Neutral Citation Number: [2025] EWCA Civ 147

Case No: CA-2024-002669

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Fordham
[2024] EWHC 2828 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2025

Before :

LORD JUSTICE BEAN
LORD JUSTICE JEREMY BAKER
and
LORD JUSTICE HOLGATE

- -

Between:

The King, on the application of RWU (by his litigation friend LTA) (Anonymity Direction continued)	**Appellant**
- and –	
THE GOVERNING BODY OF A ACADEMY	**Respondent**
- and -	
LONDON BOROUGH OF SOUTHWARK	**Interested Party**
- and -	
BLACK EQUITY ORGANISATION	**Intervener**

- -
- -

Nicola Braganza KC, Ollie Persey and Alex Temple (instructed by **Bindmans LLP**) for the **Appellant**
Leon Glenister and Siân McGibbon (instructed by **Stone King LLP**) for the **Respondent**
Duran Seddon KC and Nadia O'Mara (instructed by **Freshfields LLP**, acting pro bono) made written submissions for the **Intervener**
The Interested Party did not attend and was not represented

Hearing date: 6 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. The Claimant is a 15-year-old boy who on 18 January 2024 was permanently excluded by the Principal from the Academy which he had been attending. A disciplinary panel of the Governing Body ("GDP") refused to reinstate him. This decision was quashed by an independent review panel ("IRP)" which directed the governors to reconsider the case. The GDP's decision on reconsideration, recorded in a letter dated 24 June 2024, was that he should not be reinstated.

2. Almost three months after this decision, on 8 September 2024, the Claimant applied for judicial review. An expedited one-day hearing was fixed for 24 October 2024 and took place before Fordham J. In his judgment ([2024] EWHC 2828 (Admin)) the judge granted permission for judicial review but dismissed the substantive claim and refused permission to appeal.

3. By an order made on the papers on 19 December 2024 Stuart-Smith LJ ordered that this court should consider the matter on a rolled-up basis, which we did at a hearing on 6 February 2025. The primary facts are not in dispute and are set out clearly and comprehensively in the judgment of Fordham J. The Claimant remains entitled to anonymity.

4. The Claimant had started at the Academy in Year 7 in September 2020, aged 11. After three years at the school, he started Year 10 in September 2023 aged 14. Then, after the autumn half-term in Year 10 – and within five weeks between 31.10.23 and 5.12.23 – he was suspended five times. The Academy's Behaviour Policy explains that, at the point of a sixth suspension within a year, the Principal will consider permanent exclusion ("PEX") for persistent breaches of the Behaviour Policy. The last three of these five suspensions related to incidents which occurred while he was being parented at home only by his father, while his mother was visiting Nigeria (18.11.23-26.12.23).

5. The suspensions were as follows:

   (1) The Claimant was suspended (31.10.23) for 3½ days for swearing at a member of staff. He had been given a detention after failure to follow a simple request to move seats, after being given a warning and a countdown. When he received the detention, he repeatedly said to the member of staff "fuck off man". When the member of staff spoke to him to say that he needed to pack up, he continued to say "fuck off man".

   (2) The Claimant was suspended (15.11.23) for one day after he and two other students jumped the Year 7 playground gate during lesson time and ran away from the Academy. They were seen by a member of staff and the CCTV was viewed.

   (3) The Claimant was suspended (28.11.23) for one day after he arrived at school seemingly under the influence of drugs. When searched he was found to have a lighter and a vape (both prohibited under the Academy's Behaviour Policy). When placed in the Reintegration Room, a supervised room within the Academy for students who have failed to follow the Behaviour Policy, he repeatedly fell asleep.

   (4) The Claimant was suspended (29.11.23) for two days for bringing the Academy into disrepute. He had been involved in an incident outside of school, during the

school day, and in school uniform, which resulted in the police bringing him to school. The police were called to a local tower block after they had received calls about a group of students throwing roof tiles off of the balcony and smoking cannabis. One roof tile almost hit a resident. No cannabis was found but some students had lighters and other cannabis paraphernalia.

(5) The Claimant was suspended for four days (5.12.23). The previous day, he again failed in the Reintegration Room and had been placed outside the Principal's office. The Principal spoke to him for 10-15 minutes in the office to see what the issue was and to run over the Pastoral Support Plan (“PSP”) which had been set up (on 1.12.23). He was outside the Principal's office between 10:00am to 3:30pm when he did not write a word and slept at least twice despite the Principal prompting him a number of times.

6. The judge observed that one of the key questions he was asked to consider was about support interventions by the Academy, and whether sufficient time had been allowed before the "last resort" of PEX. The Academy made a Multi-Agency Support Hub (“MASH”) referral on 29.11.23, after the incident which led to the third suspension. MASH referrals are addressed in the Academy's Safeguarding Policy, which also describes Early Help (additional help where the needs of a child are beyond the level of support provided by universal services). MASH referrals are "safeguarding" referrals where a child is considered to be "at risk of harm". The referral was made by the Deputy Head of Year, due to the concerns regarding the Claimant being brought by the police, his friendship group outside school, possible drug misuse and the Claimant's parents finding it very difficult to manage his behaviour at home. The MASH referral was picked up within the local authority by Family Early Help (“FEH”) and a family early worker (“FEW”) was assigned.

