against Borders for Children ("ABC") is an unincorporated association, founded in August 2016, which primary objective is to campaign for the removal of borders and immigration controls from education and children's lives. Members of this association are parents, teachers, campaigners and non-governmental organisations. ABC is represented in these proceedings by the group's founder and concerned parent, [redacted] and a leading member [redacted]

[2] See Exhibit WD19 of the witness statement of [redacted] **[V1/B138]**

6. The coalition was started in August 2016 when a group of concerned parents learnt of new regulations through which the Defendant require schools (whether state-maintained, grant-funded or independent) to obtain information about the nationality and country of birth information from children aged 2 to 19. Concerned about the lack of information on the purpose of the data collection, why it is necessary, who will have access to the information and where / how it would be retained, ABC started a high profile social media campaign to raise awareness and urge a national boycott of such sensitive personal data being collected from toddlers and children as young as 2 years old. [redacted] witness statement (at **Tab B of the Permission Bundle**) outlines in some detail the significant steps that ABC has taken pursuant to the organisation's aim, including a meeting with the Defendant to urge a stop to the collection of children's nationality and country of birth data. The group's advocacy with the Defendant has led to some alterations to the census collection arrangements, including an exemption of toddlers and children ages 2 to 4 who attend Early Years educational provision from having to provide this sensitive personal data. It has, however, not brought to a stop the collection of this sensitive personal data from children and young adults aged 5 to 19 or clarity and transparency over the purpose of the actual data collection.

7. The actions taken by ABC, as outlined in [redacted] witness statement, demonstrate that the group has sufficient interest (within the meaning of section 31(1) Senior Courts Act 1981) to bring these proceedings against the Defendant. The Defendant has not disputed this through pre-action correspondence.

8. ABC is best placed to bring this generic challenge to the systematic collection of children's nationality and country of birth data given that as an umbrella organisation with a commitment to ensuring schools remain open and safe learning spaces, it has been able to collect the perspectives of children, parents, teachers, and other campaigning bodies, all with an interest in this issue. While an individual could theoretically bring a claim for an alleged breach of their rights as protected under the Data Protective Directive, this is no answer to the wider issue at stake: namely, whether the systematic collection and storage of sensitive personal data of more than 8 million school aged children is lawful, necessary, compliant and consistent with data protection principles under the Directive and the domestic framework under the Data Protection Act 1998.

C. Legal and Policy Context

C.1. Education Act 1996 – Collection of pupil information

9. By **s. 29 of the Education Act 1996** ("EA 1996") local authorities are required to provide such information as the Defendant may require "*for the purpose of the exercise of his functions"* under the Education Act. This includes information relating to "*the provision of primary or secondary education in the area of the local authority as may be prescribed"* and in particular information relating to the provision of education for children with special educational needs: **ss. 29(3) and (4)**.

10. **Ss. 408(1) and (2)** confers powers on the Secretary of State to make regulations which require local authorities, maintained schools, school governing bodies and head teachers to provide information about school curriculums, syllabuses and the educational achievements of pupils at the school.

11. **S. 537A(1)** confers powers on the Secretary of State to require specified *"individual pupil information as may be prescribed"* from schools maintained by local authorities as well as independent schools. "Individual pupil information" is defined under s. 537A(9) as: *"information relating to and identifying individual pupils or former pupils at any school within subsection (1), whether obtained under subsection (1) or otherwise."* Thus information collected and stored in pursuance to s. 537A(1) is information which is individualised and capable of identifying the individual pupil whose data is provided by the school.

12. S. 537A of the EA 1996 in its various forms has been in existence since 1997, by an amendment introduced via **section 20 of the Education Act 1997**. As enacted then, the section was headed *"Provision of information about individual pupils' performance"* and defines pupil performance information as the performance of individual pupils in any assessment made for the purpose of the National Curriculum or in accordance with a baseline assessment scheme, in any prescribed public examination, in connection with attainment of vocational qualifications or any other examination or in connection with attainment of prescribed qualifications.[3] The stated aim of the 1997 Act, amending the EA 1996, was to *"raise standards"* and *"measure each child's progress to completing the national curriculum framework so that we can have a proper measure of what children achieve through the compulsory school years."* The information collected clearly reflects that aim.

[3] http://www.legislation.gov.uk/ukpga/1997/44/section/20

13. Successive regulations made by the Secretary of State in England since 1999 have collected information from individual pupils about their names (including preferred names), gender, ethnicity, school attendances (and exclusions), national curriculum year group, whether they are in care, adopted from care, receive pupil premiums, are eligible for free school meals, have special educational needs, and speak another first language. Until 2016, the operating regulations were the Education (Information about Individual Pupils) (England) Regulations 2013 (SI 2013/2094) ("the 2013 Regulations"). Schedule 1 to the 2013 regulations list the information all schools in England are required to collect form individual pupils.

14. As was stated in the School Census Guide 2015 to 2016 (version 2.5, January 2016),[4] census data underpins the Defendant's processes with funding, absence, attendance, attainment and childcare. The census is in particular described as *"a key source of data used to calculate schools' funding"*.

