



Neutral Citation Number: [2018] EWCA Civ 2813

Case No: C1/2017/2506

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**HIS HONOUR JUDGE MCKENNA**  
**[2017] EWHC 2097 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/12/2018

Before :

**THE MASTER OF THE ROLLS**  
**LORD JUSTICE HAMBLEN**  
and  
**LORD JUSTICE GREEN**

Between :

<b>THE OFFICE FOR STANDARDS IN EDUCATION, CHILDREN'S SERVICES AND SKILLS ("OFSTED")</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>THE SECRETARY OF STATE FOR EDUCATION</b>	<b><u>Interested Party</u></b>
<b>- and -</b>	
<b>R (on the application of DURAND ACADEMY TRUST)</b>	<b><u>Respondent</u></b>

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**Sir James Eadie QC and Shane Sibel (instructed by OFSTED Legal Services) for the  
Appellant**  
**Gemma White QC and Gurprit Mattu (instructed by Lee Bolton Monier-Williams  
Solicitors) for the Respondent**

Hearing date : 5 December 2018  
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**Approved Judgment**

## Lord Justice Hamblen :

### Introduction

1. The appellant (“Ofsted”) is a non-ministerial Government Department with responsibility for inspecting and reporting on schools.
2. The respondent is an academy trust (“the Trust”) which at the material time ran the Durand Academy School (“the School”) with two sites in Stockwell, London, and a boarding site in Midhurst, West Sussex.
3. Following an inspection carried out on 30 November and 1 December 2016 (“the Inspection”), Ofsted produced a report dated 1 February 2017 (“the Report”) which adjudged the School to be “inadequate” with a recommendation made under section 44(1) of the Education Act 2005 (“EA 2005”) that it be placed into “special measures”.
4. The Trust brought a claim for judicial review seeking an order that the Report be quashed on the grounds that Ofsted’s assessment of the School was *Wednesbury* unreasonable and/or that Ofsted’s Complaints Procedures are procedurally unfair.
5. The Judge, HHJ McKenna sitting as a judge of the High Court, found that “the absence of any ability effectively to challenge the Report renders the Complaints Procedures unfair” [47] and that this “vitiates” the Report which was accordingly quashed. In those circumstances it was not necessary for the Judge to rule on the rationality challenge and he did not do so.
6. Ofsted appeals against the Judge’s decision, permission to appeal having been granted by McCombe LJ on 25 May 2018.
7. The Judge’s finding that Ofsted’s Complaints Procedures are unfair has serious implications for other cases and impacts on Ofsted’s ongoing work and, in particular, the manner in which it deals with schools which have been graded inadequate.
8. Since the judgment below, following the termination of the Trust’s funding agreement by the Secretary of State for Education, the Van Gogh Academy under the direction of a different academy trust, namely the Dunraven Academy Trust, operates from the same site. The Trust still exists as a charity and it remains appropriate to address the wider issues raised by the appeal.

### The facts in outline

9. The factual background is set out in the judgment at [19] to [40]. In the light of the fact that the appeal does not concern the rationality challenge, the relevant facts can be shortly stated.
10. As set out in the judgment:
  - “19. The School serves a diverse community in Lambeth. The majority of pupils are of Black African or Black Caribbean heritage and the proportion of pupils who speak English as an additional language is higher than the national average.

20. The School has two sites in Stockwell and a boarding site in Midhurst, West Sussex. The two London sites provide education for Early Years to Year 9, divided between the Mostyn site (Early Years and Years 1 to 3) and the Hackford site (Years 4 to 9). The site in Midhurst has boarding and education provision for Years 10 and 11.
21. The School became an academy under the Academies Act 2010 and established its boarding facility in 2014. It had at the time of the Inspection 1,064 pupils on the school roll and 70 boarders.
22. It is fair to say that the School has undergone significant expansion in recent years, adding key stages as well as a new site and boarding provision.
23. In January 2008 following an inspection under section 5 of the 2005 Act, at a time when it was a primary school catering for pupils aged 3 to 11 with 860 pupils on its roll, the School was adjudged overall as outstanding. In April 2011 that outstanding categorisation was confirmed following an interim assessment.
24. In December 2013 the School was again inspected pursuant to section 5 of the 2005 Act, the conclusion of which was that it merited the characterisation of good. At this time the age range of pupils was 3 to 13 and the number of pupils on the roll was 1,116. The School operated from the two London sites.
25. In April 2015 the School underwent an inspection under section 8 of the 2005 Act. At this stage, the School catered for an age range of 3 to 14 and had established a weekly boarding provision in Midhurst, West Sussex for year nine pupils. There were plans to continue expanding its provision year on year. As this was a section 8 inspection no judgments as to grading were made.
26. In June 2015 the School received its first social care inspection. The judgment at this inspection, which was of the School's boarding provision, was "requires improvement" for all aspects. At that time the boarding provision was for pupils in the age range thirteen to fourteen and there were a total of 37 boarders on the school roll.
27. Thereafter OFSTED initially proposed to carry out a further section 5 inspection of the School in the summer of 2017, towards the end of the inspection window of July 2016 to July 2017. OFSTED considered a section 5 inspection rather than a short inspection was

appropriate as a result of the addition by the School of a Key Stage in the intervening period and the age range of pupils was now 3 to 18.

