



Neutral Citation Number: [2020] EWHC 957 (Admin)

Case No: CO/4205/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 April 2020

Before:

JAMES STRACHAN QC
(Sitting as a Deputy Judge of the High Court)

Between:

THE QUEEN
(on the application of DOUNIA GASSA AND
DOMINIC MATTHEY-FLEMMING)

Claimants

- and -

RICHMOND INDEPENDENT APPEALS
SERVICE

Defendant

-and-

LONDON BOROUGH OF RICHMOND UPON
THAMES

Interested
Party

Denis Edwards (instructed by **Edwards Duthie Shamash Solicitors**) for the **Claimants**
Tom Amraoui (instructed by **South London Legal Partnership**) for the **Defendant**
Jack Anderson (instructed by **South London Legal Partnership**) for the **Interested Party**

Hearing date: 18 February 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 22 April 2020.

James Strachan QC (sitting as a Deputy Judge of the High Court):

Introduction

1. In *R v South Gloucestershire Education Appeals Committee ex parte Bryant* [2001] ELR 53, Buxton LJ observed:

“Nobody who has had any sorts of dealings with educational matters ... would wish to undervalue the importance that is placed by parents upon having their child educated at the school that they would prefer. The legislation recognises that, but at the same time has to make provision for that right to be exercised within the constraints of what is practically available.”

This claim for judicial review concerns that right and the practical constraints that affect it.

2. In this case, the Claimants’ basic challenge is to a decision of the London Borough of Richmond upon Thames (“the Council”) to refuse to treat their current address in East Sheen as their permanent home for the purposes of their application for a primary school place for their son. Their appeal against the Council’s consequential decision to offer him a place to their preferred school was rejected by an appeal panel of the Defendant (“the Appeal Panel”) by decision letter dated 16 September 2019. The Claimants now challenge that decision on various grounds.
3. The Defendant and the Council have now conceded the challenge to the adequacy of the reasoning of the Appeal Panel. They concede the underlying appeal should be redetermined by a fresh Panel. Consequentially, they argue that these proceedings have become academic. The Claimants do not agree. They argue there are three issues of law as to the approach a fresh panel must take on redetermination which require resolution by this Court before an Appeal Panel make a fresh decision. I deal with each issue in turn below.

Factual Background

The Claimants’ Circumstances

4. The Claimants’ son is now five years old. Both before his birth and whilst he was an infant, the Claimants lived in a flat which they own in Barnes in London. The flat is within the Council’s area. They also owned a second flat in the Barnes area (now sold) and a third flat in East London which they rent out.
5. As their son grew older, the Claimants took the view that they needed a larger property. They were also concerned that its location on a main road was related to their son’s symptoms of asthma for which he required an inhaler. They also wanted access to a garden in which their son could play.
6. In 2016 they began to look at East Sheen as an area. They made an offer to purchase a property there in 2016 and again in 2017, but they were outbid each time.

7. They decided that their financial circumstances might not enable them to purchase a suitable home in East Sheen as quickly as they had hoped, so they started to look at properties to rent. They found a house to let in East Sheen. They moved into it in December 2018 on a standard form assured shorthold tenancy agreement for 1 year. They informed the landlord of an intention to stay longer. The lease has subsequently been extended for a further year until December 2020. They moved in with their existing furniture and new furniture to furnish the property.
8. The Claimants retained ownership of the flat in Barnes, but they let it out to a tenant on a lease of 18 months in January 2019. The Claimants have stated to the Council that until they find a home in the East Sheen area which they can afford to buy, they believe it is better to retain and let their flat to have a rental income to offset the significant expense of renting a house in the East Sheen area.

The Claimants' Primary School Application

9. At the time of this move, the Claimants applied to the Council for a reception school place for their son. The application form identified their permanent home address as the rented house in East Sheen. Their preferred choice of school was Sheen Mount Primary School, approximately 35 metres away from that property. They listed two other schools near to the house in East Sheen, followed by three schools near to the flat that they continued to own in Barnes.

The Council's admission arrangements

10. The Council's admission policy to its primary schools for the relevant school year was set out in a document entitled "Admission to Richmond's Primary Schools" 2019. This lists all the primary schools in the Council's area, including a map of their location. It identifies the number of places available and the number of applications received in the previous year.
11. Section 3 of that document sets out six steps for an application. Step 1 is described as understanding the admissions process. It identifies that an applicant may apply for up to six state funded schools on one application. The applicant must list the schools in the Council's area and in any other council's area in the order that the applicant prefers them. It explains that each school listed on the application will consider the application against the school's admission criteria only, and not according to the order of preference in the application. If a child meets the admission criteria for more than one school, the Council will look at the preference order and the applicant will be offered the highest preference school for which the child has met the admission criteria. If the Council is not able to offer the child a place at any of the schools applied for, the applicant will be offered, where possible, a place at another school.
12. The document advises an applicant to think carefully about the order of preference when deciding how to list the schools, because if a child qualifies for a place at a number of schools, the applicant will only be made one offer of the school which is named as a higher preference.
13. An example of a completed table with schools in order of preference is given. In the example given, only 5 out of the 6 spaces for potential preferences are completed.

14. The document also states that if an applicant wishes to change the preferences after the closing date, all the preferences will be considered as late applications and considered after all on-time applications.
15. Step 3 sets out five admission criteria that apply in sequential order to all community infant and primary schools. The first criterion is for places for “looked after children and previously looked after children”. The next criterion is for cases of “exceptional family, social or medical need”. The third is the offer of places to siblings. The fourth is the offer of places to children of members of staff employed at the school for two or more years. The fifth and last criterion identifies that the remaining places will be offered to children who live nearest to the school. It explains that this will be measured by the shortest route by road and/or maintained footpath from the property to the nearest pedestrian school gate used by the relevant year group and all distances using the Council’s geographical information system. The way in which the measurement is carried out is explained in more detail, but it is unnecessary to set out that detail here as the mechanics of that measurement are not in issue here.
16. The notes to this section state:
 - “1. Any offer of a place on the grounds of distance must be based on the child’s permanent address. A business address, a childminder’s address or any address, including a family member’s address, other than the child’s permanent home will not be accepted. Proof of address will be sought if there is doubt about the validity of the address given and it may be the subject of further investigation. Temporary addresses will not be used for the purpose of administering applications.”
17. It is the application of this fifth criterion, and in particular the identification of the child’s “permanent address”, that is at the heart of this case.
18. Step 4 deals with “Completing Your Application”. This section includes the following in relation to this question of a child’s “home address”:

“Child’s home address

To ensure that offers of school places are made correctly and fairly, the Council is committed to following strict address verification procedures. The Council will investigate any applications where there are doubts about the information provided or where information has been received that suggests a fraudulent or misleading application has been made. Before we make our decision as to whether we will accept an address or not, we will consider your circumstances in accordance with the guidance set out below, which should be read in its entirety.

As part of the admission process, we will check Council records to confirm that the address you have given in your application is your child’s permanent home address. If there are any doubts about your address details we may request further evidence. It is your responsibility, as the applicant, to provide evidence to support your application.

We may seek evidence from Council records, schools or any other source we consider appropriate. The Council may refer cases to the Internal Audit and Investigation Service for further investigation, and may make a home visit. This could lead to legal action.

Proof of address

In order to prioritise applications correctly, we will verify that home to school distances are being measured using the child's correct home address.

You are not permitted to use a temporary address to secure a school place for your child. This includes a business address, a childminder's address, or any other address, including that of a family member or friend.

The address you give on your application must be the one where your child is living permanently and must be the address where your family normally lives. An application can only be made from a single address and only a single application made for each child. Future addresses cannot be used. This includes a property you own in the area.

- If you are connected to more than one address, for example, you own a property and are renting and living in another, we will require further evidence to demonstrate the permanence of the address you are using for your application.

- If you rent out property you own or put it up for sale, this does not mean that the property cannot be considered as your family's home address.

...

- If you move at any time during the admissions process (the admissions process covers the entire period from submitting your application to your child starting school), you must inform the School Admissions Team as soon as possible and no later than two weeks after your move. You must inform us of the circumstances of your move to ensure that places are offered fairly and correctly.

- If you move to a new address and have advised us, once our address verification checks have been made, we will revise your child's position on the waiting lists for each of the schools that you prefer so that your application is considered correctly following this change of circumstances.

...

If an offer of a school place is made on the basis of false or misleading information the Council reserves the right to withdraw the offer at any stage during the admission process. The admission process refers to the time from when you submit your application to the time your child starts

school. In disputed cases we will make a judgment based on evidence available to us.

...”

19. This section combines the reference in Step 3 to the “permanent” address with the reference to a child’s “home” to focus on the child’s “permanent home address”.
20. The Claimants’ circumstance of being “connected to more than one address” in owning a property and renting and living in another is therefore one in which the document anticipates the need for further evidence to demonstrate the permanence of the address used in the application. The document also advises that if applicants rent property they own, or put it up for sale, this does not mean that the property cannot be considered as the family’s home address.
21. In subsequently rejecting the Claimants’ East Sheen property as their permanent home address, the Defendant has pointed out that the Claimants included schools close to the flat they own in Barnes in their preferences. The Claimants have stated that they thought it was necessary to complete the application form by naming six schools, rather than just the preferred schools nearest to their family home. They say they filled in all the available boxes on the application form with schools that they knew names of, including schools in the vicinity of their previous flat. In this respect, the Claimants refer to the fact that they are Belgian and German EU citizens respectively, both of whom grew up and were educated abroad. In the course of correspondence, the Claimants have sought to remove the stated preferences located close to the flat in Barnes in their application.

The Council’s Approach

22. By email dated 31 December 2018 a School Admissions Officer of the Council acknowledged the application, but noted that the Claimants were linked to another two addresses in the SW13 area and asked for details of their previous addresses and evidence that they were no longer associated with “this address”.
23. The Claimants replied the following day stating that their previously owned buy-to-let property in Barnes had been sold and offering to provide the contract of sale if required. As to the retained flat in Barnes the First Claimant stated:

“For the last 12 years we have been living in a one-bedroom flat ...[in Barnes]. As we needed a larger home after our son ... was born, we recently moved from there into a cottage [in East Sheen], which is our only address and home.

Again, we would be happy to send you the rental agreement of evidence, if required.

Please feel free to let me know if you require evidence that we are no longer living [the flat in Barnes], we can also send you a copy of the rental contract for the tenant living there now. We are currently visiting my family in Belgium, but we can provide you with all this information by the end of this week when we are back.

Please let us know if this answers your questions fully, and if there are any other points we should be addressing.”

24. On 10th January 2019, a Council School Admissions Officer replied asking for information and/or evidence the Claimants believed will demonstrate that whilst they had retained ownership of the flat in Barnes, the house in East Sheen should be considered as their main permanent residence. The Officer also raised a query regarding whether the flat in Barnes had one or two bedrooms.
25. The Claimants replied on 14 January 2019. They enclosed the signed rental contract for East Sheen, along with a recent council tax bill and water bill for it, and the signed tenancy agreement for the flat in Barnes. They explained why the flat had been marketed as having 2 bedrooms, but identified the problems with the second bedroom for their son that had led them to move.
26. The Council Officer replied on 24 January 2019 stating that the Council’s decision was that the address in Barnes would be treated as their permanent address as follows:

“...

Whilst you have retained ownership of your family home ... [in] Barnes ..., the current rental address [in East Sheen] is considered temporary and will not be used to process your son’s school application. This is because your owned property is considered as your permanent residence where you and your family have been residing for the past twelve years till December 2018.

We accept you are currently renting another local address, however, for school admissions purposes [the address in] Barnes is considered your family’s permanent address, to which you can return at any time. As a result, your ties to, your current rental address, can only be regarded as temporary. Therefore, to process your child’s school application correctly under the home to school distance criterion, we will use [the Barnes address].

We have a duty to follow our published policy as stated pages 22 and 23 of the Admission to Richmond’s Primary Schools 2019 brochure and as such I can only reiterate:

If you rent out a property you own or put it up for sale, this does not mean that the property cannot be considered as your family’s home address.

In the event that you do not gain an offer at a preferred school, you will have the statutory right of appeal against not being offered a school of preference. ...”

27. I can understand why the Claimants may have interpreted this as a decision that the Council would continue to treat East Sheen as a temporary address unless and until they sold the flat in Barnes. Following a telephone call with the officer, they wrote an email

to him on 29 January 2019 setting more details of their reasons for their move in the interests of their son and their previous attempts to move in 2016 and 2017. As to the retention of the flat in Barnes, they stated:

“We should also clarify that two years ago, we worked with a Financial Advisor, who advised us to keep the flat as a pension investment. Since then, we decided to rent instead of buy a property, as we cannot afford to buy a larger house in East Sheen at the moment.

