CO/8/2018

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

BETWEEN

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

Claimant

- and -

SECRETARY OF STATE FOR EDUCATION

Defendant

CLAIMANT'S SKELETON ARGUMENT FOR RENEWAL OF PERMISSION
For Hearing on 22 March 2018

References in [Vol/Tab/Pg] are to the 2-volume Permission Bundle. Volume 1 contains all the relevant court documents and evidence. Volume 2 contains the authorities.

Hearing: 1 hour

Essential reading

1) This skeleton argument
2) Claimant's grounds **[V1/A7]**
3) Defendant's Summary Grounds of Defence **[V1/A37]**
4) Witness statement of [redacted] dated 6 December 2017 **[V1/B1]** and relevant passages of those identified in this skeleton argument
5) Claimant's application for a Cost Capping Order **[V1/D15]**, witness evidence in support **[V1/D1, D10, D67]** and accompanying supplementary skeleton argument for renewal of a CCO

A. Introduction

1. The Claimant is seeking to challenge the legality of the systematic collection and storage of children's nationality and country of birth through the School Census which takes place three times each school year, most recently on 18 January 2018. Schools are under a statutory duty to comply with this systematic information collection exercise 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 already comprehensive list of information that schools must provide the Defendant from individual pupils three further categories of information (1) proficiency in speaking, writing and reading English; (2) nationality; and (3) country of birth. The

information is retained by the Defendant by reference to each pupil by name; there is no published time limit for retention and storage of data in this way. For the avoidance of doubt, the Claimant takes no issue with the collection of information about children's proficiency in speaking, writing and reading English but challenges the systematic collection of children nationality and country of birth.

2. It is the Claimant's case that the systematic collection of children's nationality and country of birth through the School Census is unlawful on the following grounds:

   2.1. **Ground 1**: It is not necessary to collect children's nationality and country of birth data to achieve the aim of understanding and monitoring the scale and impact of migration on schools. Its collection is in breach of the Data Protection principles and ultra vires the implied limits to the power under section 537A of the Education Act 1996.

   2.2. **Grounds 2 and 4**: There is a disproportionate and unjustified interference with children's fundamental right to privacy in the collection and permanent retention of children's country of birth and nationality. The Defendant has not shown that a less intrusive measure cannot be used to meet the stated aim or that the information collected and retained is attended by sufficient safeguards to prevent arbitrary interferences with the children's rights to privacy and / or to ensure the interferences are proportionate.

   2.3. **Ground 3**: The collection is unlawful for want of explicit consent from the children and parents of children and the absence of sufficient safeguards in breach of data protection principles, and particularly the strict restrictions of processing of sensitive personal data.

3. The purpose of the judicial review permission stage is to *"eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration."* Permission was refused by Lang J on 12 February 2018 on the basis that (1) the Claimant is an unincorporated association with no standing; (2) the challenge to the 2016 regulations is out of time; and (3) the power under section 537A permits the collection of children's nationality and country of birth information. The Learned Judge did not address her mind to the implied limits to the power under s. 537A by reference to data protection principles. With respect to the Learned Judge, the present case does not come close to being "hopeless", "frivolous", "misguided" or "trivial". The grounds pleaded are properly arguable and raise issues of considerable public importance for the right to privacy of 8.67 million school-aged children in England.

4. This skeleton argument is structured as follows:

   4.1. Standing of the Claimant: §§5-9

   4.2. Grounds: §§10-68

      4.2.1. Applicable Legal Principles: §§11-29

      4.2.2. Ground 1: §§30-46

      4.2.3. Grounds 2 and 4: §§47-64

      4.2.4. Ground 3: §§65-68

   4.3. Time limit: §69

   4.4. Alternative Remedy: §70

B. Standing of the Claimant

5. The Learned Judge misdirected herself in law in finding that an unincorporated association has no capacity to bring judicial review proceedings.

6. That unincorporated associations have capacity has been confirmed in the Administrative Court Judicial Review Guide 2017 at §2.2.1.3[1] which states:

> *The Court may allow unincorporated associations (which do not have legal personality) to bring judicial review proceedings in their own name. But it is sensible, and the Court may require, that proceedings are brought in the name of one or more individuals, such as an office-holder or member of the association, or by a private limited company formed by individuals. A costs order may be, and often is, made against the party or parties named as claimant(s).*

7. The Court approached this similarly in *R on the Application of (1) Friends of the Earth (2) Frack Free Rydale (by David Davis and Jackie Cray) v North Yorkshire County Council* [2016] EWHC 3303 in which the Second Claimant, Frack Free Rydale, was permitted to proceed by reference to two named individuals who are part of the group.p

8. In the current claim, contrary to the Learned Judge's finding, the Claimant has, as directed by the Administrative Court Judicial Review Guide, brought this claim via two named representative members, [redacted] (founder) and [redacted] This is clear from the detailed statement of facts and grounds at **[V1/A7]** and specifically at §§5-8 of the grounds under the heading 'Standing'. **[V1/A8-9]** Both named representatives have also made witness statements explaining their involvement with the Claimant organisation and their