7. There was follow-up to the MASH referral. After the Claimant was absent on a number of days in the second week of the new term in January 2024, the Head of Year emailed the FEW on 15 January 2024 to check whether they were working with him. The FEW's email response the same day was that "the case was stepped up to Social Care given the safeguarding concerns" and that a social worker had been allocated. The Head of Year emailed the social worker on 16 January 2024 to say that he had advised the Claimant's mother to call the police and report him "missing", adding that:

> “Unfortunately, in the past, [the Claimant] has been collected by the police from a building where he was with a group of boys that were smoking cannabis and throwing pieces of the tile at residents. We are worried that [he] may still be spending his time with this group rather than coming to school. ”

8. A PSP had been set up on 1 December 2023. PSPs are described in the Academy's Behaviour Policy. A PSP is a structured and coordinated 16-week school intervention designed to support students at risk of PEX. They are used for students who have received a set number of negative behaviour points or suspensions and who are not responding to other forms of intervention. They are created with the involvement of key staff, parents or carers, the student and any other relevant professionals. Targets are set for a student, using information obtained from their teachers, and are reviewed every 4 weeks. They provide a tailored and structured form of intervention which is

regularly reviewed so that progress can be checked and changes can be made. When the Claimant's PSP was set up, an initial meeting took place that day. The attendees included the Claimant, his father and the Academy's Designated Safeguarding Lead ("DSL"). The recorded reasons for the PSP were persistent absence from school, including an attempt at running away from school; lack of proactive work in and out of lessons in order to ensure success, the Claimant having shown great work in the past, but having recently shown a lack of interest which had impaired his work in lessons; and poor conduct outside of school, which could be dangerous to himself and would jeopardise his professional success.

9. The picture regarding support and interventions by the Academy is completed by the following. The PSP recorded the following previous school interventions: Ambition Centre; Football Journeys (Year 9); FutureMen (Year 9); and Khulisa group counselling (Year 8). Football Journeys is a programme where students from different postcodes work together on video projects around what type of person they are in the community and then meet up to play football. FutureMen is a programme specifically tailored to young men at risk of potential gang involvement, criminal activity or criminal exploitation and the Claimant was "profiled" to participate. Khulisa is a programme to prevent PEX brought in for students matching a similar "profile" to the Claimant. In addition, the Claimant had been offered, but had refused, further counselling. The Academy had offered to work with the local authority's SAFE task force, with paperwork sent for the parents to sign so that the Claimant could join. The Claimant's father had consented to the referral to FEH and SAFE taskforce. Football Journeys and the SAFE Taskforce are described in the Academy's Behaviour Policy as examples of pastoral interventions. Home visits had been carried out from November 2023 onwards.

The permanent exclusion

10. When the Claimant did not arrive on time for school on 18.1.24, the Academy contacted his mother who said he had left home at 8am. He arrived at 09:30. Later that morning, the Head of Year emailed the assigned social worker (at 11:18) to say:

> "We've been given a bit more information on [the Claimant]: - Mum was concerned about [him] sneaking out of the house and returning at 4:30am on numerous occasions. There is a friend that lets the group enter a building where they smoke weed and use canisters at the same time. (I'm interpreting this as NO [nitrogen oxide] canisters). This has been shared in videos on snapchat but we have not seen it. Some students are from our school, but many are not. Today he arrived at 9.30am. [His] Pastoral Support Manager, had a good conversation with him in order to support him coming to school on time. "

11. Several members of staff reported that the Claimant smelt strongly of cannabis. He originally refused to allow his blazer to be searched. His father and mother were contacted by the Assistant Principal for Behaviour ("APB"). The Claimant's mother came into the Academy. There was a discussion and then a physical altercation between mother and son. That was de-escalated. The Claimant indicated that he had drugs in his possession and was found to be in possession of a bag of cannabis in a foil packet, rizla papers, a lighter, a vape and £270 in cash. Drugs are banned under

the Academy's Disciplinary Policy, as are lighters and vapes. The Claimant was asked about the cash and said he was holding it for a friend to buy a jacket. When she was then asked about the cash, the Claimant's mother stated that she had given him the money for a jacket.

12. It was in these circumstances that the Principal made his decision to impose the PEX. In the decision letter (18.1.24) the Principal wrote (the paragraph numbering was added by the judge):

> “[1] As we discussed when we met earlier today, [the Claimant] has been permanently excluded as a result of persistent breaches of the school's behaviour policy, such that allowing him to remain at [the Academy] would significantly risk harming the education and welfare of others at [the Academy].
>
> [2] As you know, before today [the Claimant] had been suspended from the Academy five times this academic year. Today he unfortunately took the decision to bring a Class B drug onto the school site; an illegal act and clear violation of the school’s behaviour policy. He was also in possession of a lighter, a vape, a grinder, tobacco, rizla and £250. As you are aware, due to the severity of this we have reported this matter to the police. As this behaviour would have led to a suspension, in line with the Academy's behaviour policy I took the decision to permanently exclude [the Claimant]. A full outline of the behaviour which led to this decision will be included in the Permanent Exclusion report.
>
> [3] Following the … Guidance: "A decision to exclude a pupil permanently should only be taken: in response to a serious breach, or persistent breaches, of the school's behaviour policy; and where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school". I deem that [the Claimant's] behaviour represents persistent breaches of the school's behaviour policy…”

13. Following the Principal’s decision to exclude the Claimant (“the PEX decision”) arrangements were made for a managed move to another Academy. However, on 22 February 2024 the Claimant was arrested in the community for possession of a Rambo knife. The second Academy was made aware of this and because of concerns associated with “bringing the school’s reputation into disrepute”, the managed move failed. This incident of possession of a knife, coming as it did after the PEX decision, was disregarded by the GDP, the IRP and the GDP on reconsideration. As Fordham J drily observed: “perhaps unsurprisingly, this was not criticised by the family or its advocate”.