So with regards to you assessment that we would return to [the flat in Barnes] at any time, we respectfully disagree with this. We chose our tenant precisely because she is looking for a long term rental and have an 18 month agreement in place. This would mean the earliest we could move in the flat would be June 2020. Should [our son] theoretically be accepted into a school in East Sheen, this would be a 30-45 minute bus ride each way. We moved to East Sheen because we want [our son] to go to a local school in walking distance, so that we can drop him off and pick him up by foot every day, and so that he lives in the same neighbourhoods as his school friends.”

28. In that email they stated that they appreciated that, superficially, it appeared they have moved the area “to play the system” and to have their son attend a school that was far away from their main residence, but they hoped that they had explained their genuine intentions and clarified why they would not return to their old flat.

29. The Officer replied on 1 February 2019 noting the points raised, but stating that the Council’s decision stood. The email also stated:

“... Your response has demonstrated your intention to buy a new permanent home in East Sheen, and until such time that you complete on a purchase of a new property, we will continue to use [the flat in Barnes] as the address for measuring home to school distance for your son’s school application.”

30. This potentially introduces another element to the Council’s decision. Whereas the Claimants rely on the past and ongoing search to purchase a property as evidence of their intention to move permanently from Barnes, the Council rely on this as demonstrating that the rented property in East Sheen is not intended to be permanent, but rather a temporary home pending the intended purchase of an affordable property in the area.

31. By email dated 11 February 2019 the Claimants sought further explanation and stated (amongst other things):

“As mentioned, we fully appreciate and support the admissions policy. You are right to question families who are moving from one house to a comparable one just to get into a catchment area. In our case, we feel that you are creating a very different outcome [to] that the policy intends.

As we have already explained to you, we will not be moving back to our flat in [Barnes]. If therefore our son ... is, for example, accepted to Lowther School (as the catchment area may suggest), we would be renting a larger home close to that school as we don't want to have [our son] spend 30-45 minutes each way every day going to and from school and living far away from his school friends. We therefore would feel discriminated against our choice of living in the borough, as well as our choice to rent. ...”

32. By email dated 14 Feb 2019, the Council's Head of Admissions and Fair Access replied. She confirmed that the Council did not dispute that the Claimants had rented alternative accommodation and explained the reasons for the move. However, she noted that the Claimants still own an address in Barnes where they had resided for 11 years until December 2018. She considered that the temporary rental of a property very close to their preferred school in East Sheen did not change the fact that by any objective criterion the property they own, and until very recently had lived in for a long time, would be regarded as their permanent family home. It was therefore this address that the Council would use for the application. She went to state:

“As explained, the rationale for the policy was driven by a widespread perception that parents were renting properties very close to popular schools to secure an offer of a school place, whilst continuing to own permanent accommodation further away. A considerable number of applicants each year do just that and effectively ask us to trust, or even second-guess, their intentions. In your case you have moved very close to one of Richmond's most oversubscribed and popular schools, and have asked us to trust that you will not move back to your owned property in Barnes. Your intention appears instead that you will buy a new permanent home in East Sheen when you are able to secure an affordable property; either way, it is clear that your rental of [the house in East Sheen] can only be objectively regarded as a temporary arrangement at this time. ...”

33. This response therefore appears to be expressing the Council's position that:
- i) The Council do not dispute the fact that the Claimants are renting and living in East Sheen for the reasons that the Claimants have given.
 - ii) The rental of the property in East Sheen is temporary and, as the Claimants still own the flat in Barnes, where they resided for 11 years until December 2018, this is regarded by the Council as the Claimants' "permanent family home" to which the Claimants could potentially return.
 - iii) In any event, the Claimants' intention is to buy a new permanent home in East Sheen once they have found an affordable property, so the rental of the house in East Sheen is a temporary arrangement at this time.
34. The last point is similar to that expressed in the email from the Officer dated 1 February 2019.

35. The Claimants replied on 17 February 2019 raising their basic concern that use of the Barnes postcode would result in their child having to commute to a school some distance away and seeking a chance to discuss the matter further.
36. The Council's Head of Admissions and Fair Access replied on 21 February 2019 repeating that the Council did not dispute the Claimants had moved for the reasons they had given, but that the Council's position was that the rental property in East Sheen would not be regarded as the Claimants' permanent residence for school admissions purposes. In a response on 3 March, the Second Claimant took issue with the Council's approach and expressed the view that it involved built-in discrimination against rented accommodation. He contended that the permanence of their previous home in Barnes had ended when they gave up that flat and moved to a large house in East Sheen. He stated:

“... Even if it is not clear at the moment how long we will have to rent this new home (as you may recall we have signed an agreement for a minimum of a year!) and when we will be able to find another house in this area which we can buy, this new home is still our only home because the life in the flat we own in Barnes ended in December 2018 ...”
37. By email dated 5 March 2019, the Council's Head of Admissions and Fair Access replied essentially confirmed the Council's previous decision.
38. The Claimants' solicitors sent a judicial review pre-action protocol letter to the Council dated 18 March 2019. This set out a proposed challenge to the lawfulness of the Council's decision to use the Claimant's address in Barnes as their permanent address for their application. The letter also sought to remove three schools from the application that had been made, namely Barnes Primary, St Osmund's and Lowther.
39. The Council's solicitors, SLLP, replied by letter of 2 April 2019 denying any unlawfulness. The letter also included the following:

“Your clients' assertion that the 18 month tenancy agreement in connection with [the flat in Barnes] provides conclusive proof of permanent resident elsewhere is simply incorrect. The Proposed Defendant is legitimately also entitled to consider that the contractual agreement will have a break clause and can ultimately be rescinded by one or both parties. The Proposed Defendant submits that until such time that a sale occurs in connection with [the flat in Barnes], the subsequent rental of that property can only be considered as a temporary arrangement.”
40. This appears to be suggesting that the Council would continue to treat the flat in Barnes as the Claimants' permanent home unless and until it was sold.
41. The letter went on to note that the Claimants would have a statutory right of appeal in relation to the Council's decision about the school for the Claimants' son. It therefore contended that any application for judicial review would be premature.

The Council's Offer

42. By letter dated 16 April 2019, the Council offered the Claimants' son a place at Lowther Primary School. This was said to be the highest ranked preference school that it was currently able to offer. The letter explained there was a right of appeal against that decision under the School Standards and Framework Act 1998. The letter enclosed a note on primary admissions for that year which, amongst other things, showed how places had been offered at the various schools within the Council's area.
43. The Claimants notified the Council of an appeal and accepted the offer without prejudice to that appeal. The appeal was submitted by letter dated 23 May 2019.

The Claimants' Appeal

44. Notification of an appeal hearing on 16 July 2019 was sent out by the Defendant by letter dated 2 July 2019. This gave the names of the members of the panel and the clerk. It also enclosed a copy of the appeal form, any supporting evidence and the Council's case. The letter refers to the ability to submit additional information up to 5 school days before the hearing and evidence submitted after that date would only be admissible at the Panel's discretion.
45. The enclosed material included a statement from the Council regarding the allocation of reception places at Sheen Mount Primary School for the academic year 2019/2020. It stated 363 applications were received for 90 places available. 33 places were taken by siblings. The remaining 57 places were allocated based on children living closest to the school, with the last child to be offered a place on that distance criterion being 1,172 metres away. As a result of 4 places having been declined, the furthest distance away of any child re-offered was 1,199 metres away. The statement noted that the address on the Claimants' application form in East Sheen was 35.50 metres away from the school, but that the Claimants' application had been processed using the address in Barnes which was 4,674.40 metres away.
46. This confirms the significance of the Council's decision to use the Barnes address. It is self-evident that if address in East Sheen been used, the Claimants' son would have secured a place at Sheen Mount Primary School. The East Sheen address is significantly closer (35m away) to the school than the address of the furthest pupil who was offered a place (1,119m away) using the distance criterion.
47. The statement explained that acceptance of 90 pupils was based on three classes of 30 children in the reception year. It submitted that admission of more than that number of pupils would cause prejudice as a result of relevant measures required to comply with the Infant Class Size Regulations, as it considered there were no spare staff resources or classroom space.
48. By email dated 9 July 2019, the Claimants' solicitors confirmed attendance at the proposed hearing. They requested the appeal be dealt with under Section 3 of the Admissions Appeal Code on the basis that the Claimants considered it was not a question of class size, but rather a decision based on the Claimants' home address. They also submitted an email from the landlord of the property in East Sheen confirming agreement to rent the property until December 2020 with no break clause.

49. The Council wrote to the First Claimant the same day notifying him of the name of a person at SLLP had been appointed as a legal advisor to the Panel. On the morning of the hearing, Claimants' solicitors raised an objection to that appointment given that SLLP had already acted for the Council in relation to the main issues that arose. The Council did not agree. It appears that at the hearing itself, the Panel decided to adjourn the appeal in light of the objection to enable a new advisor to be appointed. The hearing was rescheduled for 12 September 2019. The hearing took place on that day attended by the Claimants and their representatives. On that occasion, the Panel was advised by a barrister. The Defendant has exhibited the clerk's notes of the Panel hearing.

The Appeal Panel's Decision

50. By letter dated 18 September 2019 the Defendant notified the Claimants that the Appeal Panel had disallowed their appeal and their son had not been allocated a place at Sheen Mount Primary School. The decision letter reveals that the Panel considered the appeal in accordance with the decision-making process under both section 3 and section 4 of the School Admissions Appeal Code ("the Appeal Code").
51. The letter explained that in relation to Stage 1 of the process, the Panel had concluded that: (1) the admission of an additional child would have breached the infant class size limit of 30 and would require qualifying measures to be taken; (2) the Council's admission arrangements complied with the mandatory requirements of the School Admissions Code 2014; (3) the Council's school admissions arrangements had been correctly and impartially applied and the Claimants' child had not been denied a place to which they would otherwise have been entitled; (4) the Council's decision to refuse a place at the school was reasonable, based on the circumstances known at the time of their decision.
52. In relation to Stage 2 of the process (applicable under Section 3 of the Appeal Code), the Panel took the view that there were not sufficient special circumstances, or overriding considerations put forward, or the school was not especially suited to meet the needs of their child over and above other schools, such that the Claimants' reasons were insufficient to outweigh the prejudice caused to existing pupils by any further admissions to their child's school year.

The Judicial Review Claim

53. A pre-action protocol letter was sent to the Defendant on 25 September 2019 setting out a proposed challenge to the Panel's decision and inviting the Defendant to accept that the Panel's decision was unlawful. The Defendant's response rejected the criticisms and argued that the Council had made a factual determination that Claimants' permanent address was in Barnes, rather than in East Sheen, and the Panel had endorsed that fact-finding of the Council.
54. On 25 October 2019 the Claimants filed the current claim advancing 8 grounds of challenge. The Claimants sought urgent consideration and expedition, but this was refused by Order of Griffiths J dated 30th October 2019.
55. The Defendant and Interested Parties filed Acknowledgements of Service opposing permission on all grounds. The Interested Party also argued there was no reason for the

family to have to undertake the journey to and from Lowther School every day because the family had been advised that a place had become available for their son at two much closer schools, Holy Trinity and Kew Riverside which the family had declined. In a Reply, the Claimants contested any such offer had been made and stated that the potential availability of places had been raised at the appeal panel hearing, but no offer made.