[1] https://www.gov.uk/government/u7ploads/system/uploads/attachment_data/file/647052/Admin_Court_JRG_2017_180917.pdf

responsibilities: §§3-6 of [redacted] 1st witness statement **[V1/B2-3]** and §§1-12 of Mr. Baidoo's 1st witness statement **[V1/D10-13]**

9. The issue of concern for the courts in respect of unincorporated associations has not been the lack of legal personality but rather the need for adequate provision made for the protection of the defendant in costs: see *R v Ministry of Agriculture Fisheries and Food ex p British Pig Industry Support Group* [2000] EuLR 724 at [107]. The Claimant has addressed this in the evidence supporting their request for a Cost Capping Order (at **[V1/D15-25]** and in a separate supplementary skeleton argument). See also 2nd statement of [redacted] **[V1/D1-9]** and 2nd statement of Mr. Baidoo dated 16 February 2018 **[V1/D67-102]**

C. Grounds

10. The Claimant's overarching submission is that the collection of a child's nationality and country of birth is not necessary or proportionate to achieve the aim of assessing and monitoring the impact of migration on schools. The Claimant's claim requires consideration of the nature of delegated power under section 537A of the Education Act 1996 and the implied limits imposed on it by reference to the Defendant's data protection obligations. The Claimant's claim also raises a legal question as to the correct approach to "necessity" in the context of EU data protection principles. These are both questions of law for the Court to determine, as is the question of whether collecting children's nationality and country of birth is a proportionate measure to meet the Defendant's stated aim.

C.1. Applicable Legal Principles

Implied Limits to section 537A

11. Section 537A, entitled "Provision of Information about individual pupils", gives the Defendant a power to require all schools to provide such individual pupil information as may be prescribed under the regulations. **[V2/G40-42]** It is under this power that the 2016 regulations requiring collection of children's nationality and country of birth are made.

12. The Claimant does not dispute that s. 537A is one of several powers enabling the Defendant to generally collect information from schools for the purposes of assisting him to perform his education functions including to raise standards, accurately target funding and monitoring and developing education policy. The Learned Judge, in refusing permission, appears to consider that any information collected about an individual will be permissible so long as it falls within

the wide ambit of these purposes. In so finding, the Learned Judge misdirected herself as to the implied limits on the s. 537A power.

13. The Claimant submits that as there can be no question that s. 537A, on its face, involves the processing of personal data of individual pupils, it must be subject to implied legal limits on the Defendant, as a data controller, to only process data in accordance with data protection principles as contained in the Data Protection Directive ("DPD") and transposed into the Data Protection Act 1998 ("DPA 1998"). "Processing" includes *inter alia* obtaining, recording, holding, storing, using, and disseminating and/or otherwise making available information: s. 1, DPA 1998, article 2(b) DPD.

14. Data processing must adhere to the following clear principles:
    14.1. It must be done in a manner that *"protect(s) the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data"*: Article 1, DPD.
    14.2. It must adhere to data protection principles under Article 6 DPD and s. 4(4) and sched 1 DPA 1998. This means that information must only be collected, retained and used for specific, explicit, legitimate purposes, be that which is relevant and not excessive in relation to the purposes of which they are collected and/or processed, be accurate, and be kept in a form which permits identification of a data subject for no longer than is necessary.
    14.3. The information processed must be "necessary" in the exercise of lawful authority: Article 7(e), DPD, para 5(b), sched 2 to the DPA 1998.
    14.4. Where information is sensitive data *"revealing racial or ethnic origin"*, it must not be processed unless the subject has given his explicit consent and is carried out with appropriate safeguards for the rights and freedoms of the data subject: Article 8, DPD, paras 1 and 4, sched 3 to the DPA 1998.

15. The fundamental right to privacy referred to in Article 1 DPD is governed by Article 8 of the Charter on Fundamental Rights ("CFR"), which provides that:

> *1. Everyone has the right to protection of personal data concerning him or her.*
> *2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified …*

16. This right is subject to Article 52(1) CFR, which sets out the circumstances in which an interference with the rights expressed in the Charter may be justified:

> *Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*

17. A similar right to privacy, particularly in respect of a child's ethnic identity, is protected under Article 8 ECHR: *S and Marper v the United Kingdom* (2009) 48 EHRR 50 at [66]. [2] **[V2/G361]** Contrary to the Defendant's contention at SGD §41(e), information about a child's nationality and country of birth do constitute sensitive personal data *"revealing racial or ethnic origin"* within the meaning of section 2, DPA and Article 8 DPD: see Grand Chamber judgment in *Timishev v Russia* (2007) 44 EHRR 37 at [55] **[Supp/B4]**:

> *Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics,* ***ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds****.*

18. *Timishev* was cited with approval by the Grand Chamber in *Sejdić and Finci v. Bosnia and Herzegovina* (App Nos. 27996/06 and 34836/06*)* [2009] ECHR 2122 at [43] **[Supp/B3]** and further approved by the CJEU in *CHEZ Razpredeleni Bulgaria AD* [2016] 1 CMLR 14 at [46] **[Supp/B1]**.

19. This means the collection of children's nationality and country of birth is subject to heightened data protection safeguards.

