



Neutral Citation Number: [2016] EWHC 2813 (Admin)

Case No: CO/3674/2016

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 08/11/2016

**Before:**

**MR JUSTICE JAY**

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**Between:**

**THE INTERIM EXECUTIVE BOARD OF X  
SCHOOL**

**Claimant**

**- and -**

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

**Defendant**

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**Peter Oldham QC** (instructed by **X Council Legal Services**) for the **Claimant**  
**Helen Mountfield QC and Sarah Hannett** (instructed by **OFSTED Legal Services, in house**)  
for the **Defendant**

Hearing dates: 27<sup>th</sup> and 28<sup>th</sup> September 2016

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**Approved Judgment**

**MR JUSTICE JAY:**

## **INTRODUCTION**

1. The principal issue in this “rolled-up” application for judicial review is whether a mixed school unlawfully discriminates against its male and/or female pupils by making “parallel arrangements” for their education in the same building (the Claimant’s characterisation of what occurs) or by applying a regime of “complete segregation” for all lessons, breaks, school clubs and trips (the Defendant’s formulation). Given that there is no evidence that either girls or boys are treated unequally in terms of the quality of the education they receive (in the sense of one sex<sup>1</sup> receiving a lower quality of education than the other), the issue - stripped of any rhetoric – resolves into an important one of principle as to the true construction and application of relevant provisions of the Equality Act 2010 (“EqA 2010”).
2. The issue arises in the context of the Defendant’s report into the Claimant’s school following an inspection initially conducted under section 8 of the Education Act 2005 (“EA 2005”) on 14<sup>th</sup> June 2016. The following day it was converted into a full section 5 inspection. After giving it an opportunity to comment, the Defendant sent the final version of the June 2016 report to the School on 15<sup>th</sup> July 2016; and, but for injunctive relief ordered by this court, would have published that report on 22<sup>nd</sup> July, being the last day of the summer term. After a contested hearing on 27<sup>th</sup> July, Stuart-Smith J continued the order of Wyn Williams J and gave a fully-reasoned reserved judgment on 1<sup>st</sup> August ([2016] EWHC 2004 (Admin)).
3. On 10<sup>th</sup> August 2016 the Defendant sent the Claimant an amended version of the June 2016 report. According to the Claimant, this amended version has altered and distorted the reasoning of the June 2016 report, and I should therefore disregard it for the purpose of ascertaining the Defendant’s true reasoning processes. According to the Defendant, the earlier reasoning is merely clarified.
4. Stuart-Smith J made an anonymity order pursuant to CPR 39.2(4), the effect of which is that no publication or report may be made which might lead to the identification of the Claimant or any individual referred to in the materials in the case or mentioned in court. I have reserved my judgment in this case, and the anonymity order continues to have effect until the parties have had the opportunity to consider my judgment and the terms of any further order.
5. Given the public importance of the principal issue, which is expressly recognised by the Defendant, and the quality and depth of the arguments I have received, I have no hesitation in granting permission to apply for judicial review on those of the Claimant’s Amended Grounds on which I consider this case hinges (namely, grounds 1, 2, 4 and 5); and I turn now to address the merits of the substantive application. As I shall be explaining, the remainder of the Claimant’s Amended Grounds either add nothing or are unarguable.

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<sup>1</sup> Some prefer the term “gender”. The statute uses “sex”. Henceforth, I will use both terms interchangeably.

6. Shortly before the hearing the Claimant filed an Application Notice seeking in effect to strike out the Defence for failure to comply with the duty of candour. This application was not pressed at the hearing. For the avoidance of doubt, I consider that, although the Defendant has been somewhat tardy in fulfilling its disclosure obligations, it has fully complied with its duties as a public authority in relation to its conduct of these proceedings.

## **THE PARTIES**

7. X School is a voluntary aided faith school for boys and girls aged between 4 and 16. It has an Islamic ethos and, specifically for religious reasons, believes that the separation of boys and girls at a certain point in their development (from Year 5, i.e. for children who have passed their 9<sup>th</sup> birthdays by 1<sup>st</sup> September in the relevant academic year) is mandated. In 2014 the School went into special measures and an Interim Executive Board (for ease of reference, subsequently referred to as “the Claimant”) was appointed. The Claimant is the “responsible body” for the purposes of the relevant anti-discrimination provisions of the EqA 2010. For all practical purposes the Claimant and the School are interchangeable.
8. As paragraph 13 of the Skeleton Argument of Ms Helen Mountfield QC explains, Her Majesty’s Chief Inspector of Education, Children’s Services and Skills (“the Defendant”, save where the current office-holder, Sir Michael Wilshaw, is being referred to by name, in which case he will be given the acronym “HMCI”) is an office established pursuant to section 113 of the Education and Inspections Act 2006 (“the EIA 2006”) (previously, an office with broadly similar functions subsisted in a different guise and under different nomenclature). S/he is the most senior officer of Ofsted which is a non-ministerial Government department established by section 112 of the EIA 2006. Anything authorised or required by or under any enactment to be done by the Defendant may be done by Ofsted, or by any additional inspector who is authorised generally or specifically for the purpose by the Defendant. Ofsted’s functions are set out under sections 116 and 117 of the EIA 2006; and the Defendant’s functions are set out under sections 118 and 119. I will touch on these in due course.