56. I mention this because if there are in fact school places available for the Claimants' son closer to the East Sheen address, it would be unfortunate if this has not been made clear (for whatever reason). The Claimants may in fact be able to accept that offer to reduce the need for their son to travel to school. Even if this is not considered by them to be an acceptable substitute for their preferred school, they could presumably continue their appeal without prejudice to the acceptance of such a place (as they have already done for the school which their son currently attends).
57. Permission to proceed was granted by Order of Mr Michael Kent QC sitting as a Deputy Judge of the High Court on 22 November 2019 who expedited the claim given the advancing school year.
58. The Deputy Judge observed that the real issue was whether the Interested Party was entitled to treat the Claimant's current address as not their permanent home on the material before them. He noted that the Defendant's Summary Grounds of Defence appeared to accept that the Panel was seised of that issue, but he considered there would be a dispute as to whether the Panel ought to have revisited that question afresh, or merely decided whether the Interested Party's conclusion on that point was irrational.
59. In its subsequent Detailed Grounds of Defence the Defendant now accepts the Panel's decision did not grapple adequately with and provide sufficient reasons on the Claimants' main argument, namely the Council's determination of their son's permanent home address. The Defendant accepted the Panel's decision should not stand and agreed to remittal to a different constituted appeal Panel to enable the Claimants to put their case afresh. The Defendant stated arrangements for this would be put in train as soon as the Claimants accepted this proposal. The Defendant considered it would not be appropriate for the Court itself to determine the Claimants' home address and this would be resisted if pursued.
60. The Interested Party's Detailed Grounds support those of the Defendant. It submits the claim is now academic given the Defendant's offer to arrange reconsideration of the appeal before a fresh panel. Without prejudice to that, the Interested Party set out its position on the other points raised in the claim. Amongst other things, it contends the Panel's role was one of review, rather than determining for itself the Claimants' address as a matter of precedent fact. It argued the decision it had taken was one that was reasonably open to it, but that issue was a matter for the Panel to determine rather than the Court.
61. The Claimants' solicitors wrote to the Interested Party's solicitors by email dated 2 January 2020 stating that they would accept the offer of a fresh appeal if the Council accepted that the family's address for school admission purposes is and always has been throughout the relevant period that in East Sheen. The Interested Party's solicitors put forward a counter-proposal to stay the judicial review proceedings pending the reconsideration of the Claimants' appeal before a fresh panel. The Claimants' solicitors

rejected this on the basis that it took the matter no further forward than “the offer made by the Defendant which has already been rejected”.

62. The Claimants then served a Reply to both sets of Detailed Grounds of Resistance. This formally abandons the claim relating to EU law. The Reply argues that the Defendant’s concession does not render the proceedings academic because of disputes about (1) the scope of the statutory appeal to the Panel, i.e. whether the Panel’s powers are those of a review or an appeal; (2) whether deference was owed to the Council by the Panel (or the Court) on questions of law; (3) the lawfulness of the Council’s approach to determining the Claimants’ home address under its published policies and (4) the lawfulness of the Council’s test for permanence of a family home address for the purposes of the school admissions process. The Claimants state that they risk going around in circles if the Appeal Panel determines the appeal without guidance from the Court on these issues. The Reply went on to deal further with the points in dispute and appeared to raise a new allegation that the Council had acted for an improper purpose.
63. By Application Notice dated 28 January 2020 the Council sought permission to file a witness statement from the Council’s Head of School Admissions and Fair Access responding to the new allegation of improper purpose and exhibiting a copy of the Panel Clerk’s notes of the hearing. That application was granted by Helen Mountfield QC sitting as a Deputy Judge of the High Court by Order dated 11th February 2020. The Order gave the Claimants liberty to apply to amend their grounds, if so advised, by 17 February 2020. It left the matter for the trial judge to decide whether to grant permission for the new ground of judicial review in the Reply for which permission had not yet been granted. In the event, no such application has been made.

The Hearing

64. At the substantive hearing, the Claimants were represented by Mr Edwards of Counsel, the Defendant by Mr Amraoui of Counsel and the Interested Party by Mr Anderson of Counsel. I wish to express my thanks to them all for the clarity and helpfulness of their written and oral submissions.
65. Before the hearing, Mr Edwards sent an email to my clerk expressing a potential concern that I was a member of the same chambers as Counsel for the Defendant, the Interested Party and the advisor to the Defendant’s Panel. In light of that, I sent an email to all Counsel to ask whether any of the parties wished to raise any formal objection to me hearing the case in light of the applicable legal principles. At the start of the hearing, all Counsel individually confirmed that no objection was being raised.

Legal Framework

School Standards and Framework Act 1998 (“the 1998 Act”)

66. Part III of the 1998 Act is concerned with school admissions. Chapter I of Part III deals with admission arrangements.

The Statutory Codes

67. Section 84(1) of the 1998 Act requires the Secretary of State for Education (“the Secretary of State”) to issue a code for school admissions. The code must contain such provision as the Secretary of State thinks appropriate in respect of discharge by (amongst other things) local authorities and appeal panels of their respective statutory functions on school admission arrangements under that part of the 1998 Act.
68. Section 84(5) of the 1998 Act enables the Secretary of State to make separate provision by means of separate codes in relation to the different functions of local authorities and appeal panels. The relevant statutory code issued by the Secretary of State may impose requirements and include guidelines setting out aims, objectives and other matters about the discharge of those functions: see section 84(2) of the 1998 Act.
69. Section 85 of the 1998 Act sets statutory processes to be followed by the Secretary of State, in the issue or revision of the relevant statutory codes, including consultation and the laying of the draft code before each House of Parliament. It is unnecessary to set out these provisions here.
70. In light of those provisions, the Secretary of State issued the current versions of the School Admissions Code in 2014 (“the Admissions Code”) and the School Admissions Appeal Code in 2012 (“the Appeal Code”)
71. There is a statutory duty on local authorities and appeal panels to act in accordance with any relevant provisions of such codes when exercising their school admission arrangement functions: see section 84(3) of the 1998 Act.

Parental Preference

72. Section 86(1) of the 1998 Act requires local authorities to make arrangements to enable the parent of a child of a compulsory school age in their area to express a preference as to the school at which he or she wishes education to be provided for the child, and to give reasons for that preference.
73. Section 86(1A) requires a local authority to provide advice and assistance to parents in connection with the preferences expressed, or to be expressed.
74. Section 86(2) provides that, subject to subsection (3) and section 87 (which is not relevant here), the admission authority for a maintained school shall comply with any preference expressed.
75. Section 86(3) provides (so far as material) that:
 - “(3) The duty imposed by subsection (2) does not apply-
 - (a) if compliance with the preference would prejudice the provision of efficient education or the efficient use of resources;
 - ...
 - (4) For the purposes of subsection (3)(a) prejudice of the kind referred to in that provision may arise by reason of measures required to be taken in

order to ensure compliance with the duty imposed by section 1(6) (duty of local authority and governing body to comply with limit on infant class sizes).

- (5) No prejudice shall be taken to arise for the purposes of subsection (3)(a) from the admission to a maintained school in a school year of a number of pupils in a relevant age group which does not exceed the number determined under section 88C or 89 as the number of pupils in that age group that it is intended to admit to the school in that year; ...”

76. The duty under section 1(6) of the 1998 Act is imposed on a local authority and governing body to exercise their functions with a view to securing compliance with any limit imposed on class sizes for infants by the Secretary of State pursuant to regulations made under section 1(1) of the 1998 Act. The relevant class size limit is 30 pupils.
77. Section 86 of the 1998 Act therefore embodies the basic tension identified at the outset of this judgment. On the one hand, the statute articulates an important parental right to express a preference as to which primary school the parent’s child should attend. There is a duty on a local education authority to give effect to that preference. On the other hand, that duty is not absolute. The duty will not apply where compliance with the preference would prejudice the provision of efficient education or the efficient use of resources. Prejudice of that kind can arise as a result of measures that a local education authority has to take to comply with limits on infant class sizes in a primary school; but it will not arise if the number of pupils in a relevant age group in a maintained school does not exceed the number that the school intends to admit as determined under section 88C of the 1998 Act.
78. Section 88C requires an admission authority for a maintained school in England to determine at the beginning of each school year the admission arrangements which are to apply. Under section 88D of the 1998 Act, that must include a determination of the number of pupils in each relevant age group that it is intended to admit to the school in that year.
79. Section 88 of the 1998 Act defines “admission authorities” and “admission arrangements”. Section 88(2) defines “admission arrangements” in relation to a school as meaning the arrangements for the admission of pupils to the school, including the school’s admission policy.

Appeals

80. Section 94(1) of the 1998 Act requires a local authority to make arrangements for enabling the appropriate person to appeal against (amongst other things) a decision refusing a child admission to a school by, or on behalf, of the authority as to the school at which education is to be provided for a child. Section 94(2B) defines “the appropriate person” in relation to a primary school aged child as being the parent of the child.
81. Section 94(5) provides that an appeal pursuant to any arrangements made under section 94 shall be to an appeal panel constituted in accordance with regulations. Section 94(5A) provides that regulations may make provision about the making of appeals pursuant to such arrangements. This may include provision as to (amongst other things)

the procedure on such appeals, or as to the grounds on which an appeal panel may, in the case of an appeal to which subsection (5B) applies, determine that a place is to be offered to the child concerned.

82. Section 94(5B) provides:

“This subsection applies to any appeal against a decision made on the ground that prejudice of the kind referred to in section 86(3)(a) would arise as mentioned in subsection (4) of that section.”

83. There is nothing in the provisions themselves which limits the grounds of appeal available to a parent.

84. The current School Admissions (Appeal Arrangements) (England) Regulations 2012 made under this section provide for the constitution of appeal panels in accordance with the schedule to the Regulations, and the payment of allowances. They require an appeal panel to consist of a minimum of three members. At least one must be an eligible lay member (namely someone that has no personal experience in the management of any school or the provision of education in any school). At least one must be a person who has experience in education, or is acquainted with educational conditions in the area of the authority or is a parent of registered pupils at a school. Paragraph 4 of the schedule disqualifies certain individuals from membership of an appeal panel, including any member of the local authority making the arrangements in question.

85. Section 94(6) provides that the decision of an appeal panel will be binding on the local authority (or, where necessary, the relevant school).

86. Neither the 1998 Act, nor the current Regulations made under it, says anything further as to the type of appeal to be conducted by the appeal panel.

The Secretary of State’s Admissions Code

87. Paragraph 1.2 of the current Admissions Code (issued by the Secretary of State in 2014) gives its purpose as to ensure that all school places for maintained schools are allocated and offered in an open and fair way. It is stated to have the force of law and it explains that where the words “**must**” or “**must not**” are used, these are said to represent a mandatory requirement.

88. Paragraph 1.4 of the Admissions Code states that in drawing up admission arrangements, an admission authority “**must**” ensure that the practices and criteria used to decide the allocation of school places are fair, clear and objective, so that parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated.

89. Paragraph 1.4 summarises the requirements of the admissions process which must include the right to appeal. An admission authority “**must**” set out reasons for its decision, the right to appeal and the process for hearing such an appeal. The admission authority “**must**” establish an independent appeals panel to hear that appeal.

90. Paragraph 1.6 of the Admissions Code sets out the requirement for oversubscription criteria to be set in the admission arrangements. Paragraph 1.8 states that:
- “Oversubscription criteria “**must** be reasonable, clear, objective, procedurally fair, and comply with all relevant legislation, including equalities legislation. Admission authorities **must** ensure that their arrangements will not disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group, or a child with a disability or special educational needs ...”
91. Paragraph 1.9 provides (amongst other things):
- “It is for admission authorities to formulate their admission arrangements but they **must not**:
- a) place any conditions on the consideration of any application other than those in the oversubscription criteria published in their admission arrangements;
- ...”
92. Paragraph 1.10 explains that the Admissions Code does not give a definitive list of acceptable oversubscription criteria. It states it is for the admission authorities to decide which criteria would be most suitable to the school according to the local circumstances, but it identifies the most common. These include a distance from school criterion, in respect of which the Admission Code states:
- “1.13 Admission authorities **must** clearly set out how distance from home to the school will be measured, making clear how the ‘home’ address will be determined and the point in the school from which all distances are measured ...”
93. Section 2 of the Admissions Code deals with ‘Applications and Offers’. The common application form must allow parents to provide their name, address (including documentary evidence in support) and the name, address and date of birth of the child. Paragraph 2.5 states that admission authorities “may need to ask for proof of address where it is unclear whether a child meets the published oversubscription criteria.” Paragraph 2.7 requires admission authorities to allocate places on the basis of their determined admission arrangements only.
94. Paragraph 2.15 deals with infant class sizes. Reflecting the regulations made under section 1 of the 1998 Act, it provides that infant classes (those where the majority of children will reach the age 5, 6 or 7 during the school year) “**must not**” contain more than 30 pupils with a single school teacher. Additional children may be admitted under limited exceptional circumstances as “excepted pupils”. It explains what is meant by “excepted children” and the definition includes:

“... ”

c) children admitted, after initial allocation of places, because of procedural error made by the admission authority or local authority in the original application process;

d) children admitted after an independent appeals panel upholds an appeal;

...”

95. Paragraph 2.24 of the Admissions Code refers to the right to appeal. It repeats the need for the authority include the reasons for refusal with information about the right to appeal. Parents have to be told of the need to set out their grounds of appeal in writing. It provides that: “... Admission authorities **must not** limit the grounds on which appeals can be made.”