20. Any process of personal data (whether sensitive or not) constitutes an interference with the right to the protection of such data: *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others* C-293/12 and C-594/12 [2015] QB 127 at [36]. The analysis is the same when considered in Article 8 ECHR terms: see the Supreme Court in *Catt v Commissioner of the Police of the Metropolis &* Anor [2015] UKSC 9 (at [6], [47], [58] and [60]) holding that any systematic collection and storage of information about an individual by the

[2] See also *R (W) v Secretary of State for Health* [2015] EWCA Civ 1034 [2016] 1 WLR 698 in which the Court of Appeal held (at [34] per Dyson LJ) that non-clinical information (including a patient's name, address, nationality) was inherently private for the purposes of privacy at common law and, by analogy, under Article 8 ECHR.

state in retrievable form constitutes *"an interference with private life."* See also *S and Marper* at [67]. **[V2/G361]** Interferences with the right to privacy will only be lawful and permitted if

20.1. they are in pursuit of a legitimate aim;

20.2. in accordance with the law, and;

20.3. necessary in a democratic society.

21. Thus, the exercise of the s. 537A power must not only be for a proper purpose (SGD §§36-37), the information sought under the power and the 2016 Regulations must also be that which is necessary in pursuit of a legitimate aim. The burden is on the Defendant to show how that the interference is *"necessary"* in a democratic society and proportionate to achieve that aim.

Proportionality

22. In *R (Lumsden and Ors) v Legal Services Board* [2015] UKSC 41 [2016] 2 AC 697, the Supreme Court held at [33]-[34], proportionality as a general principle of EU law involves a consideration of two questions:

22.1. First, whether the measure in question is suitable or appropriate to achieve the objective pursued; and

22.2. Secondly, whether the measure is necessary to achieve that objective, and that no other measures could have been equally effective but less restrictive of the freedom in question.

23. The burden to show no other measure could have been equally effective but less restrictive of the freedom in question is on the Defendant: see [55]

24. As to the approach of the Court,

24.1. The assessment of proportionality will depend on context. Where the validity of a national measure is under challenge before a national court on grounds that it infringes the EU principle of proportionality, it is for the national court to reach its own conclusion: [29].

24.2. Where the measure in question interferes with fundamental rights guaranteed in EU law, a strict approach is generally adopted by the Court: [37].

24.3. Justification tends to be examined in detail by the Court: [61].

24.4. In applying the less restrictive alternative test, it is necessary to have regard to all the circumstances bearing on the question whether a less restrictive measure could equally

well have been used: [67] The Court will be heavily reliant on submissions of the parties for an explanation of the factual and policy context.

Necessary for a Legitimate Aim

25. The concept of *"necessity"* laid down by Article 7(e), DPD is a concept with an independent meaning in Community law, and should be interpreted in a manner which fully reflects the objective of that Directive, as laid down under Article 1: see [48]-[52] of *Huber v Germany* [2009] 1 CMLR 49. There an Austrian businessman who had moved to Germany complained that storing data relating to him in a central register of foreign nationals discriminated against him as there was no such database for German nationals. At para AG27 **[V2/G186]** Advocate General Poiares Maduro pointed out that:

> *"The concept of necessity has a long history in Community law and is well established as part of the proportionality test. It means that the authority adopting a measure which interferes with a right protected by Community law in order to achieve a legitimate aim must demonstrate that the measure is the least restrictive for the achievement of this aim."*

26. He went on to say that if the processing might be liable to infringe the fundamental right to privacy, Article 8 ECHR becomes relevant. He cited the judgment of the CJEU in *Rechnungshof v Österreichischer Rundfunk* (Joined Cases C-465/00, C-138/01 and C-139/01) [2003] ECR I-4989 ("the Austrian Radio case") which held that if a national measure was incompatible with Article 8 ECHR, then it also failed to pass the threshold of necessity under Article 7(e) DPD: para AG27.

27. As to how "necessary" is to be defined, Advocate General Poiares Maduro drew on the case law of the European Court of Human Rights, stating that it should not be interpreted too broadly so as to allow fundamental rights to easily be circumvented. Whilst the ECtHR has held that the adjective *"necessary"* is not synonymous with *"indispensable"*, *"absolutely necessary"* and *"strictly necessary"*, neither has it the flexibility of such expressions as *"admissible"*, *"ordinary"*, *"useful"*, *"reasonable"* or *"desirable."* "Necessary" implies the existence of a *"pressing social need"*: see para AG27 of *Huber* **[V2/G186]** applying *Gillow v United Kingdom* (1989) 11 EHRR 335 and *Z v Finland* (1998) 25 EHRR 371.

28. The proposition advanced by Advocate General Poiares Maduro was later approved by Lady Hale in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55 [2013] 1 WLR 2421 at [25] and [27]. Lady Hale went on to hold that what is "necessary" (and how that should be defined) must be considered in relation to the processing to which it relates.