C.2. Collection of nationality and country of birth information from pupils

15. By the **Education (Pupil Information) (England) (Miscellaneous Amendments) Regulations 2016** (SI 2016/808) ("the 2016 Regulations"), Schedule 1 to the 2013 Regulations were amended to insert three new categories of individual pupil information which schools were required to collect and transmit to the Defendant, namely (at paragraph 2(l)-(n)):

> *(l) nationality;*
> *(m) country of birth;*
> *(n) proficiency in speaking, reading and writing in English*

16. The **Explanatory Memorandum**[5] stated that the regulations are *"necessary to improve central Government's understanding of the scale and impact of migration on the education sector."* It was said that this information will be used *"alongside existing data items (such as 'ethnicity' and 'language')"*. Specifically, data on English proficiency of children classed as having English as an Additional Language ("EAL") will be used to:

> "*inform policy on this high needs group with the basic rationale that current data on EAL pupils do not distinguish between pupils who lack a basic command of the English language versus those who are bilingual and have mastered English sufficiently to access the curriculum. English proficiency statistics would therefore provide for the first time important national statistics on the characteristics of this group, along with their*

[4] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495464/2015_to_2016_School_Census_Guide_V_2_5.pdf

[5] http://www.legislation.gov.uk/uksi/2016/808/pdfs/uksiem_20160808_en.pdf

attainment and destinations and allow the Department to measure whether the individual pupils, or the schools they attend, face additional educational challenges."

17. No explanation is given specifically as to the rationale for collecting and storing children's country of birth and nationality information or its use. The information collected will be as declared by the parent / guardian.

18. The 2016 Regulations were laid before Parliament on 27 July 2016 after the summer recess had commenced for Parliament and in the aftermath of the Brexit referendum purdah and the change of government. It came into force on 1 September 2016 quietly before Parliament resumed. It was not subject to public consultation or Parliamentary debate. The Explanatory Memorandum stated that no assessment of impact was undertaken. The collection and storage of information about children's nationality and country of birth was to apply to all children aged 2 to 19, including those who attend Early Years educational provisions.

19. Prior to the 2016 Regulations coming in force, knowledge in the public about the additions to the school census did not emerge until June 2016 when Schools Week, a trade magazine for the education sector, reported the intention of the Government to introduce a statutory instrument requiring schools to collect and transmit to the Defendant children's nationality and country of birth information in school.

20. Following this media report, in mid-July 2016, Parliamentary written questions were asked in the House of Commons by Charlotte Leslie MP and Caroline Lucas MP. The questions sought to ascertain the purpose of collecting this sensitive personal data from children and the extent of any consultation and information provided to parents and children about the purpose and their right to object to or opt out of providing the information. Education Minister Nick Gibb repeated the statement in the Explanatory Memorandum. He confirmed that no consultation was undertaken and the 2016 Regulations had a minimal impact on the public sector.[6] The Defendant later told the House of Lords' Secondary Legislation Scrutiny Committee that there was no legal requirement to carry out a privacy impact assessment and in any event *"these additional pieces of information (about the same individuals) do not present any new privacy risks so a formal privacy impact assessment was not required."*[7]

[6] See exhibit WD2 and WD3 for the Parliamentary written questions and answers. **[V1/B36 and 39]**

[7] See §17 of [redacted] witness statement for the Claimant **[V1/B7]** and the letter to the Scrutiny Committee at exhibit WD4. **[V1/B46]**

21. On 28 July 2016, following concerns raised by its members, the National Union of Teachers ("NUT") also sought clarification from the Defendant as to the purpose for which the new information about children's nationality and country of birth information is collected and stored. The Defendant again repeated what was said in the Explanatory Memorandum and further stated that this will *"provide the Department with valuable statistical information on the characteristics of these groups of children [referring to foreign nationals] and along with their attainment and destinations, will allow the Department to measure whether the individual pupils, or the schools they attend, face additional educational challenges."*[8]

22. By September 2016, there was sufficient concern around the imprecision in the Government's explanation of how collecting and storing of children's nationality and country of birth contribute to improvements in educational attainment, school curriculums and schools' funding, particularly as the Government was reported to be stating in the media that no additional funding is intended to be allocated on this basis.[9] The concerns were also prompted by the Government's announcement in August 2015 of a national inquiry into suspicions of "education tourism" with a view to introducing immigration control and enforcement into schools.[10]

23. No information was published in the public domain providing information and notification to parents and children about the new categories of sensitive personal data which would be collected in the autumn 2016 School Census. No information was systematically distributed to the schools to provide advice to them about the new census information to be collected, its purpose and the arrangements for doing so.

24. In September 2016, following discussion in the NUT's Education and Equalities Committee of the National Executive around the concerns about the new school census data collection, NUT published guidance on their website for their members about the collection and storage of

[8] See §4 of witness statement of Amanda Brown, deputy General Secretary for the National Education Union (formerly the NUT). **[V1/C348]**

[9] See §22 of [redacted] witness statement and corresponding exhibit WD7 for a copy of the Schools Week article. **[V1/B10]** That this is the case has also been confirmed by the Defendant's published School Census Guide for Local Authorities and Schools 2016 to 2017 and the current School Census Guide 2017 to 2018, in which nationality and country of birth information are not used for funding markers. **[V2/F19]**

[10] "Nicky Morgan orders immigration review to examine 'education tourism'. Daily Telegraph 16 August 2015: exhibit WD20. **[V1/B141]** See also Schools Week article dated 17 August 2015, also in Exhibit WD20.

children's nationality and country of birth information. In the Guidance for its members, the NUT stated that:[11]