Policy and guidance documents

14. The Academy has a safeguarding policy, including what the school should do in a possible case of child criminal exploitation (“CCE”). One member of staff is

appointed as the Designated Safeguarding Lead ("DSL"). The policy states as follows:-

> "Child Criminal Exploitation (CCE). CCE is where an individual or group takes advantage of an imbalance of power to coerce, control, manipulate or deceive a child into any criminal activity in exchange for something the victim needs or wants, and/or for the financial or other advantage of the perpetrator or facilitator and/or through violence or the threat of violence. The victim may have been criminally exploited even if the activity appears consensual. CCE does not always involve physical contact; it can also occur through the use of technology. CCE can include children being forced to work in cannabis factories, being coerced into moving drugs or money across the country (county lines), forced to shoplift or pickpocket, or to threaten other young people. Some of the indicators of CCE are: children who appear with unexplained gifts or new possessions; children who associate with other young people involved in exploitation; children who suffer from changes in emotional well-being; children who misuse drugs and alcohol; children who go missing for periods of time or regularly come home late; and children who regularly miss school or education or do not take part in education. Any possible CCE case will be shared with the DSL with a view to referring to appropriate agencies following the referral procedures.
>
> County Lines. Criminal exploitation of children is a geographically widespread form of harm that is a typical feature of county lines criminal activity: drug networks or gangs groom and exploit children and young people to carry drugs and money from urban areas to suburban and rural areas, market and seaside towns. Key to identifying potential involvement in county lines are missing episodes, when the victim may have been trafficked for the purpose of transporting drugs. Like other forms of abuse and exploitation, county lines exploitation can affect any child or young person (male or female) under the age of 18 years; can still be exploitation even if the activity appears consensual; can involve force and/or enticement- based methods of compliance and is often accompanied by violence or threats of violence; can be perpetrated by individuals or groups, males or females, and young people or adults; and is typified by some form of power imbalance in favour of those perpetrating the exploitation. Whilst age may be the most obvious, this power imbalance can also be due to a range of other factors including gender, cognitive ability, physical strength, status, and access to economic or other resources."

15. As Fordham J noted at [30] of his judgment, the Home Office Guidance on Criminal Exploitation of Children and Vulnerable Adults explains that CCE "is a form of modern slavery" and "as such, if you are a designated First Responder for the National Referral Mechanism (NRM), you must … refer any child you suspect of being a potential victim of modern slavery to the NRM". Police forces and local authorities are each designated First Responders. The Home Office Guidance says, in relation to schools and other organisations, in the case of any child who they think may be at risk of "county lines exploitation", the designated safeguarding lead is to make a safeguarding referral to the responsible local authority. It is for the local authority's social services to consider, with safeguarding partner agencies, whether any further actions are necessary to protect the child.

16. What is said in the Academy's Safeguarding Policy fits with what is said about CCE and County Lines in the Modern Slavery Statutory Guidance issued pursuant to s.49 of the Modern Slavery Act 2015. The Modern Slavery Statutory Guidance addresses NRM referrals: see *R (TDT (Vietnam)) v SSHD* [2018] EWCA Civ 1395; [2018] 1 WLR 4922 at §33(1). It explains that the approach to child offenders continues to recognise and promote safeguarding children as the primary objective, to see the child first and the offender second; that all work by professionals should be child-centred and child-focused. It says this (at §9.35):

> "If anyone has concerns that a child may be a victim of [CCE] they should be referred to Local Authority Children's Social Care, who will decide within 24 hours what action to take including (where there is reasonable cause to suspect that a child is suffering or is likely to suffer significant harm) whether to, convene a strategy discussion. A timely assessment based on the needs of the child will then take place within 45 days. ………With cases of CCE, it is important that Local Authorities consider the wider context and extrafamilial threats when safeguarding children…"

First hearing before the GDP

17. The GDP hearing was convened on 18.3.24. The GDP was comprised of a governor appointed as Chair of the GDP and two other Governors, assisted by a clerk and a note taker. The hearing was attended by the Principal, the Assistant Principal for Behaviour, the Claimant, his mother and the local authority's Senior Education Welfare Officer. As the IRP was later told, the assigned social worker was invited but did not attend. There was a bundle of documents.

18. The GDP deliberated and reached its decision. This was communicated by decision letter. It referred to the PEX "for persistent breaches of the Academy's Behaviour Policy"; satisfaction that the Principal had "acted within his legal powers"; consideration of the interventions the Academy had put in place to support the Claimant; consideration of special needs, disability and protected characteristics (the Claimant being of Black African heritage); consideration of the £270 cash and the mother's explanation that she was its source; the GDP's satisfaction as to "the fairness of the procedure"; its satisfaction that PEX was a last resort; and this conclusion:

> "Having considered the representations made by all parties, and the interests and circumstances of [the Claimant], and others in the Academy community, the panel concluded that, based on the evidence presented to them, [the Claimant] had persistently breached the Academy's Behaviour policy. They are satisfied that [the Principal's] decision to exclude [the Claimant] was lawful, reasonable, and fair."