28. In late September 2016 OFSTED decided to bring forward this inspection and at the same time delayed a social care inspection, which had previously been scheduled within the inspection window, for 11 October 2016 so as to be able to carry out what has been described as an “integrated” inspection. This was ultimately carried out on 30 November until 1 December 2016 and is the Inspection.”
11. Following the Inspection Ofsted’s Report was prepared and a draft of the Report was provided to the School on 6 January 2017, with comments invited to be made within five working days. The draft Report found the School to be “inadequate” under virtually every Inspection judgment heading and in overall effectiveness.
12. On 13 January 2017, the Trust submitted a document headed “Factual Accuracy Check” which disputed the conclusions reached and commented critically on each Inspection judgment made. The document ran to 31 pages.
13. On 20 January 2017, the Trust submitted a complaint to Ofsted’s Complaints Team (“the Complaint”). It was said that the findings of the draft Report were irrational and had no foundation in fact and that there had been numerous breaches of protocol and procedure.
14. On 23 January 2017, Ofsted replied by email stating that the Complaint had been forwarded to the region completing the quality assurance of the draft Report, and that, while this assurance was being completed, it would not investigate any concerns under its complaints policy.
15. On 30 January 2017, Ofsted wrote to the School stating that “the judgement that your school requires special measures has been moderated and confirmed”. As foreshadowed in the 23 January 2017 email, the Complaint was considered as part of the moderation process. It was the evidence of Mr Michael Sheridan, one of Her Majesty’s Inspectors (“HMIs) and Ofsted’s Regional Director for the London region, that this is standard procedure where a complaint is submitted prior to the completion of that process.
16. At the same time Ofsted provided a detailed response to the School’s “Factual Accuracy Check” document. This set out each of the main comments made by the School together with the lead inspectors’ response. The response ran to 26 pages and resulted in some minor amendments to the draft Report.
17. On 1 February 2017, a copy of the finalised Report was sent to the Department of Education, the Education Funding Agency and the local education authority.
18. The Report stated that the School was found to be “inadequate” under all except one Inspection judgment heading and in overall effectiveness, provided a summary of eight

key findings as to why the School was inadequate, but also identified four strengths of the School.

19. It was Ofsted's intention to publish the Report on its website five working days after 1 February 2017, in accordance with its usual policy. The Trust's judicial review proceedings were, however, issued on 7 February 2017. This was accompanied by an application for an interim injunction against publication, which was granted by Holman J on 8 February 2017. That injunction was later continued until the hearing before the Judge by order of McGowan J on 10 May 2017.
20. Meanwhile, on 15 March 2017, Ms Emma Ing of Ofsted, Senior Operational lead and Senior HMI, responded to the Complaint. In summary, she was unable to uphold ten elements of the Complaint; was unable to make a judgment about two elements; upheld one element and found two instances where the Report should be changed in response to the Complaint. It was noted that "I have no mandate to consider the inspection judgments as these have been considered when the inspection judgments were moderated".
21. On 4 April 2017, the School requested an internal review of Ofsted's response to the Complaint. This was responded to by a letter of 19 May 2017 from Mr John Young, a Senior HMI. He stated that "this review is an examination of whether or not Ofsted's policy and procedures on handling complaints were followed correctly to address your concerns". He addressed the original complaint investigation; the original complaint investigation outcomes; concerns about conduct; concerns about administration, and the extended quality assurance process and outcome. In summary, he found that "the original investigation was thorough and carried out in line with our published complaints policy. All available information was carefully considered and all aspects of your concern were addressed".

### **The statutory framework**

22. Her Majesty's Chief Inspector of Education, Children's Services and Skills ("the Chief Inspector") is Ofsted's most senior officer. Sections 116-119 of the Education and Inspections Act 2006 ("EIA 2006") describe the general functions and duties of Ofsted and the Chief Inspector. The Chief Inspector has power to delegate her functions to Ofsted (and/or additional inspectors) under paragraph 9 of Schedule 12 to EIA 2006.
23. Section 5 EA 2005 imposes a duty on the Chief Inspector to inspect certain schools (including academies) in England at intervals prescribed by Regulations, and to make a report of the inspection in writing. Section 8 provides for other inspections, at the request of the Secretary of State or at the discretion of the Chief Inspector.
24. Under the Education (School Inspection) (England) Regulations 2005 ("the 2005 Regulations"), the prescribed interval for the purposes of the section 5 inspection is no more than five years, beginning with the end of the school year in which the latest section 5 or section 8 inspection was carried out.
25. In conducting such an inspection, the Chief Inspector (or her delegates) "must" have regard to any views expressed to them by (amongst others) the head teacher and the governing body or proprietor of the school – see section 7 EA 2005.

