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PRESS SUMMARY

HM Chief Inspector of Education, Children's Services and Skills (Appellant) v The Interim Executive Board of Al-Hijrah School (Respondent) [2017] EWCA Civ 1426
On appeal from: [2016] EWHC 2813 (Admin)

JUDGES: Sir Terence Etherton, MR, Lady Justice Gloster, VP, and Lord Justice Beatson

BACKGROUND TO THE APPEAL

This appeal considers whether it amounts to discrimination for a mixed-sex school to have a complete segregation of male and female pupils over a certain age. Section 85 of the Equality Act 2010 ("EA 2010") prohibits discrimination by a school against a pupil in the way it provides education for the pupil and in the way it affords the pupil access to a benefit, facility or service. Section 13 of the EA 2010 defines discrimination as including where a person is treated less favourably because of their sex than those who are not of that sex.

Al-Hijrah School ("the School") is a voluntary aided faith school for girls and boys aged between 4 and 16. The School has an Islamic ethos and for religious reasons believes that separation of the sexes from Year 5 onwards is obligatory. Complete segregation of boys and girls in the age range of 9 to 16 for all lessons, breaks, school clubs and trips is one of the defining characteristics of the School. This policy is public and apparent both to parents of potential pupils and to regulators.

In a June 2016 Inspection Report Ofsted assessed the School as "inadequate" in "effectiveness of leadership and management". One factor in this assessment was the segregation of pupils. Ofsted did not express any opinion that girls were receiving a different or qualitatively poorer level of education than boys but it assessed that the segregation limited the pupils' social development and the extent to which they were prepared for interaction with the opposite sex when they left school, and in that way they suffered educationally from the segregation. Ofsted concluded that this practice constituted unlawful discrimination contrary to the EA 2010. The School issued proceedings for judicial review of the Inspection Report, seeking an order that it be quashed.

The High Court allowed the School's claim. Mr Justice Jay recognised that denying pupils the educational benefits which might flow from interaction with the opposite sex could be detrimental to them. In considering, however, whether subjecting pupils to this detriment amounted to discrimination on the basis of sex, Mr Justice Jay held that each sex must be viewed as a group, and a comparison made between the groups. As the treatment of both groups was of equivalent nature with equivalent consequences, it could not be said that one group was being treated less favourably than the other, and there was therefore no discrimination. Mr Justice Jay rejected Ofsted's submissions that the segregation imposed a particular detriment on female pupils.

JUDGMENT

The Court of Appeal unanimously allowed the appeal. It held that the School's policy of strict segregation caused detriment and less favourable treatment for both male and female pupils respectively by reason of their sex and was therefore contrary to the EA 2010.

By a majority of 2 to 1 the Court held that the segregation did not impose a particular detriment on female pupils, with Lady Justice Gloster dissenting on this issue.

REASONS FOR THE JUDGMENT

The High Court was wrong to approach the question of whether there had been less favourable treatment by reason of sex by looking at each sex as a group. Each girl pupil and each boy pupil is entitled, as an individual, to freedom from direct discrimination [49-50]. The School's policy prevents an individual girl pupil from interacting with a boy pupil only because of her sex; if she were a boy she would be permitted to interact with a boy pupil, and vice versa. It was reasonable for Ofsted to take the view that this policy is detrimental to each pupil as it adversely impacts upon the quality and effectiveness of the education given to them by the School. As a result of the policy each pupil suffers less favourable treatment by reason of their sex [48, 51-55 and 67].

The Court of Appeal rejected the School's argument that separate but equal treatment by reason of gender cannot be unlawful discrimination, even if it is detrimental, if both sexes suffer the same detriment. Discrimination legislation should be given a wide and purposive interpretation rather than a narrow one [56]. The statutory scheme embodied in the EA 2010 envisages that both 'separate but equal' and 'separate but different' treatment can constitute unlawful discrimination [62-70]. The clear inference from Chapter 1 of Part 6 of the EA 2010, which deals with schools, is that Parliament did not envisage or intend segregation by sex in co-educational schools [71-73]. It was not the mere fact of segregation which gave rise to discrimination (as would be the case if there was segregation based on race), but rather the impact of the segregation on the quality of education which the pupils would receive but for their respective sex [80].

The motive for discrimination was irrelevant. That the School had a religious motivation for the segregation is therefore not relevant. The same was true of parental satisfaction with the School's policy. Whilst the statutory provisions in the Education Act 1996 and the School Standards and Framework Act 1998 provide for the accommodation of parental choice in their children's education, this cannot negate the statutory right of each child to be educated in a non-discriminatory manner as required by the EA 2010 [81-82].

Ofsted made clear during the proceedings that if their appeal succeeded they would apply a consistent approach to all similarly organised schools. What steps may be required to be taken to address the discrimination and within what timescale fell outside the present proceedings [96-100].

The majority, Sir Terence Etherton, MR, and Lord Justice Beatson, do not consider that there is sufficient evidence before the court to support the proposition (which in any event the court did not need to determine given the above finding) that the segregation imposed a greater detriment on girls than it did on boys [107-123]. Lady Justice Gloster, in a dissenting judgment, found that the evidence before the Court did demonstrate a greater practical harm for girls than for boys [142] and that this evidence, together with matters of which the Court could take judicial notice, established that the segregation was also particularly discriminatory against girls through reinforcing male and female stereotyped roles [170].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court of Appeal is the only authoritative document. The full judgment and accompanying media statement can be found on the judiciary website accessible to the public