



Neutral Citation Number: [2017] EWCA Civ 1787

Case No: C1/2016/4313

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**MR JUSTICE JAY**  
**[2016] EWHC 2813 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/11/2017

**Before :**

**THE MASTER OF THE ROLLS**  
**LADY JUSTICE GLOSTER VP**  
and  
**LORD JUSTICE BEATSON**

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**Between :**

**HM CHIEF INSPECTOR OF EDUCATION,  
CHILDREN'S SERVICES AND SKILLS**

**Appellant**

**- and -**

**THE INTERIM EXECUTIVE BOARD OF AL-HIJRAH  
SCHOOL**

**Respondent**

**- and -**

**THE SECRETARY OF STATE FOR EDUCATION**

**First  
Intervener**

**- and -**

**THE EQUALITY AND HUMAN RIGHTS COMMISSION**

**Second  
Intervener**

**- and -**

**SOUTHALL BLACK SISTERS and INSPIRE**

**Third  
Interveners**

**IN THE MATTER OF AN APPLICATION FOR  
JOINDER BY THE ASSOCIATION OF MUSLIM  
SCHOOLS**

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**Approved Judgment**

**Sir Terence Etherton MR, Lady Justice Gloster, Lord Justice Beatson :**

1. We handed down our judgments in this case on 13 October 2017. The order was made and sealed on the same day allowing Ofsted’s appeal and so in effect dismissing the claim of the Al-Hijrah school (“the School”) for judicial review.
2. There was no application by the School for permission to appeal to the Supreme Court.
3. By a letter dated 24 October 2017 the Association of Muslim Schools (“AMS”) applied to be a respondent or interested party or, failing that, an intervenor. The purpose of the application is to enable AMS to apply for permission to appeal to the Supreme Court.
4. The application is supported by a witness statement of Mr Ashfaque Alichowdhury, who is the chairman of AMS. In that witness statement he gives the following evidence, among other things.
5. AMS, a registered charity, was established in 1992 to act as a representative body for Muslim schools in the UK. Its objects are:

*“to promote and advance the education of children and young people attending full-time Muslim Faith schools according to the teachings of the Qur’an and the Sunnah, and to provide advice, guidance and support to said schools and those wishing to establish Muslim schools”.*

6. AMS is the “relevant diocesan authority” for any state funded Muslim school for the purposes of the Education Acts. It must be consulted regarding any change to the admissions criteria of a Muslim school and it conducts inspections of Muslim schools pursuant to section 48 of the Education Act 2005.
7. AMS has 133 formal member schools, including the School, but supports a wider group of Muslim schools, both independent and maintained, as well as academy trusts.
8. AMS has a “Strategic Plan”, which Mr Alichowdhury describes as:

*“a sincere and concerted effort to galvanise professionals, volunteers and donors engaged with Muslim faith-ethos schools to make significant headway in raising standards, and raising the profile and impact of Muslim faith-ethos schools”.*

9. So far as Mr Alichowdhury is aware, ten Muslim schools in AMS’ membership formally segregate boys and girls in a mixed sex school. He says that there may be others which are not in the membership, and that other schools may separate boys and girls for certain activities. He says that AMS understands that some schools from other faiths separate boys and girls as well.
10. Mr Alichowdhury explains AMS’ interest and concerns, as follows:

*“10. In its role both guiding Muslim schools and carrying out statutory inspections, the Association must try to ensure that schools comply with their legal obligations and act in a way which is consistent with Islamic teachings and practices. The*

*Association supports the case which it understands has been put forward by Al-Hijrah School. The Court of Appeal's judgment may have created a conflict between these two fundamental requirements which compromises the Association's ability to fulfil what it understands are its purposes. The judgment also puts the segregating schools at immediate risk of challenge from statutory bodies and other interested parties.*

*11. Clearly where there is a conflict, the schools and the Association must obey the law. However, the Association believes that this is an important issue and would welcome a review of the Court of Appeal decision by the Supreme Court.*

*12. The Association also feels that the judgment has created a degree of uncertainty as to what schools might expect in the event of an Ofsted inspection. This is particularly the case given the lack of guidance from Ofsted or the Department for Education on the question of segregation. There has been no public consultation and no official statement that educating girls and boys separately is fundamentally wrong."*

11. Mr Alichowdhury acknowledges that AMS was aware of these proceedings and the appeal.
12. In a letter from the legal and governance department of Birmingham City Council ("the Council") to the Court dated 2 November 2017, written on behalf of both the Council and the School, it was stated that the Council and the School "accept the Court of Appeal judgment and are working towards implementation". It said that the Council and the School "are not supportive of the application [of AMS], but equally, have no objection to the actions of the AMS in this matter either".
13. Ofsted opposes the application on the ground that it has been made too late because the appeal has concluded and AMS had full knowledge of the appeal but chose not to apply to become a party at an earlier stage.
14. We refuse the application for joinder for the following reasons.
15. AMS was aware of these proceedings and of the appeal but never applied, until after the conclusion of the appeal and the making of the order giving effect to the decision of this Court allowing the appeal and dismissing the claim, to be joined as an interested party or to be an intervenor.
16. The proceedings themselves concern the legality of a specific report by Ofsted about the particular arrangements for pupils in the School. Although, plainly, our judgments touch on matters of general application, the School itself, which is the claimant in the proceedings and the subject of them, accepts the decision of the Court of Appeal and is working with the Council to implement that decision.
17. This is not a case in which a losing party does not have the resources to appeal or for some other reason is disabled from appealing. The School, as claimant, has made a conscious decision to accept and to implement the Court of Appeal's decision. The

School does not encourage or support the desire of AMS to obtain permission to appeal in order to overturn the decision.

18. Further, our judgments are limited to the precise arrangements for segregation in the School at the time of the relevant Ofsted report. They do not address other situations mentioned by Mr Alichowdhury, such as the separation of boys and girls only for certain activities. Nor was there any evidence before us as to the precise arrangements in schools organised to meet the principles of other faiths. In relation to Muslim schools, Mr Alichowdhury refers generally to there being ten schools, which are members of AMS and which, so far as he is aware, “formally segregate boys and girls in a mixed sex school”. Neither the identities of those schools, nor their individual reaction to our judgments or to the stance now taken by the School itself in accepting and seeking to implement our decision, nor the precise nature of such formal segregation in each of those ten schools are set out in his witness statement.
19. Finally, as to Mr Alichowdhury’ concern that our decision has created a degree of uncertainty as to what schools might expect in the event of an Ofsted inspection, it was never part of the claim or the appeal, nor would it be part of any appeal to the Supreme Court, that the court should direct Ofsted what to do in the event it established that it was entitled to publish the relevant report.
20. In so far as uncertainty is a relevant factor at all, even if we had agreed to the application for joinder we would have refused permission to appeal on the ground, among others, that an appeal would have no real prospect of success. Any subsequent application to the Supreme Court would itself foster uncertainty for an unpredictable period and with an uncertain outcome with implications for the Council and the claimant School which accept and wish to implement our decision.