26. Subsections (5A) and (5B) of section 5 EA 2005 set out that the Chief Inspector’s report “must in particular cover”:
- “(a) the achievement of pupils at the school;
  - (b) the quality of teaching at the school;
  - (c) the quality of the leadership in and management of the school;
  - (d) the behaviour and safety of pupils in the school.”
27. Section 11 EA 2005 gives the Chief Inspector power to arrange for any report of an inspection to be published in such manner as she considers appropriate.
28. Under section 14 EA 2005 the Chief Inspector “must ensure” that a copy of the report of any section 5 inspection is sent “without delay” to the appropriate authority for the school. The appropriate authority “must” then make the report available for inspection by members of the public and take steps to secure that every registered parent receives a copy of the report within 5 days (a period prescribed under the 2005 Regulations). Section 14 accordingly requires that the report be made public and that this be done promptly.
29. Section 44(1) EA 2005 provides that special measures are required to be taken in relation to a school if:
- ‘(a) the school is failing to give its pupils an acceptable standard of education, and
  - (b) the persons responsible for leading, managing or governing the school are not demonstrating the capacity to secure the necessary improvement in the school.’
30. Section 13 EA 2005 sets out the Chief Inspector’s duties where a school causes or has caused concern, including where special measures are required. It provides as follows:
- “13. Duties of Chief Inspector where school causes or has caused concern
- (1) If, on completion of a section 5 inspection of a school the Chief Inspector is of the opinion –
    - (a) that special measures are required to be taken in relation to the school, or
    - (b) that the school requires significant improvement,he must comply with subsections (2) and (3).
  - (2) the Chief Inspector must –
    - (a) send a draft of the report of the inspection-

(i) in the case of a maintained school, to the governing body, and

(ii) in the case of any other school, to the proprietor of the school, and

(b) consider any comments that are on the draft that are made to him within the prescribed period by the governing body or proprietor, as the case may be.

(3) If after complying with subsection (2), the Chief Inspector is of the opinion that the case falls within paragraphs (a) and (b) of subsection (1) –

(a) he must without delay give a notice in writing, stating that the case falls within paragraph (a) or (b) of subsection (1) –

(i) to the Secretary of State,

(ii) in the case of a maintained school to the local authority, and

(iii) in the case of any other school to the proprietor of the school; and

(b) he must state his opinion on the report of the inspection.”

31. In cases of concern, section 13 EA 2005 accordingly imposes a duty on the Chief Inspector to send a draft of the report to the appropriate school body, to consider any comments made within a prescribed period of 5 days (as prescribed under the 2005 Regulations), and, if the case remains one of concern, to give notice in writing “without delay” to the Secretary of State and others and to state her opinion on the report.

### **Inspection and reporting policies**

32. The statutory framework outlined above is supplemented by policies published by Ofsted and, in particular, the schools inspection handbook (“the Handbook”).
33. The Handbook describes the main activities undertaken during inspections of schools in England under section 5 EA 2005. Part 1 of the Handbook explains how schools will be inspected, and Part 2 sets out the evaluation schedule by which schools will be judged for the purposes of reports, namely: Grade 1 – Outstanding; Grade 2 – Good; Grade 3 – Requires Improvement, and Grade 4 – Inadequate. The relevant version of the Handbook for the purposes of this case is that published on 23 August 2016.
34. The Handbook sets out in detail the procedure to be followed during the inspection. This includes what Ofsted described in argument as various “safeguards”. In particular (with references to the relevant paragraph number in the Handbook):
- (1) Regular meetings between the lead inspector and the head teacher should take place throughout the inspection in order: (i) to provide an update on emerging issues and findings, in order to enable further evidence to be provided; (ii) to

- allow the headteacher to raise concerns, including those related to the conduct of the inspection or of individual inspectors, and (iii) to alert the headteacher to any serious concerns (para. 87).
- (2) During the process of inspection, inspectors must offer feedback to teachers after lesson observations (paras. 67-68). The lead inspector and the headteacher should also take part in joint lesson observations and discuss their views about the strengths and weaknesses of the teaching thereafter (paras. 69-70).
  - (3) The Handbook also sets out a process by which inspectors will seek the views of registered parents and other stakeholders (paras. 51-56). This is in accordance with the statutory duty imposed under section 5 EA 2005. Parents are formally notified of an inspection and an online system (“Parent View”) is made available in order to facilitate the gathering of evidence and views from parents. Where parents raise serious issues, inspectors should follow these up with the school and record its response (para. 55).
  - (4) At the end of the inspection there is a final feedback meeting, by which the school is orally informed of (amongst other things) the provisional grades in advance of quality assurance procedures and moderation (paras. 92-93).
35. Further safeguards are set out in the Handbook in relation to the drafting of the report. In particular:
- (1) The draft report is quality assured prior to being sent in draft to the school (para. 110);
  - (2) The school is thereafter provided with the draft report (para. 110);
  - (3) The school will then have the opportunity to provide comments on the draft report, including (but not limited to) any details of factual inaccuracies (para. 111).
  - (4) The school will thereafter be sent the final report (normally five days prior to publication) (paras. 113-114).
36. Of particular relevance in the present case is the opportunity to comment on the draft report. Paragraph 111 of the Handbook states as follows:
- “111. The school will be informed of the timescale for commenting on the draft report. The lead inspector will consider comments including details of any factual inaccuracies identified by the school and will make changes as appropriate. Ofsted will notify the school of the lead inspector’s response”.
37. This imposes no restriction on the type of comments which may be made on the draft report. These may therefore include challenges to findings and judgments, as was done in this case in the Trust’s “Factual Accuracy Check” document of 13 January 2017.
38. Additional safeguards are provided in the Handbook where the judgment may be or is that the school is inadequate. In particular:
- (1) Where, by the end of the first day of the inspection, or during day two, the lead inspector thinks it is possible that the school’s overall effectiveness is inadequate and that it might be judged to have serious weaknesses or to require special measures, the lead inspector must contact Ofsted’s regional desk and talk through the evidence with the ranking HMI (paras. 96-98).