Review by the IRP

19. The IRP hearing was convened on 13.5.24. The IRP was comprised of a lay member as Chair, a Governor member and a headteacher member, assisted by a clerk. The hearing was attended by the Claimant, his mother, his legal representative (Ms Aqsa Suleman, an education advocate) and his social worker; by the Principal, the GDP Chair and the GDP's clerk; and by an SEN expert. There is a full 36-page record of the IRP hearing; together with a 3-page record of the deliberations and decision. These are then combined to form a Decision Document (29.5.24).

20. In applying judicial review principles, the IRP found no "illegality". It was satisfied that the GDP acted within its legal powers, followed the applicable laws and regulations and made a decision within the scope of its authority. The IRP found that there were no equalities issues: the Academy showed due regard to the Claimant's protected characteristics in the context of the PEX and met its duties under the Equality Act 2010. The IRP said that – insofar as it could see – the Academy had followed its own policies and guidance. As to the five suspensions and the events of the day of the PEX, the IRP recorded that it found – applying the balance of probabilities – that the Claimant had persistently breached the Academy's Behaviour Policy and that he was responsible for the breaches which were alleged. As to procedural impropriety, the IRP said it was satisfied that the GDP's consideration was not "so procedurally unfair or flawed that justice was clearly not done".

21. The IRP's reasoned decision said this about "irrationality":

> "Irrationality: Did the governing board rely on irrelevant points, fail to take account of all relevant points, or make a decision so unreasonable that no governing board acting reasonably in such circumstances could have made it?
>
> [1] This was specifically challenged by the Appellant and was considered by the Independent Review Panel in depth in any event. The Panel considered the issue of irrationality and whether the decision to permanently exclude [the Claimant] was reasonable and rational. The Panel was content that on the balance of probabilities the evidence as presented by staff members and which was accepted by the [GDP] was the likely version of events which happened on 18th January 2024. The IRP did not however accept that the decision taken to permanently exclude was rational or reasonable and in coming to this conclusion considered the following:

[2] The IRP considered the family's submission that the timeline of suspensions was very short and that they questioned whether enough pastoral support and intervention work was considered and given enough time to be effective given the timeline presented from the first suspension to the sixth. The governors on their own admission focused mainly on the last incident and took the other incidents which the suspensions relied on at face value as they were not challenged by the family, and the governors were clear that they felt enough intervention had been put in place. The IRP were content that a MASH referral was in place. However, the governors did not have in front of them any reintegration meeting notes and did not ask for them and the governors did not have in front of them the PSP and did not ask for it. The IRP was concerned that the PSP did not have a list of current interventions to support [the Claimant].

[3] The IRP found that whilst some intervention had been put in place in the short period of time however, at a crucial period of time where the child appeared to be going through some form of crisis, the PSP is put in place with no form of meaningful pastoral support that is detailed, and the governors did not question it, they did not see the reintegration meeting notes and they did not robustly probe in relation to this therefore the IRP found it unreasonable that they concluded that enough had been put in place. The IRP would note that [the Claimant] had not been given a trusted adult which could have been a supportive measure.

[4] The IRP looked at the independent evidence available to the governors and was concerned that most were edited from emails meaning that paragraph 181 of the Statutory Guidance was contravened. No independent evidence was supplied for suspension four and independent evidence supplied for suspension two did not mention defiance or bringing the school into disrepute. The IRP found it irrational that the governors were so willing to take the Head of Year and Principal's outline at face value with such a lack of independent evidence which also included a lack of suspension letters, just because the family did not contest it.

[5] The family's submission that the school had contravened paragraph 4 of the Statutory Guidance with the lack of the pupil's voice throughout the pack was discussed by the IRP. The IRP accepted [the Principal] had spent an amount of time on the 18th January with [the Claimant] in order to feel that he had taken into consideration [the Claimant]'s voice within that incident. [The Principal] conceded that it would have been better to have asked [the Claimant] to write a statement. [The

> Claimant]'s voice is lacking in all the other incidents with no statements in the pack.
>
> [6] The IRP was concerned that the governors did not make enquiries into why there were no statements from [the Claimant] but relied on the fact that [the Claimant] did not want to extend his voice on the matter in their meeting.
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> [7] The IRP discussed whether [the Principal] and the governors had taken [the Claimant]'s vulnerability to child criminal exploitation enough into consideration and, in hearing the social worker's timeline and the school's understanding that Mum had concerns of peers and not others, accepted that the school had taken child criminal exploitation into consideration at the time when [the Principal] made his decision and by the governors at the [GDP]. The IRP found there was "not enough curiosity" around [the Claimant]'s background, needs and circumstances from the governors which would have enabled them to come to a reasonable conclusion on [the Claimant]'s needs and whether they had been fully met.
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> [8] The Panel were satisfied that the governing board did not rely on irrelevant points but found that the governors failed to take account of all relevant points and in doing so made a decision so unreasonable that no governing board, acting reasonably in such circumstances would have made it."

This is what the IRP added in the context of "procedural impropriety":

> "Considering safeguarding concerns around substance misuse and child criminal exploitation had been raised in the circumstances of this case the IRP were concerned that the governors did not have to hand the school's Safeguarding Policy, the Keeping Children Safe in Education Guidance 2023, the Behaviours in Schools Guidance and the DfE Statutory Guidance on Suspension and Exclusion 2023 which would have supported them in meeting their Statutory decision…
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> The Panel balanced the interests of the excluded pupil against the interests of all the other members of the school community and determined that they had concerns about the needs of [the Claimant] and questioned whether his background and vulnerabilities had been given enough consideration by the governors to come to a fair and reasonable judgement when balancing interests."