29. The more tenuous the link between the objective pursued by the intervention and the achievement of the aim, the much less likely that the information is necessary even if it is useful or helpful and therefore more difficult to justify as a significant interference with an individual's private life: *Christian Institute v the Lord Advocate* [2016] UKSC 5 at [89]. **[V2/G410]**

C.2. Ground 1: Not Necessary to Achieve the Stated Aim

30. The information collected, retained and used relating to a child's nationality and country of birth clearly fall within the definition of *"personal data"* because this is information which relates to a child who can be identified by that information: s. 1(1), DPA 1998; Article 2(a), DPD. Indeed, it is, as a matter of law, sensitive personal data because it is capable of revealing a child's ethnic or racial origins: *Timishev* applied. There thus can be no dispute that such collection and retention fall within the ambit of Article 8 ECHR and Article 7 CFR and constitute a prima facie interference with the child's private life.

31. In order to comply with the implied limits to s. 537A (as stated above), each time the Defendant exercises his s. 537A power to add more categories of individual pupil information to the School Census, he must do so in compliance with the DPA and the DPD and must demonstrate that the *additional* categories of information sought are necessary having regard to the vast amount of information already collected and stored about individual pupils pursuant to the Education (Information about Individual Pupils) (England) Regulations 2013.

32. The stated "aim" of the Defendant's collection of nationality and country of birth data has been described in various ways in the following official documents:
    32.1. In the Explanatory Memorandum to the 2016 Regulations, it is said that this would *"improve Central Government's understanding of the scale and impact of migration on the education sector"*: see §§4.2 and 7.2. **[Supp/A5]**
    32.2. In the School Census Guidance at **[V2/F86-87]**, the aim is put in this way: *"understanding trends in migration and the associated needs in the school system helps us ensure that all children, wherever they are from, have the best possible education."*

33. The Claimant does not dispute that in principle, understanding the scale and impact of migration on schools can constitute a legitimate aim where it is with the intention on improving education for all pupils. However, in accordance with the above legal framework on data protection, this must be balanced against the seriousness of an interference with the right to privacy of persons

concerns, in this case, the right of children to their privacy. The burden on the Defendant to show they are *necessary* in pursuant to the stated aim and proportionate to a serious infringement of a child's right to privacy is a heightened one in view of nationality and country of birth constituting information revealing ethnic or racial origin and thus are senisitve personal data. It is simply not enough for the Defendant to assert that there may be some (undefined and speculative) use in the future. Desirability or utility is not sufficient: *South Lanarkshire Council v the Scottish Information Commissioner* applied.

34. Notwithstanding it is for the Defendant to show 'necessity', the Claimant contends that there is no rational nexus between the *additional* information sought and the aim to be achieved in the following ways:

35. First, as already stated, the context is material to the proportionality assessment. The Defendant accepts that she *already* collects a vast amount of data from pupils on an individual basis.[3] This is material to the assessment of whether the *additional* information asked of pupils is necessary. Per data protection principle 3, personal data must be *"adequate, relevant and **not excessive**"* in relation to the purposes for which they are collected and/or further processed. The *anterior* question then is whether the data *already collected* is sufficient to provide meaningful data for the Defendant's purposes.

36. The Defendant has notably adduced no evidence with his SGDs explaining the rationale behind the decision to exercise the power under s. 537A to seek additional individual pupil information about nationality and country of birth above and beyond the vast amount of information already collected for the School Census.

37. Little insight can be gained from considering the Explanatory Memorandum to the 2016 Regulations. There, the Defendant stated (at §7.2) that the country of birth and nationality data are to be collected to be *"used alongside existing data items (such as 'ethnicity' and 'language') to improve central government's understanding of the scale and impact of migration on the education sector."* Rather than providing an explanation for why additional information is necessary and required, that passage of the Memorandum rather recognises that the School

[3] See SGD §11: Under the 2013 Regulations, schools were required to provide the Defendant with individual pupil data which included (among other things): gender; date of birth; unique pupil number; name; address and post code; ethnic group; date of admission to school; first language; any special education needs and provision made to meet those needs whether the pupil is a looked-after child; whether the pupil is eligible for free school meals; attendance records, including reasons for absence; fixed period of permanent (disciplinary) exclusions.

Census already collects information of assistance to the Defendant's understanding of the impact of migration. Nothing is said in the Memorandum as to why a child's country of birth and nationality would *additionally necessary y* for this analysis. Neither does the School Census Guidance, excerpts of which are in **[V2/F15-17, 85-87]**.

38. See by contrast the explanation provided by the Defendant on why proficiency in English language as an Additional Language was added by way of the 2016 Regulations at paragraph 5.3.3 of the School Census Guidance **[V2/F13-15]** and §7.3 of the Explanatory Memorandum to the 2016 Regulations. **[Supp/A5]**

39. Second, when the characteristics of nationality and country of birth are properly examined and understood, it is clear that they are not necessary for the purposes of understanding the scale and impact of migration on schools. Nor are they even useful markers.

40. British nationality law is complex; this is evident from the witness statements of Solange Valdez-Symmonds, director of the Project for the Registration of Children as British Citizens **[V1/C135]** and Lisa Matthews, coordinator at Right to Remain. **[V1/C47]** Both organisations provide legal advice, assistance and information to individuals to navigate the complex labyrinth of immigration and nationality law in the UK. At §10 of her witness statement, Ms. Valdez-Symmonds sets out the variety of ways in which a child may acquire British nationality **[V1/C138-139]**:

    40.1. A child may acquire British citizenship if she was born in the UK, is 10+ years old, and at least one of the child's parents has been granted settlement in the UK (i.e. indefinite leave to remain but not British citizenship): section 1(3) of the British Nationality Act 1981 ("BNA 1981").