> *The NUT has no reason not to believe the DfE [in respect of their explanation as to why the information is being collected], but we are concerned that the DfE may have been less than honest about its reasons for seeking the information. A child's nationality and country of birth are not necessarily indicators of 'additional educational challenges' in the way that a pupil's lack of proficiency in English who be, for example, and we are therefore dissatisfied by the DfE's explanation.*

25. The NUT Guidance went on to explain that the union had become aware that the Home Office and the Police have relied on the Defendant in the past to provide information gleaned from the school census for immigration control and crime prevention purposes. Of particular concern to NUT was the absence of information being provided to parents or children about the fact of information-sharing as well as their right to object to information being collected, transmitted and stored by the Defendant and shared with other government agencies and third parties. This, the NUT stated in their guidance to members, *"is of consideration concern to us. We do not want schools to become an extension of the immigration service."*

C.3. Claimant's Campaign against collection of children's nationality and country of birth

26. On 26 September 2016, the Claimant, along with 20 other human rights and anti-racism organisations, wrote to the Defendant, identifying a number of concerns with the collection of nationality and country of birth information about children and the risks of breaches of the children's and their families' right to privacy with respect to the processing of their personal data. The Claimant pointed out that information regarding English as an additional language and children's proficiency in speaking, reading and writing English were already collected and this was sufficient for purposes of making further resources available to schools to target support for particular cohorts of children. The joint letter complained of the absence of any explanation given as to how this additional information about nationality and country of birth would assist in targeting support to schools and children who need it.

27. Concerns were also raised about school census data being shared by the Defendant with other public authorities for purposes of immigration enforcement, which are unconnected to the specific purpose for which the Defendant, via powers under the EA 1996, collected children's personal data in the first place. These concerns were confirmed at the beginning of October 2016 in a response provided by the Defendant to a Freedom of Information Act request (FOIA).

[11] Exhibit AB1 to the witness statement of Amanda Brown. **[V1/C358]**

In that response, the Defendant stated that the nature of the Home Office's requests relate mainly to children of parents or guardians who are suspected of committing immigration offences.[12] The FOIA response was the first published confirmation by the Defendant (through the whatdotheyknow website[13]) that information collected and stored via the school census was being used for purposes *other than* for that provided for under EA 1996 to improve school standards, curriculum and children's educational attainment.

28. Around the same time, the Claimant also launched a national campaign through social media channels to raise awareness among parents, teachers and educators that the school census contained new categories of information relating to sensitive personal data about children's nationality and country of birth, that parents (and children) were not obliged to provide the information when asked and that they were entitled to retract information already provided.

29. The Defendant did not respond to the joint letter of 26 September 2016 before the School Census commenced, so on 6 October 2016, for the first time, schools in England started collecting and transmitting children's nationality and country of birth information to the Defendant along with English language proficiency and other personal information that had been collected under the 2013 Regulations.

30. Questions as to the specific purpose of collecting children's nationality and country of birth information were raised in both Houses of Parliament in October 2016. Viscount Younger, the Government's spokesperson in the House of Lords, stated that the information would be used to improve educational attainment for children whose first language was not English but provided no explanation of why this could not already be achieved by the collection of children's first language (which will reveal whether English is an additional language) and children's proficiency of the English language, a newly added category of information under the 2016 Regulations.[14] In the debate to a subsequent Motion to Regret moved in the House of Lords on 31 October 2017 by Lord Storey, the Government's Parliamentary Under Secretary for Schools, again stated that the purpose of nationality and country of birth information was to understand the level of English that children who do not speak it as a first language have, explaining that many children characterised as having English as an Additional Language are

[12] See exhibit WD10 **[V1/B88]**
[13] The whatdotheyknow website publishes all FOIA requests and responses submitted to government agencies made through them
[14] §31 of [redacted]s witness statement. **[V1/B13]**

fluent in English thus collecting children's first language did not provide sufficient information to target support to children who require the support. This explained why proficiency in the English language was added in the 2016 Regulations but not nationality and country of birth.

31. On 28 October 2016, the Defendant announced in the media via Lord Nash, the Parliamentary Under Secretary for Schools, that it will not place children's nationality and country of birth information not the National Pupil Database and that the information collected would be stored separately in a manner accessible only by the Defendant.

32. Following a meeting held in November 2016 by the Defendant, at which the Claimant and other signatories to the September 2016 joint letter attended, the Defendant announced that she will not proceed to collect nationality and country of birth information from children under 5 years old in the Early Years Census. Children under 5 who started their reception year in primary school would still be subject to the data collection.[15]

33. On 16 November 2016, the Defendant made a further policy announcement that parents would be given a right to retract nationality and country of birth information previously submitted, but that this right to retract would be subject to review in December 2017.[16]

34. In December 2016, the Defendant, through a response to another FOIA request, disclosed formal terms of a Memorandum of Understanding dated June 2015 between the Defendant and the Home Office to share information collected and stored by the Defendant from the school census.[17] The MoU identified key strategic aims of the information-sharing agreement as including: to identify families who have committed an immigration offence, and *"create a hostile environment for those who seek to benefit from the abuse of immigration control"* by obtaining the addresses of suspected immigration offenders through their children's information collected via the School Census.[18] The information included (prospectively) the nationality of children *"once collected"* and revealed a clear primary purpose for the introduction of the 2016 Regulations a year later.