The reconsideration by the governors in June 2024

22. At the GDP reconsideration hearing, the Principal told the GDP orally:

> "To sum up my point I believe the actions the school has taken have been proportionate. [The Claimant] is a risk and allowing him to remain here is a risk to the wellbeing of other students in the school and that is why we took the decision. When suspensions were ramping up, work was undertaken to help [him]. The severity of the incidents in particular the last incident were risking the wellbeing of the other students in the school…
>
> It does come to a point when he becomes a risk to others. His behaviour is spiralling; this is a massive risk to the students…
>
> What we are discussing today is not easy and none of us want to be here by choice. We all want [the Claimant] to go on and do well but this is also about the other students in the school. You cannot bring drugs into school, you cannot be continuously defiant. Have we followed the policy? Yes. Have we offered support? Yes. Have we considered the specifics of the child? Yes. Would I do it again? Absolutely. If [the Claimant] is to return to [the Academy], we will do everything we can to reintegrate him but [his] returning here will have a negative impact on others."

The education advocate representing the Claimant referred during the hearing to the risk of exploitation if her client were to remain permanently excluded, but did not argue that he might already be the subject of CCE.

23. The GDP's decision on reconsideration, which is the subject of this application for judicial review, was contained in a letter of 24 June 2024. It is most easily read with the numbering added by Fordham J at [50] of his judgment:

> "[1] Following the recommendation of the Independent Review Panel (IRP) held on Monday, 13th May 2024, the governors met on Monday 17th June 2024, to reconsider their decision to decline the reinstatement of [the Claimant] to the Academy. The Governors' Disciplinary Panel consisted of the same governors who sat on [the Claimant]'s original exclusion panel. I am writing to inform you of their decision.
>
> [2] The governors gave lengthy and careful consideration to the IRP's direction but concluded to uphold their original decision. As such, they agreed that [the Claimant] should not be reinstated to the Academy. The reasons for the governors' decision are set out below.
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> [3] In coming to their decision, the governors considered additional information which was not available to them during the original governors' review meeting, and which the IRP felt could have and should have been available. The additional information included: [the Claimant]'s PSP (Pastoral Support Plan); notes from suspension reintegration meetings; additional

statements from previous suspensions and the exclusion; relevant information from CPOMS (Child Protection Online Monitoring System); additional information from [the Principal] on the exclusion variation rates in the Academy; and copies of all relevant Academy policies.

[4] The governors considered all the additional information provided alongside all the previous information presented at the original governors' review meeting. They also noted [the family's advocate's] additional oral representations on behalf of the family.

[5] Having reviewed the additional statements relating to [the Claimant]'s previous suspensions, listened to all the oral presentations, and read the behaviour logs in the exclusion pack, the governors were satisfied that [the Claimant] had persistently breached the Academy's Behaviour Policy. The veracity of the additional information presented by Academy staff was not challenged by any party at the meeting. [The Claimant] was asked directly whether any of the claims made by school staff were untrue or if there were some things he disagreed with, to which he replied, no.

[6] The governors reviewed [the Claimant]'s PSP, the notes from some suspension reintegration meetings, and some additional information from CPOM, and they were satisfied that Academy staff had made considerable efforts to provide [the Claimant] with support to improve his behaviour. However, it was [the family's advocate's] view that although the Academy may may have put certain support interventions in place, they were not given adequate time to have an impact before [the Claimant] was excluded.

[7] The governors discussed [the family's advocate's] submission at length but felt that the timing of [the Claimant]'s exclusion was not chosen by academy staff; it was ultimately dictated by [the Claimant] bringing drugs onto the Academy site. The governors felt that this final incident was a serious breach of the Academy's Behaviour Policy, and in light of [the Claimant]'s previous misconduct, it was not unreasonable for [the Principal] to issue the exclusion.

[8] The governors also considered [the family's advocate's] submission that [the Claimant] may have special educational needs (SEN) which Academy staff have failed to identify and support. They were also guided by the SEND Code of Practice when discussing the matter. The SEND Code of Practice, paragraph 6.21 states: "Persistent disruptive or withdrawn behaviours do not necessarily mean that a child or young person has SEN. Where there are concerns, there should be an assessment to determine whether there are any causal factors

> such as undiagnosed learning difficulties, difficulties with communication, or mental health issues. If it is thought housing, family, or other domestic circumstances may be contributing to the presenting behaviour, a multi-agency agency approach, supported by the use of approaches such as the Early Help Assessment, may be appropriate. In all cases, early identification and intervention can significantly reduce the use of more costly intervention at a later stage".
>
> [9] The governors felt that there might be issues in [the Claimant]'s "family or other domestic circumstances" which may have been a causal factor in his behaviour and required exploring beyond the ability of Academy staff. The panel noted that [the Claimant]'s behaviour became more challenging when you left the country for a period. Academy staff evidenced that they adopted a multi-agency approach by referring their concerns around [the Claimant]'s possible underlying issues to Southwark's Multi-Agency Support Hub (MASH) for further support.
>
> [10] In conclusion, it is a principal's first priority and duty to create and maintain a safe learning environment with high standards for all pupils to thrive, achieve, and enjoy. To this end, the government gives headteachers the power to exclude a pupil from school on disciplinary grounds. The governors are satisfied that, having considered and reconsidered [the Claimant]'s exclusion, [the Principal] has used this power fairly, reasonably, and as a last resort.
>
> [11] For the reasons set out above, it was agreed that [the Claimant] should not be reinstated. The decision was unanimous. We appreciate that you will be disappointed with the outcome, but we wish [the Claimant] well in the future."