## **ESSENTIAL FACTUAL BACKGROUND**

9. Segregation of boys and girls in the age range of 9-16 is one of the defining characteristics of the School, and no secret has been made of it. In this way the School’s policy is apparent both to parents who might wish to send their children to it (on the basis that this is one of its merits) and to regulators who might take a different view. As it happens, and Mr Peter Oldham QC for the Claimant was entitled to make much of this forensic point, the Defendant did not take a different view until June 2016.
10. According to the School’s Admissions Criteria (the September 2016 version is available, but in this regard it has not materially changed), “the school provides education for boys and girls in parallel gender streams”. A further document entitled “X School Working Model” suggests that opportunities exist for all pupils to come

together at various times, which are generally specified; but I accept Ms Mountfield's submission that this was not the evidence before the Defendant at the time he made his decision. Ms Emma Leaman, who exhibited the Working Model document to her second witness statement dated 8<sup>th</sup> September 2016, has also stated that the "most accurate description I would provide of the School is that it operates as if it were two single sex schools on one site". This description is consistent with what the assistant head teacher told the Defendant's inspectors on 14<sup>th</sup> and 15<sup>th</sup> June.

11. The School is not the only Islamic school which operates a similar policy but I was told by Counsel that the majority do not. Of the three great Abrahamic religions, Islam is not alone in this respect because judicial notice may be taken of the fact that a number of Jewish schools with a particular Orthodox ethos do exactly the same (the majority of Orthodox schools do not). Indeed, there is evidence before me of a particular Jewish school, operating on what is described as two campuses, which at its last Ofsted inspection in 2012 was rated "outstanding" across the board. From brief internet research I have gathered that a number of Christian faith schools have similar practices.
12. The history relating to X School has been covered in the narrative section of the judgment of Stuart-Smith J and I may take the broad sweep of events leading up to 8<sup>th</sup> June 2016 quite briefly.
13. In December 2013 the Defendant inspected the School, concluded that it was inadequate, and placed it in special measures. Subsequent monitoring inspections disclosed a measure of improvement, but the special measures remained in place. The School was subjected to a further section 5 inspection in early December 2015, and its improvement was judged to be sufficient to enable special measures to be removed. The overall effectiveness of the School was assessed to require improvement. The report, published on 5<sup>th</sup> January 2016, noted that girls and boys were segregated for lessons, breaks and lunchtimes from Year 5, but no adverse comment was made.
14. Between 5<sup>th</sup>–7<sup>th</sup> January 2016 the Defendant provided training for Her Majesty's inspectors on equality; and, in particular, on segregation. As a training tool, inspectors were offered the following scenario:

"Inspectors should be mindful of a school's obligations under the Equalities Act 2010 and, in particular, the protected characteristics. Gender is a protected characteristic [in fact, section 4 of the EqA 2010 refers to "sex" not "gender", although many prefer the latter term]. The Equalities Act applies to all types of schools and it is unlawful for schools to discriminate against a pupil by treating them less favourably because of their sex. Where a school chooses in exceptional circumstances to segregate lessons, assemblies and other activities on the basis of gender, there must be good educational reasons for doing so. The school will need to justify these reasons. If the school has a religious character it has to demonstrate how they ensure the religious character of the school does not disadvantage the overall education."

The advice given is not as clear as it might have been. Not merely are “good educational reasons” undefined, the final sentence suggests that segregation will not be discriminatory if a school can demonstrate that the overall education of boys and girls is not disadvantaged. This might be read as indicating that there will be no discrimination if girls and boys are treated equally in the sense that the overall quality of their education, judged by objective measures, is the same. In answer to my question Mr James McNeillie, the lead inspector on 14<sup>th</sup>–15<sup>th</sup> June 2016 and who gave oral evidence in these proceedings on an exceptional basis, without opposition from Ms Mountfield, agreed that segregation does not *necessarily* disadvantage the overall education of pupils and that consideration must be given in each case to the extent to which it does.