[15] See §38 of [redacted] witness statement. **[V1/B15]**
[16] See §42 of [redacted] witness statement. **[V1/B17]**
[17] Exhibit WD12 for the Schools Week article **[V1/B99]** and exhibit WD22 for the Memorandum of Understanding disclosed in December 2015. **[V1/B160]**
[18] See §§15.1.1 and 15.1.2 of the MoU (June 2015): exhibit WD22. **[V1/B174]**

35. An amended version, said to be in force from November 2016, also disclosed via the FOIA response, removed children's nationality from the categories of information to be provided to the Home Office, consistent with Lord Nash's statement in the media (referred above) that the nationality and country of birth data would be stored separately to the National Pupil Database.

36. However at a meeting with the Claimant in November 2016, the Defendant's chief data officer, Iain Bell stated that nationality data would remain in the matching algorithm used to match school records with Home Office records even if the information about nationality did not itself leave the Defendant's control. This means that children's nationality will still be used to search for individual pupils' personal information for the purposes of immigration enforcement.[19]

37. On 28 November 2016, the UK Statistics Authority wrote to the Defendant to require plans for ongoing review of the collection of nationality and country of birth data, stating that maintaining public trust is essential and requiring an ongoing commitment to communications and transparency including *"clear communication of purpose"*.[20] No such reviews have taken place so far as the Claimant is aware.

38. In April 2017, in the absence of a fundamental change to the Defendant's policy of collecting and storing children's nationality and country of birth information, the NUT passed a motion at their annual national conference condemning the MoU and information-sharing by the Defendant with the Home Office with the stated intention of creating a hostile environment for those falling foul of migration regulations, the failure of the Defendant to adequately inform schools of the right of parents to refuse to disclose their children's nationality and country of birth information and the practice of asking children for the information directly as they will not understand the implications of what is being asked. The NUT membership further instructed the Executive to continue to challenge the Government to remove the requirement on schools to collect nationality and country of birth data and permit the use of pupil data in policing immigration, and provide guidance to schools about the importance of informing parents / carers that they are not required to provide census information even though schools are required to ask for it. [21]

[19] See §39 of [redacted] witness statement. **[V1/B16]** See also a FOIA response dated 7 June 2017 to Liberty: exhibit WD26. **[V1/B205]**
[20] Exhibit WD19. **[V1/B138]**
[21] Exhibit AB3 of witness statement of Amanda Brown. **[V1/C364]**

39. On 2 October 2017, the Defendant published the **School Census 2017 to 2018 Guide for Local Authorities and Schools, version 1.3 (September 2016)**:

39.1. **Paragraph 1.1** of the Guide states that its purpose is, *inter alia,* to set out information to enable schools and local authorities to "understand the purpose and rationale of the school census." **[V2/F23]**

39.2. **Paragraph 1.2.2.1** states that pupils and parents should be provided accessible information about *"how you will use their personal data"* as this is said to be a key element of the Data Protection Act 1998 and the General Data Protection Regulations (GDPR)[22] This should be done by way of an "accessible privacy notice" which explains: **[V2/F26]**

39.2.1. what data is collected about them

39.2.2. for what purposes the data is collected

39.2.3. how the data is used (processed)

39.2.4. what the lawful basis is for processing

39.2.5. how long is the data retained

39.2.6. who the data is shared with

39.2.7. why the data is shared.

39.3. **Paragraph 1.2.3** states that whilst parents and individual pupils cannot *"opt out of the school census collection"*, information about ethnicity, language, country of birth and nationality *"must always be reported as declared by the parent / guardian"* or by the pupil where *"deemed mature enough to have capacity to understand and agree to share their personal data with others."* **[V2/F27-28]**

39.4. **Paragraphs 1.2.3.1 and 1.2.3.2** set out the right to refuse and retract information given in respect of a child's nationality and country of birth. **[V2/F28]**

39.5. **Paragraph 1.3.3** notes that where a data item contributes to the school's funding calculation it will be marked "used for funding". **[V2/F29]**

40. In terms of the categories of information added to the school census collection by the 2016 Regulations, the Guide states the following: **[V2/F83-87]**

40.1. Data on **English proficiency of pupils and on pupils with English as an Additional Language** are used to inform policy on what is described in the Guide as a high needs group with the basic rationale being that current data does not distinguish between

[22] To be transposed in the UK and across the EU by 25 May 2018.

pupils who lack a basic command of the English language versus those who are bilingual and have mastered English sufficiently to access the curriculum. This information *"will help the department understand how effective the education sector is for EAL pupils"* and will provide *"valuable statistical information on the characteristics of these children"* and help to *"measure whether individual pupils or schools they attend face additional educational challenges*": **paragraph 5.3.2** Proficiency levels are measured against a five-point scale of reading, writing and spoken language proficiency including: New to English, Early acquisition, Developing competence, Competent, and Fluent.

40.2. As for **nationality and country of birth information**, the Guide states that this will *"help us to understand a range of factors allowing us to better plan to meet needs within the school system."* Examples given include the *"extra support"* for schools with *"high numbers of children who don't speak or understand English sufficiently to access the curriculum"* and evidence of *"good practice"* with children of different nationalities: **paragraphs 5.34 and 5.35**.

C.4. Data Protection Principles

C.4.1. Data Protection Act 1998

41. The data collected pursuant to paragraph 2 of Schedule 1 to the 2013 Regulations (as amended by the 2016 Regulations) constitutes personal data within the meaning of **section 1(1) of the Data Protection Act 1998** ("DPA"). The information concerning ethnicity, nationality and country of birth constitutes *"sensitive personal data"* as defined in s. 2 of the DPA.