Events subsequent to 24 June 2024

24. On 29 July 2024 the Claimant was arrested in Doncaster. On 19 August 2024 the local authority, as designated First Responder, made a referral to the NRM on the basis that the Claimant was a potential victim of CCE. On 30 August 2024, the NRM made a positive reasonable grounds decision on the basis of a reasonable suspicion that the Claimant was a victim of human trafficking. By this time he had also been arrested on 26 August 2024 at the Notting Hill Carnival for possession of a hunting-style knife in a public place. Fordham J held that these events subsequent to the GDP's refusal of reconsideration on 24 June 2024 could not affect the outcome of the judicial review, and there has – correctly, as it seems to me – been no challenge to that decision in this court. The lawfulness of the exclusion decision cannot be determined with the benefit of hindsight.

The judicial review claim

25. The grounds of challenge before Fordham J were firstly that the GDP's second decision was premised on a material error of fact, namely that its first decision had not been quashed by the IRP; that was rejected by Fordham J and not pursued in this court. The next ground was that the GDP misapplied the legal test for a permanent exclusion in failing to engage with the requirement in a case of proposed permanent exclusion that to allow the pupil to remain in school would "seriously harm the education or welfare of the pupil or others such as staff or pupils in the school". This also has not been pursued in this court.

26. The next ground, based on Article 4 of the ECHR, was the focus of the argument before us. It stated that the requirement for the Defendant to act compatibly with Article 4 required the school to comply with the Article 4 duty of protection; to consider the impact of permanent exclusion on the Claimant including the increased risk of CCE if he was removed from mainstream schooling with the protective factors of teachers and staff who know him; and that the legal test for permanent exclusion should be construed strictly to avoid exposing children to the risk of CCE.

27. Finally, it was submitted that the GDP misunderstood and misapplied the clear direction from the IRP and failed to give conscientious consideration with due rigour to reinstatement and to identify the necessary strong justification to depart from a presumption that the child should be reinstated. A mandatory injunction was sought in the Statement of Facts and Grounds requiring the Claimant's immediate reinstatement to the Academy. It appears that this was not pursued before the judge. For my part I would regard it as an extraordinary step for any court to say that the solution to the difficult problems raised by the Claimant's behaviour should be resolved by an order informing the Principal and governors that unless they immediately readmitted him to the school they would be liable to be sent to prison.

The decision of the judge

28. Fordham J's decision on the issue of the claimed positive obligation under Article 4 was as follows:-

> "59. This is one of the four grounds for judicial review. The issues are (i) whether the GDP failed to construe the PEX test compatibly with the Article 4 positive obligation, because (ii) there were clear indicators that the Claimant was at risk of harm from CCE. The Claimant's case on this ground for judicial review came into clear focus in the written and oral submissions. There are three steps.
>
> 60. The first step is a legal point about the relevance, to a PEX decision, of the Article 4 positive obligation. This was the essence of Ms Braganza KC's submissions. By virtue of s.6 of the HRA (read with ECHR Article 4), relevant UK public authorities owe a positive obligation to take appropriate measures within the scope of their powers to protect an identified individual in respect of whom they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion of a real and immediate risk of having been, or being, trafficked or exploited: see *TDT* at §§14-18. This is an

important protection duty. Where the circumstances are such as to trigger the protection duty, it could not be lawful for a designated First Responder to refuse to make a referral to the NRM: see *TDT* §§33-36. True it is that the Principal and the GDP are not designated First Responders. But they are relevant public authorities with a role to play. Where the Article 4 protective duty is triggered in relation to a pupil facing PEX, that does not necessarily mean that PEX is unlawful or unreasonable as a response. It is the state as a whole which has to protect. But a Principal, and a GDP, need to recognise the duty and consider it, especially because of the importance of school as a protective environment for a person vulnerable to modern slavery including CCE. That means [according to Ms Braganza] that the test for PEX must be interpreted and understood as if it said:

> "the decision to exclude a pupil permanently should only be taken [i] in response to a serious breach or persistent breaches of the school's behaviour policy; and [ii] where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others such as staff or pupils in the school; and [iii] having regard to any protection duty owed to the pupil by reason of Article 4 ECHR."

61. I have been unable to accept this submission in light of its reach. I can agree that the PEX decision should only be taken "compatibly with a duty owed by the school to the pupil by reason of the Human Rights Act 1998". *I would also agree that the GDP could not fail to reinstate if, by the time of its consideration or reconsideration of reinstatement, an HRA duty was owed by the school to the pupil………*If – and I emphasise if – there were a protection duty owed by the school, then it must not be contravened. In the same way, by reference to Article 2, the Academy could not lawfully order someone to leave a school building, knowing that they faced the imminent prospect of being murdered at the school gates. So, if the "appropriate measures" within the scope of a public authority's powers involved an Article 4 duty on a school not to impose PEX, then that would become the statutory duty of the school. Ms Braganza KC is right to recognise that the Article 4 protection duty, where it is triggered, does not necessarily place such an obligation on a school. Where I could agree with her, on a case-specific basis, is that there may be cases where the same circumstances which would trigger an Article 4 protection duty have become an obviously relevant consideration, to which regard must be had by a school in making the PEX decision." [emphasis added]

29. There is a potential issue as to whether, on judicial review of an exclusion decision where an ECHR issue is raised, the court should make its own objective evaluation as to whether at the relevant date the circumstances gave rise to a credible suspicion of a real and immediate risk of the child having been, or being, trafficked or exploited. Fordham J proceeded on the basis (more favourable to the Claimant than the alternative) that the court could look objectively at the trigger test as at 24 June 2024, while emphasising that this could not be an exercise in hindsight. We proceeded on the same basis, and it was not suggested that we should do otherwise.