The Secretary of State’s Appeals Code

96. The Appeals Code gives statutory guidance for school leaders, governing bodies and local authorities regarding school admission appeals. It is to be read alongside the 2012 Regulations and the Admissions Code.
97. Its purpose is said to be “to ensure the independence of admission appeal panels and to ensure that all admission appeals for maintained schools and Academies are conducted in a fair and transparent way.”
98. Like the Admissions Code, the Appeals Code states that it “has the force of law” and that where it imposes mandatory requirements, the words “must” or “must not” are used. It states that it is designed to give admission authorities the freedom they need to run the appeals process efficiently, whilst maintaining minimum requirements which will ensure fairness and transparency. It explains that in drawing up a shorter Code (from that which it replaced), the Secretary of State has been guided by the principle that admission authorities are best placed to decide how to meet those requirements.
99. Section 1 deals with the Constitution of Appeal Panels. Paragraph 1.2 identifies that “appeal panels perform a judicial function and **must** be transparent, accessible, independent and impartial, and operate according to principles of natural justice.”
100. Paragraph 1.4 requires an admission authority to appoint a clerk to the appeal panel who is independent of the school and the education functions of the local authority. It states the “... The clerk **must** have knowledge of this Code, the School Admissions Code, other law relating to admissions and other relevant law, and be able to offer advice to enable the panel to undertake its judicial function.”
101. An appeal panel must consist of a chair and at least two other panel members, with the panel consisting of at least one from each of the two specified categories of members reflecting the requirements of the 2012 Regulations referred to above (see paragraph 1.5). Admission authorities “**must** ensure that panel members are independent and retain their independence for the duration of their service” (see paragraph 1.6).

102. Section 2 deals with “Appeal Hearings”. It repeats the requirements in the Admissions Code for authorities to give reasons and to identify the right to appeal and again stipulates that: “... Admission authorities **must not** limit the ground which an appeal can be made” (see para. 2.5 of the Appeals Code and para 2.24 of the Admissions Code).
103. Paragraph 2.7 identifies that notification of a hearing “**must** included a deadline for the submission of any further evidence that was not sent with the initial appeal”. This therefore expressly contemplates the submission of further evidence in support of an appeal beyond that submitted with the initial appeal notice itself. It also states that: “... Admission authorities **must** ask appellants whether they intend to call any witnesses or be represented at the hearing.” Again, this expressly contemplates that an appeal panel may hear evidence for itself from witnesses.
104. Paragraph 2.9 requires an admission authority to supply the clerk to the appeal panel with all relevant documents needed to conduct the hearing in a fair and transparent manner. This must include the reasons for the decision to refuse admission and an explanation as to how admission of an additional child would cause prejudice to the provision of efficient education or efficient use of resources.
105. Paragraph 2.22 provides that “Appeal panels **must** either uphold or dismiss an appeal and **must not** uphold an appeal subject to any specified conditions.” Paragraph 2.23 requires them to be decided by a simply majority of votes cast and it identifies that sections 3 and 4 provide detail on the decision-making process.
106. Paragraph 2.24 of the Appeal Code requires an Appeal Panel to communicate its decision, including its reasons, in writing. Paragraph 2.25 states in this regard:

“The panel **must** ensure that the decision is easily comprehensible so that the parties can understand the basis on which the decision was made. The decision letter **must** contain a summary of relevant factors that were raised by the parties and considered by the panel. It **must** also give clear reasons for the panel’s decision, including how, and why, any issues of fact or law were decided by the panel during the hearing.”
107. Paragraph 2.26 requires the clerk to ensure that an accurate record is taken of points raised at the hearing, including the proceedings, attendance, voting and reasons for the decision.
108. Section 3 deals with “Reaching Decisions on Appeals”. Paragraph 3.1 identifies a “Two stage process” which Panels “**must**” follow for all appeals “except for infant class size appeals which are dealt with section 4”. I will return to the question of what constitutes an “infant class size appeal” and the process to be followed for such an appeal below.
109. The first stage under section 3 is described as “examining the decision to refuse admission”. The Appeals Code provides as follows:

“3.2 The panel **must** consider the following matters in relation to each child that is the subject of an appeal:

- a) whether the admission arrangements (including the area's co-ordinated admission arrangements) complied with the mandatory requirements of the School Admissions Code and Part 3 of the School Standards and Framework Act 1998; and
 - b) whether the admission arrangements were correctly and impartially applied in the case in question.
- 3.3 The panel **must** then decide whether the admission of additional children¹¹ would prejudice the provision of efficient education or the efficient use of resources.
- 3.4 In all cases, the panel must refer to the local authority and the admission authority (if the appeal is for a school that is its own admission authority) any aspects of the admission arrangements that do not comply with admissions law.
- 3.5 The panel **must** uphold the appeal at the first stage where:
- a) it finds that the admission arrangements did not comply with admissions law or had not been correctly and impartially applied, and the child would have been offered a place if the arrangements had complied or had been correctly and impartially applied; or
 - b) it finds that the admission of additional children would not prejudice the provision of efficient education or efficient use of resources.
- 3.6 However, in multiple appeals where a number of children would have been offered a place, and to admit that number would seriously prejudice the provision of efficient education or efficient use of resources, the panel **must** proceed to the second stage.
- 3.7 The panel **must** proceed to the second stage where:
- a) it finds that the admission arrangements did comply with admissions law and that they were correctly and impartially applied to the child; or
 - b) it finds that the admission arrangements did not comply with admissions law or were not correctly and impartially applied but that, if they had complied and had been correctly and impartially

applied, the child would not have been offered a place;

and it finds that the admission of additional children would prejudice the provision of efficient education or efficient use of resources.”

110. Footnote 11 which is referenced in paragraph 3.3 of the Code states:

“At this stage the characteristics and circumstances of the particular child in question will not, except in extreme cases, be relevant to the question of whether the admission will cause prejudice (*R (on the application of M) v Haringey Independent Appeal Panel* [2010] EWCA Civ 1103).”

111. I will return to the decision in the *Haringey* case shortly.

112. Section 3 deals with the Second stage, described as balancing the arguments, as follows:

“Second stage – balancing the arguments

3.8 The panel **must** balance the prejudice to the school against the appellant’s case for the child to be admitted to the school. It **must** take into account the appellant’s reasons for expressing a preference for the school, including what that school can offer the child that the allocated or other schools cannot. If the panel considers that the appellant’s case outweighs the prejudice to the school it **must** uphold the appeal.

3.9 In multiple appeals, the panel **must not** compare the individual cases when deciding whether an appellant’s case outweighs the prejudice to the school. However, where the panel finds there are more cases which outweigh prejudice than the school can admit, it **must** then compare the cases and uphold those with the strongest case for admission. Where a certain number of children could be admitted without causing prejudice, the panel **must** uphold the appeals of at least that number of children.

Consideration of prejudice

3.10 Whilst the panel **must** take into account the school’s published admission number, the admission authority **must** be able to demonstrate prejudice over and above the fact that the published number has already been reached¹². The panel **must not** reassess the capacity of the school, but must consider the impact on the school of admitting additional children. In reaching a decision

as to whether or not there would be prejudice the panel may consider the following factors:

- a) what effect an additional admission would have on the school in the current and following academic years as the year group moves through the school;
- b) whether any changes have been made to the school's physical accommodation or organisation since an admission number was originally set for the relevant year group;¹³
- c) the impact of the locally agreed Fair Access Protocol;
- d) the impact on the organisation and size of classes, the availability of teaching staff, and the effect on children already at the school."

113. Section 4 deals with "Infant Class Size Appeals". Paragraph 4.1 refers to the 30 pupils per school teacher infant class size limit pursuant to the regulations made under section 1 of the 1998 Act. Paragraph 4.2 states:

"This section deals only with appeals where an admission authority refuses to admit a child on the grounds that the admission of an additional child would breach the infant class size limit and there are no measures it could take to avoid this without prejudicing the provision of efficient education or efficient use of resources. Decisions on appeals for infant classes where the refusal was for any other reason should be made in accordance with the two stage process in section 3."

114. Paragraph 4.3 states that Panels "**must**" follow the two stage decision making process in section 4 when considering "infant class size appeals¹⁹." Footnote 19 states that the procedure for determining infant class size appeals has been considered by the Court of Appeal and High Court in a number of cases. I refer to some of the decisions in the analysis below.

115. Differing in certain key respects to Section 3, the two stages under section 4 are then set out below as follows:

"First stage – examining the decision to refuse admission.

4.4 The panel **must** consider all the following matters

- a) Whether the admission of an additional child/additional children would breach the infant class size limit;
- b) whether the admission arrangements (including the area's co-ordinated admission arrangements)

complied with the mandatory requirements of the School Admissions Code and Part 3 of the School Standards and Framework Act 1998; and

- c) whether the admission arrangements were correctly and impartially applied in the case(s) in question; and
 - d) whether the decision to refuse admission was one which a reasonable admission authority would have made in the circumstances of the case.
- 4.5 The panel must immediately refer to the local authority and the admission authority (if the appeal is for a school that is its own admission authority) any aspects of the admission arrangements it identifies as unlawful.
- 4.6 The panel may only uphold the appeal at the first stage where:
- a) it finds that the admission of additional children would not breach the infant class size limit; or
 - b) it finds that the admission arrangements did not comply with admissions law or had not been correctly and impartially applied, and the child would have been offered a place if the arrangements had complied or had been correctly and impartially applied; or
 - c) it finds that the decision to refuse admission was not one which a reasonable admission authority would have made in the circumstances of the case.
- 4.7 In multiple appeals where a number of children would have been offered a place under paragraph 4.6 above, and to admit that number would seriously prejudice the provision of efficient education or efficient use of resources, the panel must proceed to the second stage.
- 4.8 The panel must dismiss the appeal at the first stage where:
- a) it finds that the admission arrangements did comply with admissions law and that they were correctly and impartially applied; or
 - b) it finds that the admission arrangements did not comply with admissions law or were not correctly and impartially applied but that, if they had complied and had been correctly and impartially

applied, the child would not have been offered a place;

and it finds that the decision to refuse admission was one which a reasonable admission authority could have made.

Second stage – comparing cases

- 4.9 The panel **must** compare each appellant’s case for their child to be admitted and decide which of them, if any, to uphold. Where the school could admit a certain number of children without breaching the infant class size limit (or without needing to take measures to avoid breaching it that would prejudice the provision of efficient education or efficient use of resources) the panel **must** uphold the appeals of at least that number of children

Consideration of ‘reasonableness’

- 4.10 The threshold for finding that an admission authority’s decision to refuse admission was not one that a reasonable authority would have made is high. The panel will need to be satisfied that the decision to refuse to admit the child was ‘perverse in the light of the admission arrangements’²⁰ i.e. it was ‘beyond the range of responses open to a reasonable decision maker’ or ‘a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.’²¹

116. The approach required for Infant Class Size Appeals is no doubt intended to recognise the importance of the statutory limit on infant class sizes under section 1 of the 1998 Act.

The Differences between Section 3 and Section 4 in the Appeals Code

117. As can be seen from their terms, there are differences between the processes for dealing with an appeal depending on whether it is determined under Section 3 or Section 4 of the Appeals Code.
118. Under the first stage of a Section 3 appeal, the Panel must first “consider” whether the Council’s admission arrangements comply with the mandatory requirements of the Admissions Code and the 1998 Act and whether the admission arrangements were “correctly and impartially applied” to the case in question (see paragraph 3.2 above). These two mandatory considerations are self-evidently driven by the statutory requirements of the 1998 Act. The Council’s admission arrangements need to comply with the statutory code on admissions, as well as the 1998 Act. The admissions authority is also required to apply the admissions arrangements to any determination. The Panel

must refer any non-compliance of the admissions arrangements with admissions law to the local authority (see paragraph 3.4). That is presumably with a view to the local authority remedying that unlawfulness by a revision to the admissions arrangements.