- (2) If, at the end of the inspection, the school is still deemed to require special measures, the school will be specifically informed of this during feedback at the end of the inspection (para. 101).
- (3) Thereafter, the timescale for publishing the draft report is extended so that the judgments of the report can be subjected to extended quality assurance and moderation (para. 102).
- (4) This will include giving the school at least five days to comment upon the draft report, pursuant to section 13(2) EA 2005 and regulation 5 of the 2005 Regulations.
- (5) In the case of schools judged to require special measures, prior to publication the judgment requires authorisation by the Chief Inspector herself, or a Regional Director on her behalf (para.102). This reflects section 13 EA 2005 under which the Chief Inspector is required to consider any comments made and state her opinion.
- (6) As made clear by Mr Sheridan, all comments received from the school, including complaints, will be considered as part of the moderation process and prior to the granting of any such authorisation.

39. Arrangements for publishing the report are set out in paragraph 115 as follows:

“115. Once a school has received its final report, it is required to take such steps as are reasonably practicable to secure that every registered parent of a registered pupil at the school receives a copy of the report within five working days [under section 14(4)(c) of the EA 2005]. After that time, the report will be published on Ofsted’s website.”

### **The Complaints Procedures**

40. At the time that the Report was prepared, Ofsted’s Complaints Procedures were as set out in its 2015 Complaints Policy (“CP”). They remain materially the same in the updated CP. The CP describes a three step process.
41. Step 1 is “Resolving concerns quickly”. It set out the expectation that in the first instance all concerns will be raised as soon as they arise and with the individuals concerned or the lead inspector. These may include concerns about the inspection process, how the inspection is being conducted and provisional inspection judgments. The aim is that such concerns will be considered and resolved before the inspection is completed.
42. If concerns are not resolved at Step 1, then Step 2 is “Making a formal complaint”. Such a complaint should be submitted within 10 working days of the incident of concern, or, in the case of concerns about an inspection, within 10 working days of the publication of the report (CP para. 9).
43. CP para. 13 provides as follows:

“13. We do not normally withhold publication of an inspection report or withdraw a published inspection report while we investigate a complaint, unless there are exceptional circumstances. This is because in most inspection remits Her

Majesty’s Chief Inspector has a duty to report the findings of an inspection or investigation on its completion. There is a public interest in the prompt publication of reports as it is important for users or prospective users of the inspected provision, who are aware that an inspection has taken place, to be informed about the findings of the inspection within our published timescales. A challenge to the inspection process or disagreement with the inspection findings alone would not normally be considered an exceptional circumstance.”

44. The Step 2 procedure relating to inspections and inspection reports accordingly envisages the formal complaint being made after production of the report but, if it is made before then, publication will only be withheld in exceptional circumstances.
45. The nature of the Step 2 investigation to be carried out is described in CP paras. 16 and 17 in the following terms:

“16. When carrying out the investigation, the investigating officer will consider the information that you have submitted and the issues that you have raised. In the case of complaints about inspections, this will include, as appropriate, a review of the inspection evidence and responses from the inspection team to the concerns raised. Additional concerns or documentation received after the submission of your complaint will not normally be considered.

17. Written responses will be provided for all complaints investigated. The response you receive will provide a conclusion on whether or not each main aspect of the complaint has been upheld and may link together similar issues for conciseness and clarity. On occasions, it may not be possible to reach a firm conclusion whether there are conflicting accounts and it is not possible to independently verify either of them. For an account to be considered independent, this must be from someone not involved in the issue of concern or inspection. In these cases, the outcome will be recorded as ‘no decision could be reached’ and the reasons for not reaching a conclusion will be explained.”

46. A different procedure is followed where the complaint is about an inspection at which it is found that the school has serious weaknesses or requires special measures. This is set out in CP para. 14 as follows:

“14. If your complaint is about an inspection at which a school is judged to have serious weaknesses or to require special measures, these judgements will not be reconsidered under Step 2 of this policy. This is because all such judgements are subject to extended quality assurance procedures prior to authorisation of the judgement on behalf of Her Majesty’s Chief Inspector. The school contributes to this process and may comment on the inspection findings prior to publication of the report. The scrutiny of the judgments and consideration of any comments

received from the school is undertaken by Her Majesty's Inspectors who are independent of the inspection. However, once the report has been finalised, any complaints about inspector conduct or the inspection process can be considered under Step 2 of this policy. Schools can request a review of the process of confirming the inspection judgements under Step 3 of this policy after completion of the Step 2 complaint investigation."