    40.2. A child may acquire British citizenship if she was born in the UK and has lived continuously in the UK since birth until her 10th birthday and is of good character: s. 1(4), BNA 1981.

    40.3. A child may acquire British citizenship if born in the UK, is stateless and has been in the UK for more than 5 years, has not been outside the UK for more than 90 days in any year: para 3, sched 2 to BNA 1981.

    40.4. A child may ask the Home Office to exercise a discretion to register her British citizenship if she has been living in the UK for 10 years, is of good character and able to show her future clearly lies in the UK: s. 3(1) BNA 1981.

41. In all of these circumstances, the child may declare British citizenship in circumstances where at least one or both of her parents are Third Country Nationals and may not have any permission to remain in the UK. These circumstances demonstrate that a child's nationality on its own will often reveal nothing about whether the child or her family has migrated to the UK unless the parents' migratory history is also known. Knowing the child's nationality *per se* will therefore not provide the information that the Defendant requires to understand the scale and impact of migration. A similar problem arises in relation to collecting the child's country of birth.

42. On the face of it, there is nothing in the nature of a child's nationality or country of birth that would provide such *additional* information to that already collected via the School Census – namely ethnicity and English as an Additional Language – to lend *necessary* insight into the scale and impact of migration on schools.

43. Third, there is nothing to evidence the notion that there is a statistical gulf in the information already retained by the Defendant through past School Census that inhibits his ability to assess and understand the impact of migration on schools. Neither the Explanatory Memorandum nor the School Census Guidance identify in any or any specific terms that the existing information about ethnicity and English as an Additional language provide insufficient information for evaluating the impact of migration on schools.

44. On the contrary, the evidence adduced by the Claimant from educators, educational psychologists and headteachers positively shows that the fact of a child's migration status has had no detectable impact on how schools are able to deliver the curriculum and target funding to ensure that all children can "access the best possible education." The views of the educators should be afforded significant weight given they are the ones at the frontline of implementation of education policy to ensure all children achieve irrespective of where they are from. See for example:

    44.1. Charlie Matthews, a parent and an educational psychologist of 40 years, who states that there is no evidence that *"nationality and country of birth can be scientifically linked with educational abilities such that it would have a material effect on the development of the curriculum of the provision of support to an individual child"* **[V1/C2-4, §§8-10]**;

    44.2. Alex Crossman, Headteacher at The Charter School East Dulwich, who considers that whilst nationality and country of birth information may be useful for a specific history or citizenship lesson, it is not information that is *"necessary"* for a statutory body and there is no *"correlation between a pupil's nationality and their educational needs or*

achievements". On the contrary, longitudinal studies that have been done show immigration's net positive impact on educational achievements. **[V1/C185, §§7-8]**;

44.3. Christian Hicks, Headmaster at The Charter School North Dulwich, who points out that socio-economic factors play a significant and known role in outcomes, and thus are relevant to funding purposes for Pupil Premium. This however *"is not related to nationality. In fact, statistically the group that performs least well are white working class boys. Where there is ethnicity information, it shows particular ethnic groups performing better."* **[V1/C189, §8].** From his perspective as an educator for nearly a decade, his professional view is that it is the child's needs, not nationality, which are determinative of the local school response: *"I cannot see that knowing the nationality and country of birth of the students of The Charter School would materially change the way we allocate resources in the classroom. We do so on the basis of needs, learning and language proficiency. I do not consider it is necessary to collect nationality and country of birth information in order to assess educational need. If my school were not compelled to collect it, we would not do so."* **[V1/C191, §§12-13]**

44.4. The National Association for Language Development in the Curriculum, which published a position statement in January 2017 pointing out that *"nationality is not a key factor in terms of access to the school curriculum. The collection of information on a pupil's nationality does not necessarily provide any indication on that pupil's academic performance. … nationality should not be conflated with EAL (English as Additional Language) proficiency. They are separate issues.":* see Exhibit WD23 of the 1st witness statement of [redacted]. **[V1/B206]**

44.5. These concerns are notably echoed by the National Education Union ("NEU"), which represents the vast majority of teachers and trainee teachers working in England and Wales. See witness statement of Amanda Brown at **[V1/C347]**

45. The Defendant has therefore not shown that collection of this information is not excessive contrary to data protection principle 3 and in any event fair and lawful within the meaning of data protection principle 1. Where the data processed is not necessary, it cannot be a proportionate interference with fundamental rights of privacy.

46. For the reasons set out above, it is arguable that the information collected about the child's nationality and country of birth breaches the Defendant's data protection obligation under section 4(4) DPA 1998, constitutes an inevitable breach of Article 7 CFR and Article 8 ECHR, and are therefore ultra vires the implied limits of the s. 537A power.