30. The critical issue in dispute below was whether an Article 4 positive protection duty *had* been triggered, either by the time of the PEX decision (18 January 2024) or by the time of the impugned GDP decision (24 June 2024).

31. Ms Braganza KC submitted to the judge that the duty was clearly triggered. Fordham J rejected this, saying:-

> "65. I cannot accept these submissions. On this part of the case I agree with Mr Glenister. The Academy was alive to the issue of CCE and was right to have concerns. The IRP was satisfied that the Academy had taken CCE into consideration at the time of the Principal's decision and the GDP's original consideration. The Academy's CCE concern was flagged up to the police on the day of the PEX decision (18.1.24). But it was never suggested to – or even argued before – the GDP at Stage (2) or the IRP at Stage (3) or the GDP at Stage (4) that there was a positive Article 4 duty; still less such a duty owed by the Academy. The MASH referral (29.11.23: §22 above) was about risk of harm, due to the Academy's concerns regarding the Claimant being brought by the police, his friendship group outside school, possible drug misuse and the Claimant's parents finding it very difficult to manage his behaviour at home. There were the drugs and the cash, and the Academy raised these promptly with the social worker (SW1) and the police. The Academy was not told – in the follow-up to the MASH referral – about the first A&E visit. The Academy's staff identified the drugs and the cash to SW1 and to the police, and had discussed these. The police and the social worker were content that the cash be returned to the mother, because she had explained that she had given the cash to the Claimant. Pausing there, and bearing in mind what is said about probing, it is relevant to note that the mother has given fresh evidence in a witness statement to this Court – with a statement of truth – that the cash did come from her for the jacket. Putting that to one side, that is what she confirmed at the time. SW1 and the police were not concerned about that answer. There was the truancy episode, with other pupils. And there was the rooftop episode with others of similar age………..
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> 66. If Ms Braganza KC's legal logic were correct, it would mean that the local authority and the police owed a protection duty, based on the circumstances known to them, to make an

> NRM referral which – given the applicable threshold – would have led to a reasonable grounds decision. Neither the local authority nor the police considered that a CCE positive obligation threshold had been crossed. Nor did they think it was crossed when the GDP was first dealing with the case; nor when the IDP was dealing with the case; and nor when it was back in front of the GDP. Neither the local authority nor the police told the Academy that the duty was triggered. There was the MASH referral; and there was the local authority Child in Need Plan. SW1 knew more about the Claimant's circumstances than did the Academy. The Academy was entitled to act with the other authorities and to share the information, especially given that the local authority and police are the designated First Responders. No NRM referral was made until 19.8.24, after the impugned decision and after the particular red flag related to the Doncaster arrest. To the police and local authority, that changed the picture and triggered action. Only by an impermissible exercise of hindsight – based on subsequent events – could it be concluded that an Article 4 positive protection duty arose at 18.1.24 or 24.6.24. There was, in my judgment, no Article 4 trigger requiring appropriate measures within the scope of public authority powers to protect the Claimant as a person in respect of whom the Academy "was aware, or ought to be aware" of circumstances giving rise to "a credible suspicion of a real and immediate risk of having been, or being, trafficked or exploited". Still less was it unreasonable for the Academy not to identify such circumstances. That means the claim on this ground cannot succeed whatever is the position in relation to steps 1 and 2. I did not need to take up the parties' offer of further written submissions on step 2. The Article 4 ground for judicial review therefore fails."

Ground 2: inadequate scrutiny on the reconsideration

32. Ms Braganza's second ground of appeal is that "if the Appellant is correct that the Article 4 ECHR threshold was met, the conscientious consideration needed to be an Article 4 ECHR compliant enquiry". Ms Braganza relies on a number of facts recorded in the judgment which were known or ought to have been known to the GDP and which conscientious consideration of the case would have shown to be indicators of CCE. This Ground by definition depends on the Appellant succeeding on the factual premise of Ground 1.

The applications to intervene

33. Following the order of Stuart Smith LJ directing a rolled-up hearing, the Appellant applied for permission to adduce fresh evidence on appeal. The first two items were witness statements from Mital Raithatha of Coram Children's Legal Centre and Kehinde Adeogan of the Black Equity Organisation. BEO also applied for permission to intervene by way of written submissions, which Singh LJ granted on 10 January 2025.

34. The additional witness statements from Coram and BEO speak powerfully of the severe impact which a permanent exclusion has on the child concerned, depriving him of the protective environment of the school and making him potentially more vulnerable to exploitation by criminal gangs. For my part I would readily accept what they say. But these factors are inherent in the balancing exercise laid down in the various policy documents we were shown. Excluding the child may well be harmful to his life chances and increase his vulnerability, which is why permanent exclusion should be a last resort; but allowing him to remain at or return to the school may create a serious risk to the welfare of other pupils and the staff.

35. The other documents which it was sought to adduce as fresh evidence related to events subsequent to the 24 June 2024 decision which is the subject of judicial review. Although these were briefly referred to before us, they are, for the reasons given by Fordham J, irrelevant to the decision on the judicial review. I would refuse the application to admit them formally in evidence on the appeal.