47. It is this difference in treatment which lies at the heart of the Trust's complaints about procedural fairness. In cases within CP para. 14, which will be the most serious cases, a Step 2 investigation will be limited to complaints about "inspector conduct" or "the inspection process" and cannot extend to the judgment of "serious weaknesses" or the need for "special measures". In all other cases, there is no limitation on the nature of the complaint which may be raised at Step 2.
48. CP para. 14 cases will, however, be subject to "extended quality assurance procedures". Mr Sheridan's evidence was that for schools in London this involves two quality assurance reads by an HMI, including an evidence based review, as well as a review of any comments made on the draft report, a sign-off by a Senior Inspector and a final sign off by the Regional Director. The judge noted at [42] that it was said that these quality assurance processes were undertaken in line with quality assurance guidance published by Ofsted internally. In addition, in this case there was an additional read by the Operational lead Senior Inspector for London. There then has to be authorisation of the judgment by or on behalf of the Chief Inspector. It would be preferable if the minimum quality assurance procedures to be followed were set out in the CP itself.
49. Step 3 is "Requesting an internal review". A Step 3 review involves consideration of whether Ofsted's policy and procedures on handling concerns have been followed correctly and results in a final decision on whether or not the original complaint was investigated fairly and properly (CP paras. 23 and 25).
50. In relation to complaints about an inspection of a school judged to have serious weaknesses or to require special measures, CP para. 24 states that "requests for a review of the process of confirming the inspection judgments will be carried out under Step 3". Although inspection judgments can be considered at this stage it would appear that this is only in relation to the process by which those judgments were reached. It would be preferable for the nature of that review to be set out more clearly in the CP.

## **The Judgment**

51. The core reasoning which led the Judge to conclude that the Report should be quashed is set out in [46]-[47] of the judgment:

"46. To my mind, a complaints process which effectively says there is no need to permit an aggrieved party to pursue a substantive challenge to the conclusions of a report it considers to be defective because the decision maker's processes are so effective that the decision will always in effect be unimpeachable is not a rational or fair process and of course it is fair to observe that in the case of *The Old Co-operative Day*

*Nursery Ltd v OFSTED* [2016] EWHC 1126 (Admin), a decision of Coulson J, there is an example of an OFSTED inspector who was held to have come to an irrational conclusion as a result of her failure to have any regard to the history of the nursery in question and the previous reports in reaching her evaluative judgements, criticisms which are squarely levelled at the inspection team in the present case.

47. The absence of any ability effectively to challenge the Report renders the Complaints Procedures unfair and in my judgment vitiates the Report. Nor can it, in my judgment properly be said that this aspect of the challenge is in any way academic, not least because of the very limited nature of the basis of any public law *Wednesbury* challenge before this court.”

52. The essence of the Judge’s reasoning was therefore that Ofsted’s Complaints Procedures are neither fair nor rational in so far as they do not allow a substantive challenge to be made to a conclusion in a report that a school has serious weaknesses or requires special measures.

### **The parties’ contentions**

53. For Ofsted Sir James Eadie QC advanced three main submissions in support of the appeal.
54. First, he submitted that Ofsted’s procedures are fair even without its Complaints Procedures. He emphasised, in particular, the “safeguards” available during the inspection and in relation to the drafting of the report and submitted that these already provided sufficient procedural protections. If so, then those protections are not undermined by alleged deficiencies in the additional level of procedural protection provided by the Complaints Procedures.
55. In this connection, reliance was also placed on the statutory scheme of protection provided where special measures are required, as set out in section 13 EA 2005. This requires that the draft report be sent to the school and that the Chief Inspector must consider any comments made. It was submitted that where, as here, parliament has made a considered decision about the process to be followed that is a factor which militates strongly against the Courts adding another layer of process – see, for example, *Wiseman v Borneman* [1971] AC 297 per Lord Reid at 308 ; *R (Hillingdon LBC v Lord Chancellor* [2008] EWHC 2683 (Admin) per Dyson LJ at [37]-[38], and *R (Buckinghamshire County Council) v Kingston upon Thames Royal LBC* [2010] EWHC 1703 at [32], and on appeal [2011] EWCA Civ 457 per Patten LJ at [55]. This is all the more so if such further process would undermine the clear public interest in prompt publication of Ofsted reports, as borne out by sections 13 and 14 EA 2005.
56. The strong public interest in publication has been recognised in cases involving refusal of injunctive relief pending the hearing of applications for judicial review relating to Ofsted reports – see, for example, *R (City College Birmingham) v OFSTED* [2009] EWHC 2373 (Admin) per Burton J at [25-31]; *Cambridge Associates in Management v OFSTED* [2013] EWHC 1157 per James Goudie QC at [58-62], and *R (Remus White*

*Ltd t/a Heathside Preparatory School v OFSTED* [2018] EWHC 3324 (Admin) per Mrs Justice Farbey at [25-33].