42. In collecting, storing and sharing individual pupil information the Defendant acts as a *"data controller"* for the purposes of s. 1(1) DPA. Pursuant to **s. 4(4)**, a data controller shall comply with data protection principles in **Part I of Schedule 1 to the DPA**, which are as follows (insofar as is relevant):

42.1. **First Principle**: Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

42.2. **Second Principle**: Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

42.3. **Third Principle**: Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

42.4. **Fourth Principle**: Personal data shall be accurate and, where necessary, kept up to date.

42.5. **Fifth Principle**: Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

42.6. **Sixth Principle**: Personal data shall be processed in accordance with the rights of data subjects under this Act.

42.7. **Seventh Principle**: Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

43. Conditions relevant for the purposes of the first principle, as set out in **Schedule 2**, include insofar as is relevant:

43.1. **Paragraph 1**: the data subject has given his consent to the processing.

43.2. **Paragraph 5(b)**: the processing *"is **necessary**"* for the exercise of any function conferred on any person by or under any enactment.

43.3. **Paragraph 6**: the processing *"is **necessary**"* for the purposes of legitimate interests pursued by the data controller or by the third party to whom the data is disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

44. The condition under **Schedule 3** in respect of sensitive personal data, and relevant to the first principle, is that the data subject has given his *"explicit consent"* to the processing of the data: **paragraph 1**.

45. **Part II of Schedule 1** sets out the *"interpretation of the principles".* In particular, and directed at determining whether there has been lawful and fair processing (First Principle) are the following:

45.1. Regard is to be had to the method by which the data is obtained, including whether anyone has been deceived or mislead as to the *"**purpose or purposes** for which they are to be processed"*: **paragraph 1(1)**.

45.2. Data is not to be treated as having been processed fairly unless the data control provides the information in paragraph 3. This includes: (i) the identity of the data controller, (ii) the purpose or purposes for which the data are intended to be processed; and (iii) any further information which is necessary having regard to the specific circumstances in which data are or are to be processed, to enable processing in respect of the data subject to be fair: **paragraph 2(1)**.

C.4.2 Data Protection Directive

46. The DPA is intended to transpose the **Data Protection Directive 95/46**. This is self-evident from the transposition of data protection principle from **Article 6(1)** to Part 1 Schedule 1 of the DPA. The object of the directive (which underpins the statutory objects of the DPA) is to *"protect fundamental rights and freedoms of natural persons and in particular their right to privacy with respect to the processing of personal data."*: **Article 1(1)** of the Directive.

47. In order for fair and lawful processing, the established case law of the Court of Justice of the European Union set down these principles (in summary):

47.1. Processing must be in accordance with the law;

47.2. It must pursue a specified, explicit and legitimate purpose, and not be further processed in a way incompatible with those purposes;

47.3. The categories of data chosen for processing must be necessary in order to achieve the declared overall aim of the processing operations and a controller should strictly limit collection of data to such information as is directly relevant for the specified purpose pursued by the processing: ***Tele 2 Svreige and Watson and Ors*** [2017] QB 772 at [94], [110] and [100];

47.4. It must be necessary in a democratic society in order to achieve the identified legitimate purpose: ***Huber v Germany*** [2009] 1 CMLR 49 [65]; ***Leander v Sweden*** (1987) 9 EHRR 433 at[58];

47.5. Where the processing may be liable to infringe the fundamental right of privacy (the object of data protection), articles 7 and 8 of the Charter of Fundamental Rights and article 8 of the European Convention on Human Rights become relevant: ***Digital Rights***

Ireland Ltd v Communications Minister [2015] QB 128 at [38], [46] and [52]. See also *S and Marper v the United Kingdom* (2009) 48 EHRR 50 at [99] and [103]

47.6. The more tenuous the link between the purpose and the measure, the more difficult it will be to justify a significant interference with the individual's right to privacy and family life: ***The Christian Institute and Ors v the Lord Advocate*** [2016] UKSC 51 [2017] SC 29 at [89];

47.7. Prior information must be given to the data subjects as to the identity of the data controller and the purpose for which the data is collected, stored and / or transferred: ***Smaranda Bara and Ors v Președintele Casei Naționale de Asigurări de Sănătate*** [2015] EUECJ C-201/14.

47.8. The concept of necessity, laid down under article 7 of the Directive, is for the purposes of delimiting with precision the situations in which processing of personal data is lawful and cannot have a meaning which varies between the Member States. It thus has its own independent meaning in Community law, which must be interpreted in a manner which fully reflects the objective of the directive, as laid down in article 1(1): ***Huber v Germany*** [2009] 1 CMLR 49 at [52];

47.9. Substantive and procedural conditions governing access and retention must be laid down to ensure that processing is related only to the specified purposes: ***Watson*** at [188].

D. Grounds

48. The Claimant contends that the systematic collection and storage of children's nationality and country of birth information is unlawful and cannot be justified having regard to the object of data protection being to protect the fundamental right of individuals to their right to privacy. This is all the more so because the sensitive data collected relates to children who, enjoy a special status as a vulnerable group.[23] The Claimant supports its principle submission in the following ways:

D.1. Ground 1: Not necessary to achieve legitimate aim

[23] This is made all the more clear in Recital 38 to the General Data Protection Regulations (GDPR) which are to be transposed across all EU member-states by 25 May 2018:
"*Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child. The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child."*

49. The fact that s. 537A EA 1996 confers a power on the Defendant to collection individual pupil information does not, of itself, sanction the collection of *any* information about individual pupils. Nor can it be presumed that *any* information which is collected by the exercise of this power would pursue a legitimate aim.