Submissions

36. The grounds of appeal which I have set out above summarise the greater part of Ms. Braganza's submissions in this court. In addition she argued that the permanent exclusion decision by the Principal, affirmed by the governors, was in the nature of a punishment imposed through a quasi-prosecutorial process. She drew an analogy between these decisions and the decision to prosecute a child in the criminal jurisdiction. She cited the following from the European Court of Human Rights' decision in *VCL v United Kingdom* application nos. 77587/12 and 74603/12 ECHR [2021]; (2021) 73 EHRR 9 at [159]:

> "The Court considers that the prosecution of victims, or potential victims, of trafficking may, in certain circumstances, be at odds with the State's duty to take operational measures to protect them where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked. In the Court's view, the duty to take operational measures under Article 4 of the Convention has two principal aims: to protect the victim of trafficking from further harm; and to facilitate his or her recovery. It is axiomatic that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future."

37. In its written submissions the intervener BEO made the following observations about the judgment of Fordham J in relation to the "credible suspicion test" and the duties of enquiry. BEO submitted that, read objectively, the facts which were known or ought to have been known by the time of the GDP's review on 24 June 2024 met the credible suspicion threshold. It was accepted that the protection duty "does not inevitably require the Academy not to impose PEX (or to reinstate a child subject to PEX)". It was also noted that the decision of the Strasbourg Court in *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 laid down that the authorities are not to be made subject to impossible or disproportionate burdens in fulfilling their ECHR duties. Nevertheless, it was submitted that the procedural and protective obligations

required the Academy at a minimum to have regard, when considering PEX, to the role played by any CCE in the behaviour leading to the disciplinary proceedings and to any risk of further CCE which might result from PEX and its impact on the child. The Academy was obliged to conduct an inquiry sufficient to establish the effect of any CCE to which the child is victim and to assess any further CCE as a consequence of PEX, and whether PEX would have a disproportionate impact on the grounds of race. These obligations were not displaced by the fact that CCE was not expressly raised at the GDP or IRP hearings.

The test on appeal to this court

38. Mr Glenister cited two well-known authorities on the approach of this court to appeals from a judge's evaluation of the facts, which are not confined to cases involving oral evidence.

39. In *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079 Lord Carnwath said:-

> "64. In conclusion, the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344 , para 34:
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> > "the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong …"

40. In *R (DB) v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7 Lord Kerr said:-

> "80. The vivid expression ….. that the first instance trial should be seen as the "main event" rather than a "try out on the road" has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a

> judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent…"

41. In response Ms Braganza relied on *Afriyie v Commissioner of Police for the City of London* [2024] EWCA Civ 1269. A police officer used a taser in circumstances where he honestly believed there was a need to use force. The trial judge held that the use of force was reasonable and proportionate. This court allowed the claimant's appeal. William Davis LJ said at paragraph 40:

> "It is not suggested by the Appellant that the court should substitute its view of what happened for that of the trial judge. Rather, the question is whether the conclusions she drew from the evidence were ones reasonably open to her. The court is concerned inter alia with the objective reasonableness or proportionality of PC Pringle's actions. That is a matter of law: see *Dallison v Caffery* [1965] 1 QB 348 at 372A."

42. Later he described the question of whether PC Pringle's honest belief that force was necessary as "a mixed issue of fact and law". Baroness Carr LCJ said that "the use of a taser on the appellant, who at the time of discharge was standing still in a non-aggressive stance with his arms folded and talking to his friend was not objectively reasonable in the circumstances."

Discussion

43. There is now no dispute in this case that the trigger or threshold test for identifying a case of potential child criminal exploitation, derived from the decision of the Strasbourg court in *Rantsev v Cyprus and Russia* and applied by this court in the *TDT* case, is whether the state authorities are aware or ought to be aware of circumstances giving rise to a credible suspicion that the child concerned has been trafficked or exploited or that there is a real and immediate risk of his being trafficked. It is not sufficient to show, in the case of a school, a risk that permanent exclusion of a child will increase his vulnerability and the possibility that he might be drawn into further or more serious criminal activity.

44. Fordham J examined the facts in detail and with great care. I have set out (at [31] above) his critical finding of fact that the Article 4 protective duty was not triggered in this case at the time of the decision under review. Even if the question for us were simply whether his finding was correct, I would hold that it was. But the matter is put beyond doubt by the observations of Lord Carnwath and Lord Kerr in the two Supreme Court cases cited above. It is not reasonably arguable that the finding of fact by Fordham J was "wrong". Despite the elaborate arguments addressed to us, I would accordingly refuse permission to appeal on both Grounds 1 and 2.

45. This makes it unnecessary to consider what the proper approach would have been if the credible suspicion threshold had been crossed by 24 June 2024. I would only add

two comments. Firstly, I do not accept that, even if the credible suspicion threshold had been crossed, the school would have been automatically required to reinstate the Claimant. I do not, therefore, agree with the sentence I have italicised from paragraph 61 of the judgment below, which in any event seems inconsistent with other observations of the judge.

46. Secondly, I have serious doubts about Ms Braganza's argument, based on *VCL v United Kingdom,* that in making or reconsidering a decision to exclude a pupil permanently a school, or its head teacher or principal, is exercising a quasi-prosecutorial function, or that there is any real analogy with the criminal law. But these are questions for another case and another day.

47. Since this is an application for permission to appeal against the published judgment of Fordham J, and we have heard full argument, I would give permission for this judgment to be cited.

Lord Justice Jeremy Baker:

48. I agree.

Lord Justice Holgate:

49. I also agree.