57. Secondly, Sir James submitted that the Judge was wrong to consider that the “very limited nature of the basis of any public law *Wednesbury* challenge” meant that it was relevant to examine the extent to which the Complaints Procedures enabled a substantive challenge to be made to the conclusions of the Report. The limited and principled constraints imposed by irrationality are irrelevant to the different and distinct question of procedural fairness.
58. Thirdly, Sir James submitted that the Complaints Procedures do not undermine the fairness of the process overall. The Complaints Procedures provide a further opportunity to raise matters of concern. Even if the criticisms made of them are justified, that would at most lead to them being discounted for the purpose of assessing the fairness of the process overall.
59. In summary, it was submitted that if one has regard to the overall process, with or without the Complaints Procedures, it was procedurally fair and the Judge was wrong to conclude otherwise.
60. In clear but admirably succinct submissions, Ms Gemma White QC for the Trust supported the Judge’s reasoning and conclusion. She submitted that the Judge was correct to recognise that it is unfair to have Complaints Procedures which deprive schools judged to have special weakness or to require special measures of procedural rights available to those whose interests are less severely affected. This was the effect of being excluded from the right to make a substantive challenge to such judgments under the Step 2 complaint procedure (under CP para. 14).
61. For the safeguards relied upon by Ofsted to remedy this unfairness they would have to make this deficiency good, which they fail to do. A Step 2 complaint in other cases may include a challenge to findings and conclusions. It involves an evidence based review by an independent investigating officer with a written response providing a conclusion on whether or not each main aspect of the complaint has been upheld (see CP paras. 16 and 17). Consideration of a Step 2 complaint under CP para. 14 will involve no reconsideration of the judgments reached. Further, the quality assurance procedures under CP para. 14 are an internal process and involve no written response. Schools are not provided with any information as to the nature of the exercise carried out and the reasoning of those conducting that exercise. The written response provided to comments on the draft report is by no means equivalent; it is focused on factual accuracy and is produced by the lead inspector rather than an independent inspector.
62. In summary, on their face the Complaints Procedures are irrational and unfair. One would expect enhanced procedural safeguards to be available for the most seriously affected schools; Ofsted’s Complaints Procedures provide the opposite.

### **Analysis and decision**

63. In order to determine whether Ofsted’s procedures are unfair it is necessary to consider the entirety of the inspection, evaluation and reporting process, including but not limited to the Complaints Procedures. If this is done, I consider that the overall process

is fair regardless of the criticisms made of the Step 2 complaint procedure in the most serious cases. In particular:

- (1) A number of opportunities are provided at the inspection stage for issues of concern to be identified and addressed. These include during the regular meetings between the head teacher and the lead inspector; during lesson feedback provided to teachers; during joint lesson observations by the head teacher and the lead inspector, and during the final feedback meeting.
- (2) Schools are encouraged to raise any concerns they may have at the inspection stage under the Step 1 complaint procedure. Such concerns may cover any relevant matter, including provisional inspection judgments. These will be considered before the inspection is completed.
- (3) Additional protections are provided if the judgment may be that the school is inadequate. The matter will be discussed at the end of the first day with a senior HMI. If concerns persist, then the school will be specifically informed during the final feedback meeting.
- (4) An important opportunity is then provided at the draft report stage for issues of concern to be addressed. The school will be able to comment on the draft report and there is no limitation on the type of comment or complaint which may be made, which may therefore include substantive challenges to the conclusions reached. This is illustrated by the “Factual Accuracy Check” document produced in this case, which set out detailed complaints, comments and challenges. The lead inspector will respond to the comments made, as was done in considerable detail in the present case.
- (5) Again, additional protections are provided if the judgment in the draft report is that the school is inadequate. The timescale for publishing the draft report will be extended. There will be extended quality assurance and moderation. The school will be given at least 5 working days to comment on the draft report.
- (6) Although, for schools judged to have serious weaknesses or to require special measures, such judgments will not be reconsidered in determining a Step 2 complaint, if a challenge to such judgments is in fact made in a complaint submitted before finalisation of the report then, in accordance with standard procedure, the complaint will be referred to those carrying out the quality assurance and moderation and all comments considered as part of that moderation process. This was indeed what occurred in the present case. The quality assurance and moderation processes in serious weakness/special measures cases are extensive and involve evidence based reviews being carried out by independent HMIs. They typically involve two quality assurance reads by an HMI, including an evidence based review and a review of the comments on the draft report, and a sign-off by a Senior Inspector.
- (7) In addition, where a school is judged to require special measures the judgment has to be authorised by the Chief Inspector or a Regional Director on her behalf.

