



JUDICIARY OF
ENGLAND AND WALES

8th November 2016

X SCHOOL v OFSTED [2016] EWHC 2813 (Admin)

MR JUSTICE JAY

NOTE: This Summary is provided to help in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.bailii.org and www.judiciary.gov.uk

1. X School is a mixed school with an Islamic ethos. Children between the ages of 9 and 16 are taught separately and segregated on the grounds of gender. The School has done this for a number of years without comment or objection from the Regulator, OFSTED.
2. Following a statutory inspection carried out in June 2016, later that month OFSTED reported on the School and placed it on “special measures” following the identification of a number of leadership and management failings. There were serious concerns about safeguarding of children and a number of offensive books about the status of women that were found in the school library; but the main issue for OFSTED was the segregation of the sexes without, in its view, any educational justification.
3. X School applied on an urgent basis for injunctive relief against OFSTED seeking to prevent it from publishing its report. This relief was granted by Wyn Williams J (21/7/16) and Stuart-Smith J (2/8/16) in the summer. These judicial review proceedings have been expedited.
4. X School advanced a number of grounds in its claim form for judicial review. The principal grounds were that: (i) OFSTED acted unlawfully in changing its mind about the educational impact of segregation, either without giving prior notice to the school or at all; (ii) OFSTED’s inspectors were motivated by

actual or apparent bias; and, (iii) the practice of segregating on the ground of sex is not contrary to the relevant provisions of the Equality Act 2010. Subsidiary grounds were also advanced which I have ruled to be unarguable.

5. In my Judgment:

- (i) I have criticised OFSTED for determining that there was a leadership and management failing in X School in circumstances where no criticism of the practice of segregation on the ground of sex was made for a number of years. However, I have declined to grant relief on this issue, because I concluded that there were other concerns within the School in relation to which OFSTED was entitled to place this institution on “special measures”.
- (ii) I have acquitted OFSTED’s inspectors of any actual or apparent bias. Exceptionally, I heard oral evidence from the lead inspector, Mr James McNeillie, concluded that he did not approach the exercise with a closed mind, and that a reasonable hypothetical observer would not conclude that there was a real possibility that he did.
- (iii) I have found for the School on the sex discrimination issue, for the reasons summarised below.

6. OFSTED argued before me that the segregation arrangements at this School are discriminatory because, and I heavily summarise: (i) both the girls and the boys are denied an advantage which the other group possesses, namely interaction with their own gender (i.e. as regards the girls, they cannot interact with the boys, the latter being an advantage which only the boys possess; and *vice versa*) [in my Judgment, I have noted that this argument was advanced in two separate ways]; (ii) given that women are the group in society with minority power, any arrangements of this nature confer on them a greater detriment; and, (iii) such arrangements serve to reinforce notions of inferiority within the female gender.

7. OFSTED’s case has raised novel points on the Equality Act 2010 and the application and scope of discrimination law. No conclusive answer is to be found in the extensive jurisprudence on this topic. Further, OFSTED’s case has required me to consider and analyse the decision of the US Supreme Court in Brown v Board v Education [1954] and elsewhere.

8. For the reasons more fully set out in my Judgment, I have concluded that:

- (i) given that both girls and boys are denied the same opportunity of interaction with the opposite sex, it would be artificial to hold that each group has been discriminated against, in the sense of receiving treatment less favourable than the other.
- (ii) there is no evidence in this case that segregation particularly disadvantages women.
- (iii) the only basis for holding that segregation between the sexes reinforces notions of inferiority within the female gender is by contending, and

then establishing, that this is, in effect, why Islamic schools in particular or faith schools in general carry out the practice. But OFSTED has not made that argument, and there is no evidence to that effect.

9. This last issue is particularly complex and difficult, and reference must be made to my Judgment for a full analysis.
10. I have continued the anonymity order imposed by Stuart-Smith J, with minor modifications, because the reasons for it retain their currency.
11. Given the public importance of this case, I have granted both parties permission to appeal to the Court of Appeal.