C.3. Grounds 2 and 4: Not least restrictive means and therefore disproportionate

47. Even if, which is not accepted, the Defendant can show at trial (by producing evidence he has not presently adduced) that there is a rational nexus between the child's nationality and country of birth information and the impact of migration on schools, there still remains a question whether the collection and retention of children's nationality and country of birth data in a form that identifies the individual – and indefinitely – is proportionate to the aim.

48. The core principles of data protection require the retention of data to be proportionate in relation to the purpose of collection and insist on limited periods of storage (data protection principles 5 and 6). There must be appropriate technical and organisational measures against unauthorisied or unlawful processing of personal data (data protection principle 7). This is explicitly required where sensitive personal data is concerned: para 4, sched 3 to the DPA 1998.

49. The proportionality of information collected under the School Census falls to be considered with reference not only to the interference with the child's privacy and data protection rights but also to its impact on the school as a safe learning environment for all children consistent with their best interests.

50. It is the Claimant's submission that the processing of children's nationality and country of birth has a disproportionate and unjustifiable impact upon these rights and interests.

51. The starting point is that children's nationality and country of birth constituting highly sensitive personal data capable of revealing the child's ethnic or racial origins: *Timishev* applied. The purpose of collecting this information, according to the Defendant, is to track the scale and impact of migration on schools.

52. The question that arises for the Court is whether there are *no less restrictive and effective means* of data processing by which the Defendant could ascertain migratory trends in school. If there are, 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).

53. In *Huber v Germany*, supra, the CJEU had to similarly consider whether the centralised collection and retention of nationality of non-German EU nationals who are exercising free movement

rights in Germany was proportionate. The German state similarly stated the aim was to understand trends of free movement of EU nationals from elsewhere in the EU to Germany and to enforce Community law provisions on entry and residence in Germany of citizens of other EU member states. The way that the information was collected and retained was by reference to identified and named individuals. It was contended that there was no other less intrusive measure which could allow national authorities to enforce immigration law.

54. The CJEU in *Huber* rejected the German state's contention and found that it was unnecessary for the purposes of understanding trends of free movement from elsewhere in the EU to Germany to collect and retain information about individual's 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 found that:

    54.1. Whilst it is legitimate for the German state to want to know migratory trends of EU citizens from other member-states to Germany, that aim did not, of itself, justify the method of collection and storage, that is by reference to individualised named entries in a centralised register.

    54.2. The onus was on the German state to demonstrate that it would be impossible to enforce Community law provisions on entry and residence in Germany unless the data of citizens of other EU member states are centrally processed.

    54.3. An argument that centralised processing is more convenient, easier or quicker than alternative forms of processing was rejected as insufficient for the Government to pass this test.

    54.4. 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 nationals in and out of Germany.

    54.5. Statistical purposes, on its own, would not justify the storing and processing such data containing individualised personal information in a centralised register.

55. In essence, the CJEU in *Huber* concluded that understanding migratory trends is a legitimate aim for a member state, of itself, does not justify the micro-level collection and retention of individually identifiable sensitive personal data for this purpose.

56. The same analysis applies aptly across to the present claim. If the Defendant's stated purpose is to track migration's impact on education, it must similarly provide sound justification for processing data at a *micro*-level. The Defendant has failed to show this in that:

57. First, it does not appear that the Defendant has ever contemplated or properly addressed his mind to the possibility of less intrusive measures to achieve the stated aim. No such analysis is contained in the Star Chamber[4] minutes exhibited at WD5 to the 1st statement of [redacted]. **[V1/B55]** Nor was there any such reference in the Explanatory Memorandum or the School Census Guidance.

58. Second, save for a bare assertion to this effect at SGD §48, the Defendant has provided no basis, evidential or otherwise, that is capable of showing that the purpose of understanding migratory trends in schools cannot be achieved by the collection of anonymised data. Nationality, like residence status, is capable of changing over time; children with one nationality may acquire another nationality in their lifetime. Thus like in *Huber*, the Defendant must show how knowledge of a child's specific nationality at a given time informs understanding of the impact of migration on schools (and is a proportionate means of doing so).

59. Third, insofar as the Defendant relies on the assertions made at SGD §44, the Claimant contends that none of these had been identified in the Explanatory Memorandum to the 2016 Regulations or the School Census as part of the stated aim. Nor did they appear to have been the basis for seeking the Star Chamber's approval: Exhibit WD5 to the 1st statement of [redacted]. **[V1/B55-60]**

60. When properly considered, these assertions do not support a contention that a child's nationality and country of birth, collected and retained by name permanently, are necessary to achieve the stated aim:

    60.1. Whether pupil outcomes are more affected by English language proficiency or time spent in this country: in order to assess pupil outcomes against time spent in the UK, the date when the child first entered the UK has to be known. The Defendant does not collect this information. Neither nationality nor country of birth will assist him to extrapolate this information on any accurate basis.