50. The power to collect individual pupil information under s. 537A EA 1996 is subject to implied (if not explicit) limitation that it must be for collection of information that relates to and informs the Defendant's exercise of educational functions under the EA 1996 and / or alternatively her general duty to promote the education of people in England. This can be seen by considering the following:

    50.1. The s. 537A power to require information from schools about individual pupil information sits within an act that was, at the time of its enactment, aimed at consolidating relevant enactments relating to education that existed and to gather in one place a comprehensive legal framework for the governing, administration, funding of the education system in England and Wales: see the introduction to the EA 1996;

    50.2. It sits under a Part of the EA 1996 that deals with ancillary functions of the Defendant and of schools (maintained, academies and other forms) to the main education-related functions contained in the earlier parts of the act such as curriculum, funding, admission, exclusion and special educational needs ;

    50.3. The original s. 537A, introduced by an amendment under s. 20 of the Education Act 1997, described the information required from schools as that related to individual pupil *performance* information;

    50.4. The Explanatory Note to the 2013 Regulations, made pursuant to s. 537A, also explained that the information collected would be analysed with a view to contributing to the raising of educational standards, accurate targeting of funding and monitoring and development of education policy.

    50.5. Elsewhere in the EA 1996, the purpose of collection of information is more clearly identified:

        50.5.1. S. 29(1) requires local authorities to give the Defendant such information as she may require (including about the provision of primary / secondary education in the local authority's area, *"for the purpose of the exercise of his functions under this Act"*

        50.5.2. S. 408 identifies at subsection 1(a) and (2) a list of specific educational purposes for which information can be required by the Defendant from

schools, all related to the school curriculum. (See Header for Part V under which s. 408 falls, titled "The Curriculum".)

50.5.3. S. 537 provides a power to require information from schools with a view to making available information that would likely assist parents in choosing schools for their children, and increase public awareness of the quality of education provided by schools.

51. The Claimant contends that children's nationality and country of birth is *not strictly necessary* for the purposes of the Defendant's policy making and funding arrangements to target resources toward the cohort of children with high needs related to having English as an Additional Language, or to target schools who need them the most.

52. The characteristic of nationality is not a static and immutable characteristic of the child. It does not in and of itself bear a direct relationship with the child's attainment and educational needs. The complexities around nationality law in the UK are set out in the witness statements of Solange Valdez-Symonds[24] of the Project for the Registration of Children as British Citizens and Lisa Matthews[25] of the Right to Remain project. Children acquire British nationality through a multitude of different means, including by birth because of a parent's British citizenship or settled status, by staged regularised immigration status and by long residence. On its face, nationality does not *per se* contain any information that is capable of indicating a child's educational need. It is notable that the Defendant has not, in the course of pre-action correspondence or otherwise, identified any relationship between a child's nationality and his educational needs.

53. Similarly, whilst a child's country of birth may well be static and immutable, it again does not bear any intrinsic relationship with the child's attainment and educational needs. Children who are born elsewhere in the world may be children of British nationals working abroad when she was born. The child's place of birth does not itself say much about migration of foreign nationals and much less of the child's educational aptitude and needs. That this is right is corroborated by the witness evidence from experienced educators in these proceedings, including head teachers, primary and secondary school teachers and teachers of children with English as an Additional Language.

[24] See **[V1/C135]**
[25] See **[V1/C47]**

54. The Defendant must also accept this, given his acceptance that the mere fact of a child's first language not being English does not, of itself, suggest that the child will have additional educational needs for which targeted support is needed. The Defendant has accepted that there will be children who are bilingual (and possibly of a different nationality or country of birth) but who will be sufficiently fluent in English for that not to affect their performance at school. This was the rationale behind introducing via the 2016 Regulations a more fine-tuned measure (paragraph 2(n)) for identifying specific levels of proficiency in a child's English language abilities. A five-point rating system was introduced (per the School Census Guide at paragraph 5.3.2) so that children's proficiency can be ranked from newly exposed to fluent. It is obvious on the face of this rating system how this can give better information on an individualised, school-wide and local authority-wide basis to enable better targeted resources to particular cohorts of children in need.

55. The Claimant takes no issue with the introduction of specified ratings of children's English proficiency or of collecting such information in an indivdiualised way given the self-evident causative relationship between language proficiency and educational attainment. It does not, however, logically follow that information about children's nationality and country of birth provide the same direct relationship.

56. This submission is fortified by considering how the School Census Guide describes the respective purposes of collecting the additional categories of information provided under the 2016 Regulations. Whereas the explanation relating to the information about English language proficiency clearly links causally to what the information is to be used for, this cannot be said to be the case with nationality or country of birth information. In respect of the latter, the Guide asserts that the data collected will inform what extra support is required for *"high numbers of children who don't speak or understand English sufficiently to access the curriculum."* However this purpose is *already met* by collecting information about the child's first language and the child's English language proficiency. The Guide does not explain at all why nationality and / or country of birth information is necessary to meet this overall aim of targeting support to high needs children with poor English language proficiency.