119. Having considered those two initial matters, the Panel then must move on to “decide” whether the admission of additional children would prejudice the provision of efficient education or the efficient use of resources. This is no doubt intended to reflect the statutory requirement to give effect to a parent’s school preference unless that preference would prejudice the provision of efficient education or the efficient use of resources (see section 86(2) and (3) of the 1998 Act as set out above).
120. Paragraph 3.5 of Section 3 obliges the Panel to uphold a parent’s appeal at the first stage if: there is non-compliance with admissions law / failure to apply the arrangements correctly and impartially; and the child would otherwise have been offered a place but for that non-compliance/failure. That is regardless of whether or not specified prejudice would arise. The Panel is also obliged to uphold an appeal at that stage if no specified prejudice would arise.
121. If not upheld for either of these reasons, the Panel must proceed to the second stage. So even if the admissions arrangements comply with admissions law and have been correctly and impartially applied and admission of a child would cause prejudice, the Panel must still go on to balance the prejudice to the school against the appellant’s case for admission. The Panel therefore has an important function of weighing such competing considerations for itself. If it considers the appellant’s case outweighs the prejudice, it must uphold the appeal. It is clear that this part of the Panel’s assessment is intended to be particularly fact sensitive and, in my judgment, one for its own decision.
122. The Panel must take into account the school’s published admission number, the authority must demonstrate prejudice over and above the fact that that the number has been reached. This does not mean reassessing the capacity of the school, but it does require the Panel to consider the impact on the school of admitting additional children and requires it to consider the specified factors set out in paragraph 3.10.
123. A Panel can therefore uphold an appeal under section 3 even where the Council’s admission arrangements comply with the law, the arrangements have been correctly and impartially applied and the admission of the child will cause prejudice to the provision of efficient education or the efficient use of resources.
124. The context for this power under the second stage of Section 3 is one where the Council has not refused to admit a child on the grounds that the admission of an additional child would breach the infant class size limit. Section 3 therefore appears to anticipate that the prejudice the Panel will be weighing in these circumstances will not be prejudice of the type that would cause a breach of the infant class size limit.
125. The section 3 process contrasts with that under section 4 for an “infant class size appeals”. Section 4 only applies to an appeal where “an admission authority refuses to admit a child on the grounds that the admission of an additional child would breach the infant class size limit and there are not measures it could take to avoid this without prejudice to the provision of efficient education or efficient use resources.”

126. There is still a two stage process under section 4; but it differs significantly from section 3.
127. The first stage under section 4 is similarly described as “examining the decision to refuse admission”. This time, however, paragraph 4.4 specifies four matters that the Panel must “consider” at the first stage. Two of these are the same that apply to the first stage of section 3, namely whether the admissions arrangements comply with admissions law (see paragraph 4.4(b)) and whether they were correctly and impartially applied in the case in question (see paragraph 4.4(c)). Paragraph 4.5 in section 4 contains an equivalent provision to that in paragraph 3.4 of section 3, requiring the Panel to refer to the local authority and admissions authority any aspects of the admissions arrangements that the Panel identifies as unlawful. Again, this is presumably to enable the authority to remedy that failing.
128. However, there are two further considerations for consideration at Stage 1 in section 4.
129. The first additional consideration is whether the admission of an additional child/children would breach the infant class size limit (see paragraph 4.4(a)). The reason for this is straightforward. The Panel needs to consider whether the infant class size limit would in fact be breached.
130. The reason for the second additional consideration is less straightforward. The Panel must consider whether the decision to refuse admission was one which a reasonable admission authority would have made in the circumstances of the case (see paragraph 4.4(d)). Paragraph 4.10 requires that in undertaking that exercise, the Panel must apply a test that is traditionally ascribed to the assessment of *Wednesbury* unreasonableness or irrationality on the part of the authority. This not only expressly indicates that the Panel is conducting a review function, but also makes it explicit that the Panel is required to limit that function of review to an assessment of the reasonableness of the local authority’s decision in a *Wednesbury* sense.
131. This more limited review function is set within the context of an appeal where the Council has refused to admit a child because of a breach of the statutory infant class size limit which cannot be addressed without the identified prejudice.
132. Paragraphs 4.6-4.8 then prescribe how an Appeal Panel should determine an appeal under section 4. Paragraph 4.6 deals with upholding an appeal, but here the language used contrasts with the equivalent provision under section 3. Paragraph 4.6 sets out three circumstances in which the Panel “**may**” (rather than “**must**”) uphold an appeal at the first stage. This discretion to uphold the appeal only arises at the first stage if the Panel finds either that a) admission of additional children would not breach the infant class size limit; or b) the admissions arrangements did not comply with admissions law / were not correctly and impartially applied, and the child would have been offered a place if there had been compliance/correct and impartial application; or c) it decides that the decision “was not one which a reasonable admission authority would have made in the circumstances of the case”.
133. Unlike section 3, paragraph 4.8 then sets out circumstances in which the Appeal Panel “**must**” dismiss the appeal at the first stage. It must dismiss if (a) the Panel finds that admissions arrangements did comply with admissions law and were correctly and impartially applied; or (b) there was no such compliance/ application, but the child

would not have been offered a place if there had been such compliance/application; and in either of the scenarios in (a) or (b), the Panel finds that the decision to refuse admission was one which a reasonable admission authority could have made. This is very different from section 3 where those findings would not require a Panel to dismiss an appeal. To the contrary under section 3 the Panel would be obliged to go on to the stage 2 consideration of prejudice even where those findings have been made.

134. The second stage of section 4 is therefore of far more limited application and not equivalent to that under section 3. It is only applicable where there are multiple appeals and the discretionary power to allow the appeal has arisen under paragraph 4.6, but to admit that number of children would cause “serious prejudice” the provision of efficient education or efficient use of resources: see paragraph 4.7. In those circumstances, the Panel must proceed to the second stage of the process which is only concerned with how to carry out the comparison exercise between the cases in multiple appeal.
135. Beyond assessing the *Wednesbury* reasonableness of the authority’s decision at stage 1 under section 4, there is no equivalent process to that under section 3 where the Appeal Panel is entitled to weigh up an Appellant’s case against the prejudice that would be caused.
136. The circumstances in which the Panel can allow an appeal under section 4 are therefore significantly more limited than for an appeal under section 3. It is therefore perhaps unsurprising that paragraph 4.12 of the Appeals Code states:

“4.12 Admission authorities **must** provide parents with information on the limited circumstances in which an infant class size appeal can be upheld in order that they can make an informed decision about whether to submit an appeal.”

137. In my judgment, these differences will normally mean it is important for the appellant, the Panel and the local authority to know whether an appeal is being determined under Section 3 or Section 4. It is therefore unfortunate that there is disagreement about this between the Claimants and the Council.

The Judicial Review Challenge

138. It is convenient to deal first with the ground of challenge that has now been conceded by the Defendant and the Interested Party.

Failure to Provide Sufficient Reasons

139. Ground VIII of the Claimants’ Statement of Facts and Grounds was that the Defendant’s Panel had failed to provide sufficient reasons for its decision.
140. Both the Defendant and the Interested Party initially contested the arguability of this challenge. Both have now conceded that the Panel’s decision letter fails to provide proper adequate and intelligible reasons and agreed that the Defendant’s decision should be quashed on that ground alone (as summarised above).
141. In my judgment, they were right to make that concession. There is no need to turn to the common law to find a duty to give reasons, nor to inform the nature and quality of

the reasons required. Paragraph 2.24 of the Appeals Code itself articulates an obligation on an Appeal Panel to communicate its decision on each appeal in writing, including the reasons for that decision. Paragraph 2.25 of the Appeals Code identifies the requirement that the Panel must ensure that the decision is easily comprehensible, so that the parties can understand the basis on which the decision was made. It states that the Panel must give clear reasons for the panel's decision, including how, and why, any issues of fact or law were decided by the panel during the hearing.

142. The Panel's decision letter did seek to follow a structure of identifying the relevant factors that were raised by the parties. It also did set out conclusions on the main issues identified whether the appeal were considered under section 3 or section 4. But in my judgment the Defendant and Interested Party have rightly recognised (albeit belatedly) that no sufficient reasons are given for the conclusions reached. It is one thing to set out conclusions. It is another to give reasons for those conclusions.
143. The absence of sufficient reasons for the conclusions causes the Claimants substantial prejudice in being able to understand how and why the issues they raised have been decided against them. For this reason, I consider that the concession of the Defendant and Interested Party is properly made.
144. The Defendant's decision should be quashed and the Claimants' appeal remitted for redetermination by a fresh Panel.

Other Grounds

145. Given that required outcome, the question arises as to whether the remaining grounds have essentially become academic, or whether they raise issues of law which the Court can and should decide now.
146. It is well-established that where a claim is purely academic, in the sense that there is no longer a case to be decided which will directly affect the rights and obligations of the parties, it will generally not be appropriate to bring judicial review proceedings: see eg *R. v Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450. A common example of this is where a defendant has agreed to reconsider a decision challenged. In such circumstances, the Court will only proceed to determine an academic issue if similar cases exist or are anticipated and the decision in the judicial review will not be fact-sensitive: see *R. (Zoolife International Ltd) v The Secretary of State for Environment, Food and Rural Affairs* [2008] A.C.D. 44 at paragraph 36.
147. In certain circumstances a claimant has been permitted to continue to press grounds of challenge despite a concession by the defendant that the decision will be redetermined. An example of this is where the claimant argues that there is only one *Wednesbury* reasonable outcome to the underlying appeal: see eg *Samuel Smith Old Brewery v Secretary of State for Communities and Local Government* [2009] EWHC 3238 (Admin) or *R(Aviva Life & Pensions (UK) Ltd v Financial Ombudsman Service* [2017] EWHC 352 (Admin) at [57]. I am prepared to assume for present purposes that another example might be resolution of a contentious issue of law which will necessarily be relevant to the redetermination and potentially determinative of the underlying appeal.
148. Mr Edwards considers that there are three issues which require resolution by the Court now, notwithstanding the Defendant's concession that the appeal will be determined

afresh. He helpfully and clearly articulated these in paragraph 5 of his skeleton argument and addressed me orally on each of them. I take them in a slightly amended order.

Whether the Council's (various) tests of "permanence" of a home address are compatible with the School Admissions Code 2014, as a matter of law

149. The Claimants submit that the approach adopted by the Council to the determination of the Claimants' address is necessarily incompatible with the Admissions Code in several respects, and consequentially unlawful.
150. They contend that: the Council's admission arrangements do not define the concept of "permanence" of a home; the criteria for such permanence must be clearly set out; it is insufficiently clear to mention ownership of another property as a possibility for rejecting a home as "permanent"; these failures risk arbitrary decision-making and means there is a lack of required clarity on a key term which is contrary to the letter and spirit of the Admissions Code. They allege the Council has introduced determinative conditions which are not published, as well as the question of financial status as those who rent homes and may therefore not be treated as occupying such homes permanently are more likely to be financially precarious.
151. Mr Edwards submitted that these issues of compliance are questions of law on which the Claimants and the Council disagree (albeit not ones on which the Defendant has expressed a view in its Detailed Grounds). He argues that the Court can and should decide them now without deference to the Panel.
152. There is clearly some force in Mr Edwards' submission that the issues the Claimants raise as to the compliance of the Council's admission arrangements with the Admissions Code raise issues of law. The correct interpretation of the Admissions Code is ultimately a matter of law for the Court.
153. I am not persuaded, however, that it is appropriate for the Court to attempt to resolve the Claimants' issues of alleged non-compliance now, for any or all of the following reasons.
154. First, as the Defendant's decision is to be quashed and the Claimants' appeal redetermined by a fresh Panel, the question of the admission arrangements' compliance with the Admissions Code will inevitably fall to be considered by that fresh Panel. That will be the case whether the appeal is treated as an appeal under Section 3 or an appeal under Section 4 of that Code. The issue is one that arises under both sections. The fresh Panel will therefore have to produce a reasoned decision on this issue in due course in accordance with that fresh Panel's obligations under the Appeals Code.
155. Secondly, I consider that both the statutory scheme and the Appeals Code deliberately create a specific role for a specialist Appeal Panel to consider such compliance questions in the first instance. An Appeal Panel is intended to be a specialist appellate body, performing an independent and impartial judicial function when considering such issues. It is intended to be served by a clerk who has to have knowledge of the Admissions Code and the Appeals Code, as well as admissions law and other relevant law, who is able to offer advice to enable the Appeal Panel to undertake that judicial function. The Appeal Panel must have as part of its composition not just a lay person,

but also at least one person with experience in education who is acquainted with educational conditions in the local authority area, or who is parent of registered pupils at the school. This combination is intended to equip the Appeal Panel to reach decisions of the type intentionally allotted to it by the statutory scheme and the Appeals Code. This includes consideration of whether a local authority's admissions arrangements complies with the Admissions Code. In these circumstances, I consider it would be premature and inappropriate for the Court to arrogate to itself the function of determining that issue of compliance before the Appeal Panel has produced a reasoned decision on which it relies.