[4] The Star Chamber is meant to help the Defendant to review all data collection relating to schools to ensure that all propsed collections are possible, necessary, good value and easy and as quick to complete as possible. See more at https://www.gov.uk/government/groups/star-chamber-scrutiny-board

60.2. Whether schools with larger numbers of migrants perform better: Current population census data already provide, on a macro-level, information about the impact of migratory trends on schools. Through other data sources about migrant population by different age group, areas of country, education authorities already able to account for the possible migration impact on schools in the area and accordingly plan for changing school populations. This is clear from the longitudinal studies that have been done in this area. See for example:

60.2.1. Research commissioned by the government's Migration Advisory Committee from the National Institute of Economic and Social Research on the *Impact of migration on the consumption of education and children's services and the consumption of health services, social care and social services* (December 2011). The report found no disproportionate negative impact of non-EEA economic migration on education, and found that although migration may impose certain demands on additional language support, pupil performance data overall showed a positive relationship between proportion of pupils with English as an additional language and achievement.[5]

60.2.2. A subsequent study by the LSE's Centre for Economic Performance drew a similar conclusion, finding that increased migration of Eastern European families had a negligible impact on the state school system.[6] There is nothing to suggest that School Census information (that did not include pupils' nationality and country of birth) inhibited an understanding of migratory trends' impact on schools.

60.3. Gathering evidence of good learning practices from children of different nationalities: This assumes some intrinsic link between nationality and performance which has no evidential grounding, that being clear from educators and educational psychologists whose professional experiences have been adduced into evidence by the Claimant: see above summary at §46. The Defendant has, in any event, provided no explanation for why such apparent good practices cannot be collected by other less intrusive means such as by surveying schools and local authorities for examples of good practices and / or why such means would not be as effective.

[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257236/impact-of-migration.pdf
[6] http://cee.lse.ac.uk/ceedps/ceedp137.pdf

61. Fourth, neither the Explanatory Memorandum nor the School Census Guidance identify any statistical gulf in the past School Census information that would need to be bridged by the collection and retention of additional information about individual pupils' nationality and country of birth identifiable by name on a permanent basis. Nor do they provide any explanation and/or reason for why existing data from population census, which breaks down (in an anonymised way) by nationality and country of birth of parents and children alike, do not already sufficiently address any apparent statistical gulf. Further, statistical purposes would, in any event, be insufficient to justify the interference with a child's fundamental right to privacy by collecting and retaining data in an individually identifiable way: *Huber* applied.

62. Fifth, it is clear from the Explanatory Memorandum and the School Census that the Defendant does not yet know whether and to what extent a pupil's nationality and country of birth may contribute to better understanding of the scale and impact of migration on schools. This can also be seen from the speculative assertions of uses contained at SGD §44. In these circumstances, and particularly as this concerns a child's sensitive personal data, there is a heightened need on the Defendant to show that there are specific safeguards to how the information collected is retained and used.

63. The question is not only about present collection and retention of the information but also about future collection, retention and uses of pupils' nationality and country of birth. The Claimant's concerns are that:

    63.1. The Defendant's case suggests that children's nationality and country of birth will be retained indefinitely in a form that will always identify the individual pupil by name to assess migratory impact on schooling but provides no justification for such permanent retention. Indefinite and permanent retention in such a form cannot be regarded as necessary for the purposes of assessing the impact of migration on schools or consistent with core data protection principles.

    63.2. The contention (at SGD §41(d)) that there is minimal effect on a child's private life and therefore no unjustified interference should be rejected for the same reasons given by the ECtHR in *S and Marper* at [67] and [121] **[V2/361, 373]**. There, the Court held that mere retention and storage of personal data by public authorities, however obtained and for whatever stated purpose, is to be regarded as having direct impact on the private life interest of an individual concerned, irrespective of whether subsequent use is made of the data.

63.3. The stated aim – understanding the scale and impact of migration on schools – is vague and open to extensive interpretation as to what that relates to and entails. The Defendant's assurance that he does not currently share children's nationality and country of birth with the Home Office does not, of itself, assures that it will not be in the future. This is especially because the Defendant, by his own admission, regularly shares information relating individual named pupils with the Home Office from the National Pupil Database under an information-sharing Memorandum of Understanding ("MoU"), the purpose of which was the maintain effective control. Previously, a child's nationality was also included as part of this MoU. There is currently no safeguard or control to prevent future sharing from resuming. These concerns are echoed by the NEU: see §§24-25 of Amanda Brown's statement. **[V1/C355-356]**

63.4. The Defendant has, neither through the School Census Guidance or otherwise, provided any information as to the safeguards relating to the retention of individual pupils' nationality and country of birth and how he will safeguard against uses of the pupils' nationality and country of birth as many be inconsistent with the guarantees under data protection principles: *S and Marper* at [103].

63.5. The only safeguard the Defendant can point to is that s. 537A prevents publication of individual pupils' nationality and country of birth: SGD §41(c). It is not an answer to contend that the Defendant has already made provision for the safe retention of sensitive personal data such as ethnic origin and information about a child's special educational needs. That information is held in the National Pupil Database whereas individual pupils' nationality and country of birth is not: see Exhibit WD26 to [redacted] 1st witness statement **[V1/B213-215]** No information has yet been made available (and accessible publicly) on safeguards against abuse or misuse of such information about the child's nationality and country of birth. The purported safeguard is inherently weak.