57. The Claimant's contention that the collection of this sensitive personal data from children is not *strictly necessary* (and therefore unlawful) is further evidenced by the Defendant's own

School Census Guide making clear that these two categories of information are not used specifically as funding markers. By contrast, children's language ability and proficiency are specifically used for funding allocation and distribution in schools. That this is can also be seen from the Schools Revenue Funding 2017 to 2018 Operational Guide,[26] published by the Education Funding Authority with the view to assisting local authorities and schools to allocate and distribute funding. Table 1 of the operational guide identifies the schools funding factors, with nationality and country of birth information distinctly and noticeably absent from the list of 13 factors. By contrast, information about English as an Additional Language is specifically identified in the Guide as key to the allocation of resources with the guide.

58. In circumstances where children's nationality and country of birth have no bearing on how funds are allocated and distributed *for educational purposes* it is difficult to see how they are, as contended for by the Defendant, directly connected with the need to target support to individual pupils who need it most as a consequence of having English as an Additional Language. Any link that might be drawn between children's nationality or country of birth and children's educational aptitude is tenuous at best. The more tenuous the link, the more likely it is not necessary (the ***Christian Institute* case** applied) and the more likely that the systematic processing such sensitive personal data would disproportionately infringe children's fundamental rights to privacy and breach base data protection principles. The Defendant's justification is predicated on an entirely false assumption that children's nationality and country of birth are necessary information for the purposes of identifying those children with high English as an Additional Language needs.

59. Contrary to the Defendant's position in pre-action correspondence, it is not sufficient for the Defendant to say that such information *may be useful*. The test, in the context of data protection and the protection of the fundamental right to privacy of children, is one of *necessity* not utility. The data collection is, for reasons outlined above, not strictly necessary.

D.2. Ground 2: Not proportionate and effective measure to achieve a stated purpose

60. Further and / or alternatively, insofar as the Defendant contends that she legitimately requires information about children's nationality and country of birth in order to undertake statistical analysis of migratory flows in schools, that does not, of itself, mean that collection and storage of *individualised personal information* regarding specific children's nationality and country of

[26] https://www.gov.uk/government/publications/schools-funding-arrangements-2017-to-2018

birth in a data base is necessary.

61. The proper test in this context is effectiveness. The Defendant must demonstrate that he has identified the measure which is *least restrictive* to achieve the aim of tracking migratory trends. This is particularly so where the personal data is *sensitive* data about a child's nationality and very plainly engages the child's fundamental right to privacy under Articles 7 and 8 of the EU Charter of Fundamental Rights and article 8 ECHR.

62. In assessing the least restrictive and effective means, the question the Court must ask is whether there are other ways of data processing by which the Defendant could ascertain migratory trends in schools. If yes, then the systematic collection of individualised information about children's nationality and country of birth must be declared unlawful and in breach of fundamental principles of data protection (as outlined above). The CJEU in *Huber v Germany*, held that it was not necessary for the alternative to be the most effective or most appropriate. It was enough that there is an alternative system which is able to achieve the overall declared aim adequately. Thus, in *Huber v Germany*, the CJEU considered, in the context of a German data base of non-German EU nationals, that it was unnecessary for the purposes of understanding trends of free movement of EU nationals from elsewhere in the EU to Germany, to collect *and* retain information about individuals' right to reside in a way that is capable of identifying them individually when this can be achieved by the collection of anonymised data. The CJEU was particularly concerned there with the fact of residence rights not being static characteristics and thus knowledge of an individual's specific residence status at any given time does not, of itself, inform understanding of macro trends regarding changes in free movement and migratory patterns of other EU national in and out of Germany.

63. Applied to the present context, even if migratory trends in schools constitute a purpose or which information can be collected in pursuance to powers under the EA 1996, the Defendant has not been able to demonstrate that such information needs to be collected at the micro-level as *individual pupil information* (defined under s. 537A(9), EA 1996) such that the information collected will be connected to and identified by reference to the individual child in the individual school. There is no basis, evidential or otherwise and available to the Court, to suggest that, like in *Huber*, the purpose of understanding migratory trends in schools cannot be achieved by the collection of anonymised data. The collection of individualised pupil information regarding their nationality and country of birth is disproportionate to the aim said

to be pursued in circumstances where the data collected is sensitive and engages fundamental rights of a child to privacy: *Leander v Sweden* at [58], see also *Marper* at [103].

D3: Ground 3: No valid explicit and informed consent obtained for fair and lawful processing

64. As children's nationality is clearly sensitive personal data within the meaning of the DPA and the Directive, it is data that requires *valid, explicit* and *informed* consent *from* the data subject, i.e. the child (or his parent / guardian).

65. Consent is only valid if the data subject is duly informed about the objective and consequences of providing the personal data. Consent can only be said to be informed if it is done through the provision of information which comprise a precise and easily understandable description of the subject matter requiring consent and outlining the consequences of consenting or not consenting. Consent cannot be implied, hence the requirement of *explicit* consent.