156. Thirdly, I am not persuaded at this stage (particularly in the absence of a reasoned decision from an Appeal Panel on which the Defendant is seeking to rely) that the question of compliance raised by the Claimants does only raise pure issues of law, which the Court can decide for itself without any input or fact-sensitive assessment from the Panel.
157. In this respect I note that the Claimants are not disputing the legitimacy of admissions arrangement taking any account of the permanence of an address. They also, realistically, do not seek to question the legitimacy of admission arrangements seeking to prevent potential abuse by parents who may seek to take advantage of the proximity of a temporary address close to a popular school. The Claimants' concern is rather to ensure that the approach to "permanent home" is clear, objective and fair in its meaning and application and to ensure that it allows one to distinguish between those abusing the system by using a temporary address, as compared with those who have legitimately moved to an area intending the move to that area to be permanent, but may have only been able to secure a short-term lease of a rented property and are continuing to look to purchase an affordable one.
158. The Claimants are therefore seeking to question whether or not the criteria in the Council's admission arrangements provide the requisite objectivity and clarity as to the nature and relevance of a permanent home to meet the requirements of the Admissions Code, as tested against the facts of their own case.
159. In my judgment, this may well call for some degree of assessment and judgment by the Appeal Panel about the particular wording of the Council's admission arrangements and its application to a case of this kind in light of the Appeal Panel's specialist knowledge.
160. One of the arguments made by Mr Edwards illustrates the sort of point the Appeal Panel may have to consider in this respect, namely how this criterion in the admissions arrangement is applied in practice to a family that lives in short-term rented accommodation, owns no other property but is looking to purchase a property in the meantime. Would the rented property be treated as the "permanent home" in such circumstances, or "temporary" because of the intention to buy a property if it can be afforded? If the latter, would this mean that a child in such circumstances had no "permanent home"? The Council will no doubt continue to argue that the Claimants' position is different because they have retained ownership of their flat in Barnes, but this means that the Appeal Panel may need to consider whether the criterion means that sale of that flat is in fact both necessary and sufficient to make the East Sheen address permanent, or whether other evidence of inability to return is sufficient and whether the criterion is sufficiently clear in these respects.

161. It seems to me that these are issues which the Appeal Panel is well-placed to consider with its specific expertise, having regard to the common goal of preventing abuse by parents moving to temporary addresses close to oversubscribed schools.
162. There is also a further complication that arises in this case which I consider makes it even less appropriate for the Court to determine these issues without a reasoned decision from the Appeal Panel. Even if the Court were to decide that the admissions arrangements did not comply with the law (for any or all of the reasons advanced by the Claimants), that would not be determinative of the appeal. Whether the appeal proceeded under section 3 or section 4, the question would then arise as to whether the child would have been offered a place if the arrangements had complied with the Admissions Code.
163. This question is also likely to require a judgment that is intended to be exercised by the Appeal Panel in the first instance. The Appeal Panel will have to consider whether the Claimants' son would have been offered a place if the non-compliance has not occurred. This will depend upon the nature of any non-compliance found to exist (if any). For example, even if the Claimants' complaint as to the lack of clarity about the permanence criterion were to be upheld, it does not mean that the permanence criterion would be discarded. It might simply mean that the criterion required greater clarity. It would then be up to the Appeal Panel to assess whether the provision of clarity would have resulted in a different outcome on the particular facts of the case.
164. The Claimants' grounds of challenge did contain a *Wednesbury* rationality challenge to the effect that the Defendant could only rationally conclude that the Claimants' address is that at East Sheen. In oral submissions, however, Mr Edwards confirmed that he was not inviting the Court to make a ruling to that effect, or to direct the Defendant to find that that East Sheen is the Claimants' address for the purposes of the admission application, or to make any factual findings.
165. In those circumstances I do not consider the Court is able, nor should it attempt, to make a finding as to whether the Claimants' son would have been offered a place at Sheen Mount Primary even assuming there is some non-compliance of the type being alleged by the Claimants.
166. Fourthly, even if I am wrong and the compliance assessment is purely a question of law, I am mindful of the statutory role that an Appeal Panel has as a specialist judicial body. The overall scheme makes it clear that it is the body that is intended to make the relevant decisions on these points in the first place. Neither the Council's admissions arrangements, nor the Admissions Code, are statutes in themselves. Disputes over their precise interpretation may not be determinative, depending on the facts of the case and how it is resolved. But in the application of such documents, there is a well-established approach by the courts of respecting the expertise of specialist appeal bodies in generally understanding the statutory framework under which they operate correctly. The courts have generally cautioned against undue intervention by the courts in respect of policy judgments within areas of the specialist competence of an expert tribunal: see eg *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49; [2008] 1 AC 678, per Lady Hale at paragraph 30. This does not mean that the Court will not ultimately have to decide whether or not such a tribunal has erred. But it does mean that the Court needs to be cautious about not unduly intervening.

167. This principle was applied by analogy by Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37 to the approach to be taken to Planning Inspectors in the interpretation of planning policy. By extension of that general principle, I consider the Court should be wary of undue intervention in respect of assessments that the Appeal Panel is required to make under the statutory scheme, particularly where an Appeal Panel is yet to produce a reasoned decision on which the Defendant is seeking to rely.
168. For these reasons, I do not consider it is appropriate for the Court to decide now whether the Council's tests of "permanence" in its admissions arrangements are compatible with the Admissions Code. I consider that this is an issue which first needs to be addressed properly by a fresh Appeal Panel on remission of the Claimants' appeal.
169. In so doing, it will be important for the Panel to fulfil its role. It will need to deal with the issues raised by the parties and provide appropriate reasons for the decision it makes as necessary. In my judgment, the Claimants have raised legitimate issues about the concept of "permanence" and the way it is applied under the Admissions Code in a case of their kind, and consequently whether it is a concept that is clear, objective and procedurally fair. By the same token, the Panel will also need to consider any countervailing arguments from the Council about the reasons for such a concept, why the Council consider it is sufficiently clear, objective and procedurally fair, and (as I apprehend) the contention that the East Sheen address cannot be "permanent" where it is only a short-term let whilst the Claimants continue to look for a property to purchase.
170. If the Panel does find any non-compliance with the Admissions Code requirements, the Panel will then need to go on to consider whether or not the Claimants' child would have been offered a place had that non-compliance not existed. It is not appropriate for the Court to try and reach its own decision on these issues in the absence of a reasoned decision from an Appeal Panel on which the Defendant is seeking to rely.
171. I recognise the question of compliance might ultimately come back before this Court if either party considers that the fresh Appeal Panel has erred in its decision. The Court may then have to resolve any issues of law that remain between the parties. But it is not inevitable that there will be such a dispute.

Whether the Council's approach to defining the "permanence" of a home address involves an unlawful rigid adherence to a policy, or is being used for an improper purpose, given the purposes of the relevant policy, or is *Wednesbury* unreasonable in any event.

172. The Claimants also argue that the Council's approach to the issue of permanence in respect of their East Sheen home breaches public law principles which were not addressed by the Panel, where the Defendant has not made any concessions as to what will happen on a fresh determination. In particular, the Claimants allege:
- i) the Council is not using the policy on permanence within its proper scope and for its proper purpose;
 - ii) the Council is rigidly adhering to a policy of always suspecting moves of home around the school application deadlines as suspicious, but without addressing the merits of the Claimants' particular case as to the genuineness of the move;

- iii) the Council's test for permanence of a home is *Wednesbury* unreasonable, arbitrary and/or irrational.
173. Mr Edwards confirmed at the outset of the hearing that the Claimants were not making any allegation that the Council had been acting in bad faith. He had not intended reference to an improper purpose to be interpreted in that way. He accepted that he may have set "a hare running" in using that terminology. He submitted that it was another way of putting an allegation that the Council had not taken into account relevant considerations, taken into account irrelevant ones or acted in a *Wednesbury* unreasonable way. I have dealt with it on that basis.
174. Mr Edwards argued that the Claimants' contentions involve the application of public law principles which are a matter of law for the Court. He submits that if the matter is to return to a Panel, it is only fair that the Claimants and the Panel have the Court's guidance on these points, given the Council's continuing robust defence of its decision-making to date.
175. For essentially the same reasons to those already articulated above in respect of the first issue (which I do not repeat again), I am not persuaded it is appropriate for the Court to reach any definitive view on these allegations in advance of any decision by a fresh Appeal Panel.
176. The Council is not entitled to limit the grounds of appeal the Claimants advance before the Appeal Panel. These are issues that the Claimants are pursuing. The Appeal Panel will need to grapple with them as part of its decision as necessary.
177. Without seeking to categorise definitively the nature of these arguments, it initially strikes me that they are likely to require consideration by the Appeal Panel under at least either or both of the considerations (compliance and correct and impartial application) common to both a section 3 and section 4 appeal process under the Appeals Code.

Whether the Appeal Panel's jurisdiction is that of an "appeal" or a "review" in respect of the Council's determination of the Claimants' home address at the material time

178. The remaining issue is about the nature of the Appeal Panel's jurisdiction when considering their appeal against the Council's decision. The parties have characterised this as a question of "appeal" or "review"; but the term "appeal" does not really reflect the nature of the dispute. It is whether the Appeal Panel should decide for itself the Claimants' address that should be used, or whether it is limited to exercising a function of review of the lawfulness and rationality of the Council's decision. I therefore shall describe it as a question of "decision" or "review".
179. The Claimants submit it is the former. The Council submit it is the latter. The Defendant's principal submission is that it should remain neutral on all topics that the Appeal Panel will have to decide, but if this issue is to be determined now, it contends that it is the latter. All parties agree that there is no binding authority that determines this issue. Those cases which do have some bearing on the issue (which I consider below) either relate to statutory provisions or versions of the Appeals Code in different form, or express non-binding opinions.

180. It is unfortunate that such a basic and fundamental question as to the nature of the Appeal Panel’s jurisdiction in determining appeals of the kind is still the subject of legal debate. Not without considerable regret, I am not persuaded that this is something that I can definitively decide, nor ought to attempt to do so, for the reasons set out below. Out of deference to the arguments advanced by the parties, however, I offer some opinions on some of the main points of debate.
181. The jurisdiction of the Appeal Panel is governed by the statutory framework and, consequently, the statutory code made pursuant to that statutory framework. As I have already noted, the 1998 Act itself does not provide any answer as to the nature of the Appeal Panel’s jurisdiction on an appeal of this kind. Section 94(1) of the 1998 Act merely requires a local authority to make arrangements to enable a parent to appeal against a refusal to admit a child to a school. There are regulations made which govern the composition of the Appeal Panel. The 1998 Act enables those regulations to specify the grounds on which an appeal panel may determine that a place is to be offered to a child concerned in the case of any appeal against a decision made on the ground that prejudice of the kind identified section 86(3)(a) would arise. The relevant regulations do not contain any such specification. Nor do the regulations or the parent Act seek to restrict the grounds on which an appeal may be made.
182. Any limits on the appellate jurisdiction of the Appeals Panel are therefore seemingly now governed by the Secretary of State’s Appeals Code issued under section 84 of the 1998 Act. This appears to be a legislative change to that which previously applied to appeals of this kind. The jurisdiction of an appeal panel on such an appeal used to be dictated by the primary legislation itself, in the form of paragraph 11 of Schedule 33 to the Education Act 1996, as then amended by the insertion of paragraph 11A to that Schedule in consequence of the introduction of the 1998 Act and paragraph 12 of Schedule 24 to the 1998 Act. By contrast, the jurisdiction is now governed by whatever is included in the Appeals Code and, presumably, is therefore capable of being changed by any variation in that Code from time to time.
183. The two different decision-making processes in sections 3 and 4 of the Appeals Code affect the overall jurisdiction of the Appeal Panel, depending on whether it is a Section 3 or Section 4 appeal they have to decide. But some elements of those sections are common to both as I have identified. Where the sections are the same and require the same issues to be considered using the same language, one would ordinarily expect the function (whether of “decision” or “review”) to be the same. But as a basic starting point for understanding the Appeal Panel’s overall jurisdiction, one would ordinarily want to understand whether it was dealing with a Section 3 or Section 4 appeal.
184. Unfortunately, there is no agreement on this basic starting point. The Claimants submit that theirs is a Section 3 appeal. The Council submits it is a Section 4 appeal. The Defendant makes no submission on this issue and does remain neutral. The Appeal Panel determination itself is somewhat unclear. There is at least a suggestion that they may have accepted the Claimants’ case that it was a Section 3 appeal in stating (with my emphasis added):
- “... Your appeal was for a place in reception, a year group bound by infant class size legislation and a decision making process as set out in Section 4 of the School Admission Appeals Code 2012. However, the Panel noted your argument that the reason to refuse

[your son] a place at the School was related to the determination o[f] your address and that, as set out in Section 4.2 of the Code, ‘Decisions on appeal for infant classes where the refusal was for any other reason should be made in accordance with the two stage process in section 3. **Whilst the Panel agreed to this submission**, they were also asked to consider your appeal under Part 4 in the alternative. The Panel therefore considered your appeal in accordance with the decision making process in both Part 3 and Part 4 of the School Admission Appeals Code 2012.’”