63.6. The Defendant's assertion that the parents' right to refuse sufficiently counters any interference fails to have regard to the compelling concerns raised by the NEU, the union which represents the vast majority of teachers in England and Wales. The concerns were so great that the NEU passed a motion at its annual conference in April 2017 condemning this as an inadequate safeguard: see §§10-11 of Amanda Brown's witness statement and Exhibit AB3. **[V1/C350, 367-368]**

64. Sixth, the evidence before the Court also shows serious concerns that the collection and retention of children's nationality and country of birth undermines children's best interests and

the importance of schools as a safe environment for all children, regardless of where they are from. See witness statements from:

64.1. Arun Mistry, a primary school teacher at §§20-23 **[V1/C277-279]**, speaking of the importance of schools being a safe environment for learning;

64.2. Ben Gidley, parent and senior lecturer at Birkbeck College, University of London, specialising in migration and integration, drawing on academic research which shows that migrant children feel safe at school: at §§10-11 and Exhibit BG1. **[V1/C64, 80-82]**. At §§25-27, he goes on to state that the collection of pupils' nationality and country of birth data in an individually identifiable and named way will change perceptions of schools and make migrant communities more wary, thereby undermining school cohesion.

64.3. [redacted], parent, school governor and senior lecturer at University of East London, highlighting (at §§1-17 **[V1/C251-255]**) the importance of trust with migrant children, the "transformative effect" trust has on children's outcomes and the undermining of this by the focus on nationality and country of birth, which appear directly linked with immigration status and highlighting differences between children rather than similarities.

64.4. Amanda Brown, Deputy General Secretary of the NEU, representing a vast majority of teachers in England and Wales who have expressed deep concerns of how this undermines schools being a safe and open space: at §§22-23 **[V1/C354-355]**.

Ground 3: No explicit valid consent for collecting sensitive personal data

65. Contrary to SGD §60, a child's nationality and country of birth constitutes sensitive personal data because it is capable of "revealing ethnic or racial origin": *Timishev* applied. The Defendant is thus required to obtain explicit consent from the child to the processing of the personal data: para 1, sched 3 to the DPA 1998. Consent is only valid if the data subject is duly informed about the objective and the consequence of providing the personal data. The information must at least comprise a precise and easily understandable description of the subject matter requiring consent and outlining the consequences of consenting or not.

66. The witness evidence filed on behalf of the Claimant – from parents, school governors, and more important the NEU – 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. See witness statement of Swadhin Bhattacharyya, a 12 year old boy recounting his experience of 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: **[V1/C335]**. 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. **[V1/C385]** That these are not one-off isolated incidents can be seen by the NEU passing a motion at their annual national conference in April 2017 raising concerns about the lack of clarity around the approach to collecting such information: see §§10-11 and 27-29 of Amanda Brown's statement for the NEU. **[V1/C350, 356]**

67. The template Privacy Notice, intended to provide the information required under the DPA to secure informed consent, contains no information about the Defendant's stated aim and thus fails the first hurdle of the duty to inform: Exhibit WD3 to 1st witness statement of [redacted]. **[V1/B39-45]**

68. As for the Defendant's fall-back contention (at footnote 3), this provides no answer to the Claimant's contention as to the heightened safeguards required for sensitive personal data. For reasons set out under Grounds 1, 2 and 4 above, the collection of this data is not necessary and in any event not proportionate to achieve the stated aim.

D. <u>Time-limit</u>

69. The Defendant contends that the claim is out of time because the 2016 Regulations came into effect on 1 September 2016. The 2016 Regulations remain in force and are being applied to children (represented by the Claimant) three times a year, and most recently on 5 October 2017 and again on 18 January 2018. The Claimant seeks to challenge a continuing act (i.e. the continued application of the policy) and not the one-off decision to introduce the 2016 Regulations. The claim is not out of time. The Claimant adopts and does not repeat the further particulars at §4 the Grounds of Renewal. **[V1/A90]**

E. <u>Alternative Remedy</u>

70. Contrary to the Defendant's contention (and the Learned Judge's acceptance of this), a complaint to the Information Commissioner is not an alternative remedy. The dispute in this claim raises questions of law as to the compatibility of secondary legislation requiring the collection of children's nationality and country of birth data pursuant to the School Census with data protection principles and the vires of the Defendant's exercise of s. 537A power to collect such sensitive personal information on a systematic basis. The Information Commissioner has no prerogative powers to declare and/or quash the systematic collection of pupils' nationality

and country of birth information. Nor can it direct the Defendant to review and remake regulations that would be consistent with the implied limits of the power under s. 537A Education Act 1996 to require schools to collect specified individual pupil information. This is a matter squarely within the supervisory jurisdiction of the Administrative Court. The Claimant adopts and does not repeat the further particulars at §§8-9 of the Grounds of Renewal. **[V1/A92]**

F. Conclusion

71. For the reasons set out above, the Claimant respectfully submits that nothing in the Defendant's SGDs contain any knock-out blows to the Claimant's case. The case put by the Claimant is arguable and raises a point of public importance regarding children's right to privacy in the School Census. Accordingly, the Claimant invites the Court to grant it permission to proceed with its claim for judicial review.

Dated 19 March 2018

SHU SHIN LUH
EMMA FITZSIMONS
Garden Court Chambers
Lincoln's Inn Fields