66. The witness evidence filed in these proceedings – from parents, school governors and, more importantly the NUT – all point to widespread poor practices in the manner in which schools collected and transmitted information about individual children's nationality and country of birth to the Defendant. Swadhin Bhattacharyya, a 12 year old boy, recounted being asked directly by a class teacher to fill out information about his nationality and country of birth on a piece of paper passed around the classroom.[27] Sonali Naik recounted her 9 year old son being asked to explain in front of the class why his mother had not consented to information about his nationality and country of birth being provided to the school.[28] That these incidents were not one-off isolated incidents is demonstrated by the NUT passing a motion at their annual national conference in April 2017 (before the autumn October 2017 census) instructing the National Executive to continue to press schools on the importance of giving information to children and their parents / carers that they are not required to provide their nationality and country of birth. This, however, is not all that is required for *informed* consent. For consent to be informed, and thus valid, the parents / carers and children must also be provided with information as to the *purpose* for which the information is being collected and how it will be used. The right to opt-out is not an answer; parents and children have to positively and explicitly give consent to the act of collecting. It cannot be said in the context of sensitive personal data processing, that if you do not opt out, you implicitly consent. That breaches the

[27] See **[V1/C335]**
[28] See **[V1/C385]**

obligations relating to the processing of sensitive personal data which requires informed *explicit* consent.

67. The template Privacy Notice on the Defendant's website, meant for discharging the duty to inform under data protection principles, provides *no information* reflecting the Defendant's stated aim of using the information for the purpose of understanding migratory trends in school. Nor does it explain that the information will inform targeted support for children with high English language proficiency needs. More importantly, there is nothing in the Privacy Notice to indicate that the information provided regarding nationality and country of birth will be used as an algorithm for any search of the Defendant's pupil data bases for the purposes of the Home Office's immigration enforcement roles and to *"create a hostile environment"* for those parents who are suspected immigration offenders. Putting aside whether the Home Office's strategic aims as set out in the information-sharing MoU with the Defendant can be characterised as legitimate, it is very plainly <u>not</u> the purpose for which the Defendant has collected (and will continue to collect) children's nationality and country of birth. It is also not information that the Defendant, in the template Privacy Notice, has acknowledged. Nor has the Defendant otherwise acknowledged this publicly. The only reason the Claimant is aware that the nationality algorithm is used is because its representatives attended a meeting with the Defendant during which her chief data officer informed the attendees of the meeting that this was being done.

68. Even if it could be said, which is not accepted, the Privacy Notice in its terms is capable of providing the necessary information for otherwise obtaining informed consent, it simply and plainly cannot be said to provide any relevant information that can be construed in a way to suggest that parents who have provided their children's nationality and country of birth information have validly and explicitly consented to the use of such information in the algorithm searches for the purposes of immigration control and enforcement.

<u>D.4. Ground 4: No necessary safeguards for retention</u>

69. Personal data is to be kept in a form which is accurate, up to date and permits identification of data subjects for *no longer than is necessary* for the purposes for which the data was collected or for which they are further processed.

70. In *Marper* the European Court of Human Rights concluded that the core principles of data

protection required retention of data to be proportionate in relation to the purpose of collection and limited in time. There the Court was concerned with the retention of DNA and fingerprints of individuals, and found that the indeterminate retention of such sensitive personal data was a manifest breach of the individual's right to privacy.

71. Whilst data retention may be permissible for statistical use, it must still satisfy the principle of necessity and must be achieved by a proportionate and effective means, such as anonymisation of the data or pseudonymisation of the data. There is, in the present claim, an entire absence of any transparent information explaining what safeguards are in place for the reviewing of retention of children's nationality and country of birth. More than 12 months ago now, the UK Statistics Authority wrote to the Defendant requiring her to put in place transparent plans for ongoing review of the collection and storage of such sensitive personal data from children. This has not happened. There is no information available in the public domain setting out plans for this happening at all and no information provided either publicly or via pre-action correspondence that indicates how the Defendant will ensure compliance with the limited retention of data principle per *Marper*.

72. The lack of transparency and absence of clear safeguards also gives rise to a real risk that the systematic collection and storage of sensitive personal data about children's nationality and country of birth has and will continue to breach the children's and their family's fundamental right to privacy and render the system unlawful.

73. By the Defendant's own admission, to date, he has carried out no assessment of the risks of a violation of the children's fundamental right to privacy arising from the collection and retention of such sensitive personal data. It is no answer for the Defendant to contend that there is no requirement in law to carry out a Privacy Impact Assessment. The onus remains with the Defendant to show by steps capable of being evidence, how he has implemented measures to ensure that the collection, transmission and retention of sensitive personal data about individual children's nationality and country of birth are safeguarded in accordance with the data protection principles and having regard to the primacy of the need to protect the fundamental right of children to their privacy.

E. Conclusion and Relief Sought

74. For the reasons set out above, the Claimant respectfully invites the Court to grant it permission

to proceed with this application for judicial review. The Claimant seeks a Cost Capping Order. Submissions in support of the order are set out at **Tab D of the Permission Bundle.**

75. The Claimant seeks the following substantive relief at the substantive stage of these proceedings:

75.1. A declaration that the systematic collection of children's nationality and country of birth information pursuant to the 2016 Regulations is unlawful and an order requiring the Defendant to take remedial steps (including deletion of data held) relating to children's nationality and country of birth already collected to date.

75.2. An order directing the Defendant to review and remake such regulations as is necessary to facilitate the collection of relevant individual pupil information which does not include individual children's nationality and country of birth, and to do so after consultation.

75.3. Such other relief as the Court sees fit.

75.4. Costs.

Dated 6 December 2017

SHU SHIN LUH
EMMA FITZSIMONS

Garden Court Chambers
Lincoln's Inn Fields