185. In my judgment, uncertainty over this basic issue is a product of some ambiguity in the wording of the Appeals Code itself.
186. At first blush, it might be thought to be a simple exercise to determine whether an authority has refused to admit a child to a preferred school on the ground specified in paragraph 4.2 (breach of the infant class size limit). I expect it would be a relatively simple exercise where (as may well be the case for many appeals) there is no issue over where the child in question lives for the purposes of the admission criteria. An appeal against refusal to admit a child to a primary school which is oversubscribed beyond the infant class size limit where the dispute is as to the measurement of distance from the child’s home to school I would expect naturally to fall within Section 4.
187. In this case, however, the principal decision of concern for the Claimants was the Council’s decision to treat their permanent address as being the flat in Barnes, rather than the house in East Sheen. The principal focus of the Claimants’ appeal was a challenge to that decision, rather than a refusal to admit on the ground that the admission would breach the infant class size limit.
188. Had the Council treated the Claimants’ permanent address as being in East Sheen, it is evident that the Council would not have refused to admit the Claimants’ son to Sheen Mount Primary School. That address was well within the outer distance of the addresses of children who were selected for the school. It was only in consequence of the Council deciding to treat the Claimants’ permanent address as the flat in Barnes that the Claimants fell outside the relevant distance for successful pupils.
189. If one treats the Council’s decision as being a refusal to admit the Claimants’ son on the grounds that the admission of him would breach the infant class size limit, then it is a section 4 appeal. If one argues, however, that the Council’s decision was a refusal to admit because they decided that the Claimants’ address was the flat in Barnes, then it looks like a section 3 appeal.
190. The position is not helped by the way in which the Council expressed its decision-making in this case. In the email correspondence with the Claimants prior to the actual decision providing a school offer, the Council made it clear that it had decided to deal with the Claimants’ application on the basis that their permanent address was the flat in Barnes. This lends support to the Claimants’ argument that their appeal is really about that decision; consequently, I can see why they contend that this is an appeal which concerns the Council’s real reason for refusal, namely the address, this is an appeal for the “any other reason” type mentioned in the last sentence of paragraph 4.2 which is required to be dealt with under section 3.

191. Moreover, in the Council’s subsequent decision letter itself dated 16 April 2019 – which is ultimately the decision that is appealed – there is no express reference to having refused to admit their son to Sheen Mount primary school. The letter contains an offer for Lowther Primary School as “the highest ranked preference school we are currently able to offer”. One has to turn to the accompanying Notes to discern that their preferred choice would have been oversubscribed. Again, one can see why this lends support to the Claimants’ argument that Section 4 is not applicable as it “deals only with appeals where an admission authority refuses to admit a child on the grounds that the admission of an additional child would breach the infant class size limit ...”
192. As the Claimants’ appeal is being remitted, the Appeal Panel will be confronted with this issue again. The Defendant has remained neutral on this issue in these proceedings. It may be that a fresh Appeal Panel will seek to deal with disagreement on this issue in the way it previously did, namely by considering the appeal in the alternative under both section 3 and section 4. Some of the central issues in dispute arise under both these sections anyway (compliance and correct and impartial application). It may therefore be that the issue is not ultimately determinative for the appeal.
193. In light of the need for caution in unduly intervening and without the benefit of a reasoned decision from the Appeal Panel (or submissions on this issue from the Defendant), I do not consider it is necessary or appropriate for me to try and rule definitely on this issue now. As the Appeal Panel’s decision is to be quashed, it is likely that any attempt at ruling on this issue would be treated as *obiter dicta* in any event. But out of deference to the arguments I have heard from the Claimants, I set out my view subject to those caveats.
194. In my opinion, although both the Council’s decision-making and paragraph 4.2 of the Appeals Code lack clarity and create the uncertainty set out above, I consider that the true intention of the ambiguous wording is that an appeal of this kind is to be dealt with under section 4.
195. I accept that the true source of grievance and principal focus of the appeal is about the decision as to which address should be used. It is this decision which has prevented the Claimants from receiving an offer for their preferred school. But in the ultimate analysis, this is an appeal in a case where the Council has refused to admit the Claimants’ son at Sheen Mount Primary school because of the breach of the infant class size limit. It is this limit which has ultimately caused the Council not to make an offer, even when applying the subscription criteria in the way they have in the use of the Barnes address.
196. It will often be the case that it is the decision on the application of the oversubscription criteria (for example a measurement between the school and home) which represent the principal focus of the dispute on an appeal of this kind. In any such case, it could be argued that if the criteria had not been applied in the way it had (ie a shorter measurement had been used) the child would have been offered a place and so the real reason for the refusal is the mistaken approach to the criteria, rather than a breach of the class size limit. In my opinion, however, paragraph 4.2 was not intended to be interpreted in this way. I anticipate that Section 4 is intended to apply to any case where an admissions authority has refused to admit a child because of a perceived breach of the infant class size limit and where there are no measures it could take to avoid this

without causing the requisite prejudice, even though this may be ultimately be based on a hotly disputed application of the oversubscription criteria.

197. I leave this question for a fresh Appeal Panel to consider on redetermination in so far as it is necessary to do so. It remains to be seen how the Appeal Panel decides to deal with it and whether it is, in fact, ultimately determinative of the appeal. As I have already noted, the questions of compliance and correct and impartial application arise under both sections 3 and 4 in any event.
198. I therefore return to the question of “decision” or “review” under either Section 3 or Section 4 in considering the Claimants’ address.
199. Both Section 3 and Section 4 require at stage one the Appeal Panel to “consider” whether (a) the Council’s admissions arrangements comply with the mandatory requirements of the Admissions and Part 3 of the 1998 Act; and (b) whether the admission arrangements were correctly and impartially applied.
200. Although the Claimants’ arguments are not necessarily limited to arguments under these two elements, the points they have raised on the “permanent home” address will require these two elements to be considered. The parties’ arguments on “decision” or “review” have therefore rightly focused on whether the task required of the Appeal Panel under both these elements is one of “decision” or “review”.
201. As with the dispute over whether this is a section 3 or section 4 appeal, I am ultimately not persuaded that it is necessary or appropriate for me to try and rule definitively on this issue. The matter is being remitted to a fresh Appeal Panel. The Appeal Panel will have to apply its mind to this issue and provide reasons for its decision. The question of “decision” or “review” may not ultimately prove to be determinative. For example, the same conclusion might be reached on either basis, or the appeal might ultimately fall to be resolved conclusively in a particular way regardless of this question. I should also exercise caution in intervening absent a reasoned decision from a specialist tribunal of this kind dealing with the issue in dispute. But similarly, both out of deference to the arguments I have heard (from all parties) I offer my views as follows.
202. Absent other judicial consideration of this issue, and based on an analysis of the statutory scheme, I would have inclined to the view that the Appeal Panel’s jurisdiction on the two elements in question was one of decision rather than review. My reasons for that view are as follows:
 - i) There is no immediately obvious reason why an appeal panel’s jurisdiction in this area should be limited to review. It is of note that the original appellate function of an appeal panel against decisions of an admissions authority appear to have been that of decision, rather than review: see eg Part II of Schedule 33 of the Education Act 1996. Earlier legislation does not necessarily assist in the interpretation of later legislation, or statutory codes made under that later legislation. But it may be of relevance in the event of ambiguity in later legislation and in the absence of any immediately obvious reason for a change to the nature of that jurisdiction.
 - ii) Neither the 1998 Act itself, nor any regulations made thereunder, purport to restrict the Appeal Panel’s jurisdiction to one of review.

- iii) The required composition of the Appeal Panel as an independent judicial body, to include a lay member and a member with, for example relevant educational experience of the Council's area, coupled with the absence of limits on what grounds of appeal a parent may advance, make the Appeal Panel well placed and well-suited to carry out a decision-making rather than simply a review function. That is not to say that the Appeal Panel could not be confined to review – it is in certain specific functions – but its composition lends itself to a role of decision rather than just review.
- iv) It is of some significance that the Appeals Code does expressly limit the Appeal Panel's jurisdiction to one of review in relation to specified matters. Paragraph 4.4(d) and paragraph 4.6(c), coupled with the express explanation in paragraph 4.10, make it clear that the Appeal Panel's consideration of whether a decision to refuse admission was one which a reasonable admission authority would have made in the circumstances of the case is to be assessed against the standards of *Wednesbury* reasonableness only. This provides some support for the notion that if the intention was to limit the Appeal Panel's consideration of compliance / correct and impartial application to one of review, the Appeals Code could and would have been more explicit in this regard.
- v) There is a natural limitation in the nature of the exercise required of the Appeal Panel in respect of the first of the two elements which makes the question of "decision" or "review" less relevant. The Appeal Panel has to consider whether the admission arrangements complied with the mandatory requirements of the Admissions Code and the 1998 Act. The Appeal Panel is therefore not formulating the admission arrangements itself, but nor, conversely, is it being asked to limit itself to an assessment of whether the Council could reasonably have concluded that admission arrangements complied. The natural meaning would suggest that it needs to make its own decision as to compliance.
- vi) Overall, the language used to describe the second of the two elements sits more naturally with a decision-making function, rather than one limited to review. The Appeal Panel must consider whether the admission arrangements were "correctly and impartially applied". The question of correct application tends to favour a decision-making function rather than a review. Even if consideration of impartial application might be more redolent of review, there is a requirement to consider both correct and impartial application. The fact that the task is backward looking (ie in the past tense) might be said to support the idea of a review, but I do not consider is determinative as it is also consistent with the Appeal Panel conducting an appeal against a decision that has been taken.
- vii) I would hesitate to place too much reliance upon the various verbs that are used in the Appeals Code to circumscribe the Appeal Panel's functions. It is right that the two elements are expressed as matters for the Appeal Panel to consider, rather than to decide. This contrasts with the third element of stage 1 in section 3 where the Appeal Panel is required to decide whether the admission of additional children would prejudice the provision of efficient education or the efficient use of resources. But there is a lack of consistency if these sorts of verbs are meant to distinguish the functions in any definitive way. For example, under paragraph 4.4 the Panel must also "consider" whether the decision to refuse admission was one which a reasonable admission authority would have

made in the circumstances of the case. This is clearly intended to be a review function in substance. But in paragraph 4.6 c) when considering the outcome of that consideration, the Appeals Code reverts to a description of that function as one of deciding: “c) it decides that the decision to refuse admission was not one which a reasonable admission authority would have made in the circumstances of the case.” More generally, the Appeals Code also refers to what the Panel “finds”.

- viii) It is not immediately obvious why the use of these different verbs “consider” and “decide” are intended to have such an important role in delineating issues of jurisdiction. If the Appeal Panel has the ability and specific function under section 3 of deciding for itself whether the admission of additional children would prejudice the provision of efficient education or efficient use of resource, rather than deferring to a review of the admissions authority’s decision on these topics, it can presumably readily make its own decision on whether admission arrangements were “correctly and impartially applied”, rather than simply reviewing whether the admissions authority reasonable considered them to have been correctly and impartially applied.
203. This issue is not, however, free from judicial consideration. Although all parties consider that none of the cases is binding, I consider that they do contain observations to which I am bound to attach considerable weight.
204. In *R v South Gloucestershire Education Appeals Committee ex parte Bryant* [2001] ELR 53, the Court of Appeal (by judgment delivered on 28 June 2000) considered the jurisdiction on admission appeals introduced by Schedule 24 to the 1998 Act. Paragraph 12 of Schedule 24 introduced the different approach to “class size prejudice” appeals and provided that in such appeals, the appeal panel’s functions were circumscribed as follows:
- “Where the decision under appeal was made on the ground that [class size prejudice] would arise ... an appeal panel shall determine that a place is to be offered to the child only if they are satisfied-
- (a) that the decision was not one which a reasonable admission authority would make in the circumstances of this case; or
 - (b) that a child would have been offered a place if the admission arrangements (as published under this Act) had been properly implemented.”
205. Buxton LJ stated at paragraph 8 of *Bryant*:
- “It will be seen, therefore, that if it is established that the case is one to which class size prejudice applies – and that has to be established by the local authority – the powers of the committee to interfere with any admission decision made in that context by the local education authority are extremely limited. They can only require the place to be offered to the child either if the local

education has behaved irrationally; or, secondly, if they are satisfied that, if the published arrangements had been properly implemented, the child would in fact have been offered a place.”