- (8) Although a Step 2 complaint in serious weakness/special measures cases will not reconsider inspection judgments, it will consider complaints about inspector conduct or the inspection process.
- (9) After completion of the Step 2 complaint in serious weakness/special measures cases, a review of the process of confirming of the inspection judgments may then be requested under Step 3.
64. Although there are differences in the Step 2 complaint procedure between serious weakness/special measures cases and other cases, there are, as outlined above, sufficient protections to ensure that the overall procedure is fair in the more serious cases. Moreover, most of those protections operate before finalisation and publication of the report. The wider Step 2 complaint procedure for other cases will generally not do so. The lodging of such complaints is meant to occur after the publication of the report and, even if done earlier, it is made clear that the publication will only be withheld in an exceptional case.
65. In any event, if the conclusion reached is that the procedure for serious weakness/special measures cases is fair, the fact that the procedure in other cases may be different does not undermine that conclusion. Fairness does not require equivalence.
66. I agree with the appellant that the issue of procedural fairness is distinct from that of the extent to which a substantive challenge to a report's conclusions may be made. The fairness of the procedure stands or falls according to its own lights and the nature of any judicial review is immaterial to that question. To the extent that the Judge suggested otherwise, I consider that he erred.
67. There are anyway opportunities for a substantive challenge to be made in serious weakness/special measures cases. In particular, that may be done when commenting on the draft report. Moreover, as illustrated by the facts of this case, if such a challenge is included in a Step 2 complaint made before publication it be considered as part of the quality assurance and moderation process under CP para. 14. After publication, a review of the process of confirming of inspection judgments may be made under a Step 3 review.
68. For completeness, I would add that I do not consider that the statutory framework in the present case militates against there being further layers of process or excludes the common law. That framework is neither detailed nor apparently self-contained. It is minimalist in the protections it provides and further layers of protection are to be expected, as borne out by the further layers of process set out in the Handbook and the Complaints Procedures. Moreover, the Complaints Procedures are meant to be mutually beneficial, it being acknowledged by Ofsted that it will "learn from complaints to improve the way we work and how our staff carry out their roles". Cases such as *Wiseman v Borneman* [1971] AC 297 (which concerned whether natural justice required that there be an oral hearing of a determination by a tax tribunal of whether there was a prima facie case); *R (Hillingdon LBC v Lord Chancellor* [2008] EWHC 2683 (Admin) (which concerned whether there was a duty to consult persons other than named statutory consultees), and *R (Buckinghamshire County Council) v Kingston upon Thames Royal LBC* [2010] EWHC 1703, [2011] EWCA Civ 457 (which also concerned whether there was a duty to consult) are clearly distinguishable.

69. For all these reasons, in my judgment the Judge was wrong to conclude that Ofsted's Complaints Procedures are unfair in serious weakness/special measures cases and to quash the Report. In particular, I consider that the Judge erred in focusing exclusively on the Complaints Procedures and not considering the overall fairness of the process of inspection, evaluation and reporting.

### **Conclusion**

70. For the reasons outlined above, I would allow the appeal. The parties will need to address us further on consequential issues, including publication and remission.

### **Lord Justice Green :**

71. I agree with the judgment of Lord Justice Hamblen and that of the Master of the Rolls.

### **Sir Terence Etherton MR :**

72. I agree that this appeal should be allowed. I am adding a brief judgment of my own in view of the general importance of the challenge to Ofsted's procedures for schools judged to have serious weaknesses or to require special measures.

73. I will adopt the same abbreviations as appear in Hamblen LJ's judgment.

74. The short but important issue is whether the Judge was correct to grant the Trust's application for judicial review and to quash the Report because of his conclusion that Ofsted's CP was unfair in not entitling a school, judged in the final report to have serious weaknesses or to require special measures, to reconsideration of the substantive judgments about the school under Step 2 of the CP whereas other schools are so entitled. The Judge, rejecting the validity of the explanation in CP paragraph 16 that "[t]his is because such judgments are subject to extended quality assurance procedures before being authorised on behalf of [HMCI]", said (at [46]):

"a complaints process which effectively says there is no need to permit an aggrieved party to pursue a substantive challenge to the conclusions of a report it considers to be defective because the decision maker's processes are so effective that the decision will always in effect be unimpeachable is not a rational or fair process".

75. The issue is one of law and principle. Although there has been some criticism by the Trust that the inspectors failed to follow some aspects of the Handbook in carrying out the inspection of the School, Ms White confirmed in her oral submissions before us that those allegations do not form any part of the School's procedural fairness challenge.

76. The short answer to the issue of law and principle is that, looked at overall, Ofsted's procedure for evaluation and reporting is a fair and reasonable one for schools which are provisionally judged to have serious weaknesses or to require special measures because, although such schools cannot challenge substantive judgements through the CP once the report has been finalised, additional safeguards have been provided for them at the stage prior to finalisation of the report.



77. Those additional safeguards are a combination of statutory and non-statutory procedures. So far as the statutory provisions are concerned, section 13(1) and (2) of EA 2005 require HMCI, who will not have been one of the inspectors at the time of the section 5 inspection, to be of the opinion that special measures are required or that the school requires significant improvement; and, in forming that opinion, she must take into consideration any comments on the draft report made to her by the governing body or the proprietor within the period of 5 days (as prescribed under the 2005 Regulations).
78. So far as concerns non-statutory additional safeguards applicable to schools causing the inspectors concern, paragraphs 96 to 98 of the Handbook make it compulsory for the emerging view of the lead inspector that the school has serious weaknesses or requires special measures to be communicated at the end of the first day of inspection or during the second day to the duty inspector, talking through the evidence supporting the emerging judgement; and they further provide that the lead inspector might contact the regional duty desk again on the second day to discuss the emerging findings. Further, once the inspection team have made the final judgement that the school has serious weaknesses or requires special measures, the lead inspector is required to telephone the regional duty desk before the oral feedback meeting with the school and be prepared to explain the reasons and underpinning evidence for the judgment in that telephone conversation.
79. Paragraph 102 of the Handbook reflects the statutory provision delaying publication of the report for at least five days, in the case of a school causing concern, so that the comments of the school can be taken into account in a process which Ofsted calls “moderating” the judgments of the inspectors. The same paragraph of the Handbook, reflecting the additional statutory safeguards, also states that, in the case of schools judged to require special measures, the judgements must be confirmed either by HMCI or a regional director on her behalf.
80. The existence of a statutory procedure in section 13(1) and (2) for the making of a report that special measures are required to be taken in relation to a school is not, of itself, necessarily determinative that the more elaborate procedures in the Handbook are fair and proper. Sir James Eadie, for Ofsted, referred to comments of Lord Reid in *Wiseman v Bourneman* [1971] AC297 at 308B-D and of Dyson LJ in *R (Hillingdon LBC) v Lord Chancellor* [2008] EWHC 2683 (QB) at [38] in relation to the significance of statutory provisions in the context of a dispute about whether a particular process is a fair one. In both cases, however, the facts were very different from those under consideration here and the passages cited express the point in slightly different ways. Lord Reid said that, where the courts have supplemented procedure laid down in legislation, “it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation”. Dyson LJ said that he was “aware of no authority for the proposition that, where Parliament has prescribed the nature and extent of consultation, a wider duty of consultation may exist at common law (in the absence of a clear promise or an established practice of wider consultation by the decision-maker)”.
81. I accept that, depending on the precise facts, what Parliament has considered an appropriate procedure is highly relevant. In the present case, however, section 13(1) and (2) do not provide a conclusive answer to the School because they do not answer the School’s principal objection that, where non-statutory procedures have been put in place, and those procedures (under Step 2 of the CP) afford some persons (schools other

than those judged to have serious weaknesses or to require special measures) greater rights than others to challenge a provisional decision, the procedures may not be fair and reasonable.

82. The answer to the Trust's complaint of principle is that the additional statutory and non-statutory procedural safeguards for a school provisionally judged by inspectors to have serious weaknesses or to require special measures provide a cogent explanation as to why the different treatment of such schools in paragraph 16 of the CP in the context of Step 2 is justified. At the same time, they make the procedure for such schools fair and proper.
83. I do not consider that the resolution of this appeal is assisted by consideration of Step 3 of the CP or issues of public policy regarding delay in publication of a report in the case of a school judged to require special measures. As regards all schools, Step 3 appears to me to be restricted to reinvestigation of the validity of process as opposed to the merits of the substantive judgments made by the inspectors. So far as concerns the undesirability of delay in the publication of a report judging a school to require special measures, this was not a matter relied upon by the Judge, and it does not feature in the grounds of appeal.
84. The actual process in the present case demonstrates the way in which comments by the School were in fact taken into account prior to finalising the Report, the provisional judgements of the inspectors were moderated and the independent confirmatory role was played by HMCI and other inspectors. The draft report was sent to the School under cover of a letter dated 6 January 2017. The letter said that it was for Mr McLaughlin, the executive Head Teacher of the School, to comment on and inform Ofsted of any factual inaccuracies, and that he had five working days to comment and carry out a factual accuracy check on the draft report. The letter stated that "[a]ny challenges to the judgements awarded will be considered through this process". In response, the School submitted a 32 page "Factual Accuracy Check". This was a wide-ranging document, which included allegations of political interference, institutional racism, and the lack of evidence to support criticisms in the draft report, and which challenged all those criticisms. All those points were answered by the lead inspector in a schedule sent under cover of the letter dated 30 January 2017 from Ofsted. An 11 page letter from the School's solicitors dated 20 January 2017 made a formal complaint about the inspection on 30 November and 1 December 2016. In response, the letter from Ofsted of 23 January 2017 stated that those matters would be taken into account as part of the quality assurance of the inspection report but could, if the School wished, be pursued as a complaint once the quality assurance process and been completed. The letter from Ofsted of 30 January 2017 stated that the judgement that the School required special measures had been moderated and confirmed. It stated that HMCI had considered all the evidence and agreed that the School required special measures.
85. In his second witness statement Mr Michael Sheridan, Ofsted's regional director for the London region, explained the "quality assurance process", which had in fact applied in the case of the School, as it would in all cases in London with schools judged to have serious weakness. He said that it involved a "quality read" by an inspector, including an evidence review and a review of the factual accuracy check response by the lead inspector, a sign-off by Catherine Anwar, a senior inspector, an additional read by John Kennedy, the Operational lead senior inspector for London, and then a final sign-off by Mr Sheridan himself as the Regional Director.

86. Looked at overall, that process of review and checking, whether or not in response to the specific concerns and complaints made by the School, was far greater than would have applied in the case of a school not judged to require special measures. A further review after the Report was finalised would have added nothing.