206. The challenge in that case involved a contention that the geographical consideration in the admissions policy had not been properly implemented for the child in question. The geographical consideration was not actually based on proximity alone. The policy was to take account of proximity to the preferred choice, but also distance from an alternative school. Whilst greater weight would be given to proximity to the preferred school than to distance from an alternative, the proximity factor would not outweigh the distance factor in all cases. There was no challenge to the admission policy itself as being either insufficiently clear or insufficiently published.
207. The Judge below had concluded that the appeal committee had information to satisfy itself that the geographical consideration limb of the admission criteria “was properly applied” given graphic information about who had been admitted. The Court of Appeal saw no answer to that finding. Buxton LJ stated in this regard:

“There is absolutely no reason to go behind that statement and the judge was right not to do so. He was also right to conclude that he should be generally guided in approaching these questions of detail by the observations of Jowitt J, albeit on a different aspect of this matter, in *R v Bradford Metropolitan Borough Council ex parte Sikander Ali* [1994] ELR 299 in which Jowitt J said (at 308G):

“... the application of a criterion involves the making of judgments and there will be questions of degree”

That is undoubtedly the case. The job for the committee is to decide whether such decisions have passed outside what can be properly discerned to be the boundary of the policy. There were entirely justified in coming to the conclusion that they did not. There is, therefore, in my judgment, no ground at all on which the judgment of the judge below can be criticised.”

208. Chadwick LJ who gave a concurring judgment stated at (41):

“The position, therefore, is that there is a finding of fact that the appeal panel did understand what the application arrangements required. ... With that understanding, the appeal panel were bound to ask themselves whether there was any material upon which they could be satisfied that the arrangements had not been properly implemented. The plan ... which was put before the panel in the form of an overhead projection provides no basis for a conclusion that the arrangements were not properly implemented. The pattern displayed by the plan is just the sort of pattern one would expect to find if the arrangements I have described were being implemented correctly. There was no

material upon which the panel could have come to a contrary conclusion; and ample material on which they could have reached the conclusion which they did ...”

209. It is evident from this that the Court of Appeal approached the task of considering whether admissions arrangements had been “properly implemented” as one more akin to a review. This decision is not binding as it considers a different statutory scheme. The Appeal Code now requires an Appeal Panel to consider whether the admissions policy has been “correctly and impartially applied” rather than “properly implemented”. That may, in itself, indicate an move to permitting an Appeal Panel to carry out a more exacting analysis. The Court of Appeal was also considering a criterion in that case which necessarily involved questions of judgment on the part of an admissions authority. However, I consider that the decision in *Bryant* generally supports an assumption that an Appeal Panel function of assessing whether something has been “properly implemented” is one of review.
210. Shortly after the Court of Appeal handed down judgment in *Bryant*, a differently constituted Court of Appeal gave judgment in *R v London Borough of Richmond ex parte JC* [2001] ELR 21 on 31 July 2000. This considered the materially similar provisions introduced by the 1998 Act (but looked at in terms of the new paragraph 11A of Schedule 33 to the Education Act 1996) on “class size prejudice” appeals.
211. In that case it concerned the criterion in an admissions policy as to “special circumstances, for example, medical or social reasons for requesting a place at a given school”. The Court considered the proper interpretation of paragraph 11A of Schedule 33 and whether it permitted a rehearing or only a review and the question of the admissibility of fresh evidence.
212. Kennedy LJ considered that the introduction of new provisions for “class size prejudice appeals” created a focus on the decision of the admissions authority, rather than enabling a committee to decide the matter afresh as had been the case under the previous provisions. His analysis was that the question of whether something had been “properly implemented” was a type of slip clause, empowering the appeal committee to put right any error made by the admissions authority on the information available to it. The example was given of failing to notice that the applicant had a sibling in the school despite that information being given on the application form, or if it miscalculated the distance between the applicant’s home and the school. He considered that the tense used limited the appeal decision to the material that had been available to the admissions authority at the time. The considered that the function was “limited to matters of fact as to whether a mistake was made by the authority without looking at fresh information after the decision was made”. Ward LJ, by contrast, considered that an appeal panel could look at fresh evidence in considering whether the admission arrangements had been properly implemented. Mantell LJ agreed with Kennedy LJ and Ward LJ insofar as his reasons were coincidental with Kennedy LJ.
213. Although this decision suggests that an Appeal Panel is able to correct errors of fact in relation to the proper implementation of an admissions policy, it still applied a restrictive approach to the functions of the Appeal Panel in these circumstances and also took the view (by majority) that there would be no role for new evidence in that reviewing function.

214. Finally, in *R(M) Haringey v Independent Appeal Panel and another* [2010] EWCA Civ 1103, the Court of Appeal dealt with a non-class size prejudice appeal governed by the previous version of the School Admissions Appeal Code dated 10 February 2009. Here the Court of Appeal was considering a section 3 appeal, rather than a section 4 infant class size appeal.
215. The case concerned the application of published admissions criteria which included a form of priority afforded to children with “an exceptional medical, social or educational need”. Unlike the subsequent 2012 Code - where the First Stage under section 3 and 4 is described as “examining the decision to refuse admission - the First Stage of the 2009 Code was described as “establishing the facts”. Like the 2012 Code, however, it raised 3 matters to be dealt with at stage 1 of section 3, namely whether the admission arrangements comply with the mandatory requirements, whether they were “correctly and impartially applied” to the child concerned and whether the admission of additional children would prejudice the provision of efficient education or the efficient use of resources.
216. In relation to the question of whether the arrangements were correctly and impartially applied, paragraph 3.2 of that version of the Code went on to require the Appeal Panel to consider whether the child would have been offered a place “had the arrangements been *properly* applied” (emphasis added). That adverb has now been replaced in the 2012 version with a requirement to consider whether the child would have been offered a place “had the arrangements been correctly and impartially applied.”
217. In the event, the question of whether or not the assessment of this element involved a “decision” or a “review” by the Appeal Panel was rendered academic. The Court of Appeal concluded that the appeal was bound to fail on the facts. Notwithstanding this, Wilson LJ went on to express the following view on this point:

“36. Mr Wise submits that the considerable expertise of the appeal panels is educational rather than legal; that their expertise therefore naturally propels a *decision* rather than, in the manner appropriate to the Administrative Court, a mere *review* of reasonableness; and that in this context, the very distinction is elusive. Furthermore, one adverb in para 3.2(a) of the code is very much in Mr Wise’s favour: it is the word ‘correctly’ ... which seems to require an intensity of examination more apt to decision than to review. The trouble is that in the subparagraph the code proceeds to deploy two other adverbs ... which dilute the force of the word ‘correctly’. For the words ‘properly’ and, in particular, ‘impartially’ suggest a function of review.

37. In my opinion the function of the panel when considering the second matter at first stage is one of review. I say so for three reasons:

- (a) The code requires that, at the first stage, the panel should ‘decide’ the third matter but should merely ‘consider’ the first two matters.

- (b) Its consideration of the second matter is, as Mr Wise concedes, retrospective, namely whether the arrangements *were* ‘correctly applied’: retrospectivity is inconsistent with a de novo decision.
- (c) Paragraph 3.2(a) requires that, if satisfied that the arrangements have not been correctly and impartially applied, the panel should proceed to consider ‘whether the child would have been offered a place had the arrangements been properly applied; in my view Mr Hyams is right to submit that this contingent issue for consideration by the panel would never arise were its function to take the decision for itself.

38. Some issues raised before a panel in relation to the second matter at the first stage will be such as to render the distinction between review and decision academic. They will be black-and-white issues such as whether the local educational authority wrongly measured the distance between the school and the child’s home. The distinction will be relevant only to circumstances in which the admission criteria in play required the authority to exercise judgment, such as indeed whether the child had an exceptional medical, social or educational need for a place at a particular school. In such circumstances its function of review requires the panel to ask itself only whether the negative conclusion of the authority was reasonable. I do not accept that such is – in principle – a difficult question for it to determine even though its expertise lies outside the law. Indeed, in the different context of an appeal against a refusal to admit an infant to a particular class in the light of its existing size, such is precisely one of the questions which it is or may be required to answer.”

- 218. This reasoning is questioned in commentary in *Education and the Courts* (3rd Edition) by Richard McManus QC. But having done so, the author notes that elsewhere in the Appeals Code the decision in *Haringey* on other points is noted and it is observed that if the Secretary of State considered the opinion not to reflect what was intended, he could have taken the opportunity to make this clear in the Appeals Code 2012 (which came out after the decision in *Haringey*). I do note, however, that one change that does appear to have been made in the 2012 version is the deletion of the word “properly” and its replacement with “correctly and impartially” in the passage I have identified. The word “properly” was a word which Wilson LJ considered to be supportive of a review jurisdiction, rather than a decision-making function, but it has now been removed.
- 219. Both the Defendant and the Interested Party rely upon this analysis as providing persuasive *obiter dicta* in support of their position. Mr Edwards sought to distinguish it and the other cases on the basis that they all concerned class size appeals. As he conceded, this is not so for *Haringey*. In any event, given the commonality of the two elements for consideration under both section 3 and 4 and the language used, it would

be surprising if there were a different function for the Appeal Panel depending on whether it is a section 3 or section 4 appeal.

220. Mr Edwards argued that in *Haringey* itself, it is recognised that there are some “black and white” issues which make the distinction between review and appeal academic, and the determination of the Claimants’ address is of this nature. This is an important point of itself, but not one which alters the principle of the analysis in *Haringey* that the function is one of review rather than decision.
221. Although none of the authorities above is binding upon me, I do consider them to be of considerable persuasive force, particularly the analysis in *Haringey* which deals with very similar wording to that now found in the Appeals Code 2012. It also deals with the wording as included in the functions of the Appeal Panel under section 3.
222. If it had been necessary and appropriate for me to reach a decision on this issue, I would have felt compelled by the weight of the reasoning in those cases (rather than precedent) to hold that the Appeal Panel’s task in considering whether the arrangements have been “correctly and impartially applied” is one of review rather than decision. And if that issue had been determinative, I would have been very receptive to the grant of permission to appeal to the Court of Appeal for resolution of this issue.
223. But for the reasons I have explained, I do not consider it is necessary or appropriate for me to reach a concluded view on this issue. The Claimants’ appeal will need to be redetermined by a fresh Appeal Panel. The Appeal Panel will need to deal with the arguments presented to it, including whether the difference between a “review” or “decision” approach materially affects the Appeal Panel’s decision on the Claimants’ address. If the Appeal Panel’s decision does ultimately turn on that distinction, it will clearly be helpful for the Appeal Panel to make this clear to the parties.
224. In that respect, the Appeal Panel will need to give close consideration to the point Mr Edwards has made about Wilson LJ’s observation in *Haringey* that some issues in relation to correct and impartial application may render the distinction between review and decision academic, and only relevant where the admission criteria require the authority to exercise judgment. The example given of that is whether a child has an exceptional medical, social or educational need. That is quintessentially a matter of judgment, where the function of review rather than decision-making is likely to be very relevant. By contrast, the measurement of a distance will normally be a matter of fact that the Appeal Panel can verify or correct itself, such that the distinction is less relevant. In this case, the criterion is concerned with the identification of the child’s “permanent home” address.
225. To my mind, the degree to which the distinction between review and decision becomes relevant in applying that criterion will be fact sensitive. For example, in a case where there is a dispute about which of two different homes occupied by separated parents should be treated as a child’s permanent home, this may well involve a significant degree of judgment on the part of the authority to which the distinction between review and decision becomes relevant. In this case, there is likely to be less judgment of that sort in play for the distinction to become particularly relevant. There is no dispute that the Claimants’ child lives with them at the East Sheen address and that the family now live there (rather than in Barnes) and the Council did not originally dispute the reasons they gave for that move. The decision is instead focused on whether this can be treated

as the permanent home in light of the established facts regarding retention of the flat in Barnes, the renting of the property in East Sheen and the continued intention to purchase a property. These are matters the Appeal Panel will need to consider in the round, but it may well be the case that the differences between “review” and “decision” have less practical relevance in that context. If my anticipation in that respect proves to be wrong, then the Appeal Panel’s reasoning should enable the Claimants and the Defendant to understand why that is the case.

226. I will therefore make an order quashing the Appeal Panel’s decision and remitting the appeal for determination by a fresh panel. I will receive written representations from Counsel as to the form of an appropriate order and any consequential submissions in light of this judgment.