15. Ultimately, though, Mr McNeillie’s answer and the nature and quality of the January 2016 advice cannot determine the outcome of this case. Both the advice and Mr McNeillie’s understanding of it could be legally incorrect. Further, another interpretation which could be placed on the advice, in the light of an accurate understanding of relevant provisions of the EqA 2010, is that segregation in an educational context will always be discriminatory unless the facts of the case may be accommodated within either section 158 or section 195 of the Act. On this approach, the correctness of which remains to be established, the noun phrase “good educational reasons” is a synonym for “a reason which falls within one of the express statutory justifications”.
16. Between 14<sup>th</sup>-16<sup>th</sup> April 2016 the Defendant inspected a Muslim independent school and judged it to be inadequate. The report noted that the school operates from two sites, in close proximity, one for boys and the other for girls, but made no adverse comment: the inadequate grading was on different bases. On 27<sup>th</sup> April 2016 HMCI wrote to the Secretary of State pointing out that this particular school practised unacceptable segregation of male and female staff (“clearly does not conform to the spirit of equalities legislation”; “clearly flouts the requirement to promote British values”) but did not expressly address the position of pupils. However, he did also say:

“Any form of segregation, without a good educational reason, is likely to lead to an inadequate inspection judgment for leadership and management.”
17. On 8<sup>th</sup> June 2016 HMCI visited the School with Ms Lorna Fitzjohn, one of his regional directors. The School was one of three he was to visit that day, and the purpose of the visit was to speak to head teachers about their experiences of working in the particular area. It is clear from all the evidence that HMCI expressed firmly negative views about the practice of segregation at the School. From the perspective of the Claimant’s witnesses, his behaviour was unacceptably hectoring, judgmental and disparaging, such as to come close to evincing personal animus or hostility. From the perspective of HMCI and Ms Fitzjohn, the former was being no more than robust and trenchant. In my judgment, it is unnecessary for me to resolve this difference in perceptions because it could not be determinative of any issue in the case. I recognise the strength of feeling on both sides.
18. Following the meeting on 8<sup>th</sup> June, and in the light of his concerns about segregation, HMCI asked Ms Fitzjohn to arrange an inspection of the School as soon as possible.

She did so, pursuant to powers under section 8 of the EA 2005, and asked James McNeillie to be the lead inspector.

19. On the same day, an anonymous email was sent to HMCI's official correspondence address saying as follows:

“In this email I will be telling you about the lies X School has told you about today.

We are segregated all the time. They do not let us talk to the opposite gender in school at all or even outside. They confiscated my friends mobile phone and searched through it because he was talking to a girl from X School.

The tour the boy and girl gave you today was all an act. They had never spoken to each other before today.

I am worried about going to college and not having the social skills to be able to speak normally to the opposite gender.”

The email has the hallmarks of authenticity inasmuch as it was timed at 16:33 and so its author must have had direct knowledge of the escorted tour of the School which undoubtedly took place. The possibility for some sort of personal grudge, or worse, cannot of course be discounted, but the final sentence from the foregoing citation is couched in moderate terms and chimes with other evidence. Further, it is quite clear to me that HMCI, assuming that he saw the email at the time (and he has no recollection that he did), had already decided to cause a formal inspection of the School to take place.

20. On the same day Mr McNeillie was contacted by Ms Fitzjohn and Jane Millward, senior HMI. He told me in evidence that communications of this nature, prior to inspections, were not unusual. However, he was told in terms by Ms Millward that “HMCI had requested an inspection because of his concerns related to gender segregation”. Further, on 9<sup>th</sup> June Mr McNeillie was sent by way of attachment to an email a memorandum entitled “Gender segregation in maintained and independent schools” which was designed to reinforce the messages conveyed during the January 2016 training. In my view, those messages were transmitted in somewhat blunter terms. For example:

“We are very clear ... that discrimination, either direct or indirect, based on the protected characteristics of the EQA 2010, including gender should not be tolerated in any shape or form.

...

**In summary, segregation will only be tolerated in mixed-sex schools when there is a clear and rational educational explanation for doing so, for example, in school sports. It will never be tolerated, in any mixed school we inspect, in terms of segregating on the basis of gender in social**

**areas/corridors (whatever the age/stage of the pupils), or if the curriculum provision or quality of teaching discriminates in any way. [emphasis in original]”**

I note that this emphasised passage does not clearly say that segregation in classrooms is discriminatory, absent a “clear and rational educational explanation”. I have not overlooked the first sentence, but its breadth is potentially vitiated by the final clause of this passage, referring as it does to the need to show evidence of discrimination in the delivery of the curriculum or the quality of the teaching. I appreciate that this last clause could be read as saying that evidence of these matters could justify an additional finding of discrimination, over and above that inherent in the arrangements to segregate; but if segregation on the basis of sex were always objectionable, in the absence of some statutory justification, it would have been preferable not to limit the first clause of the second sentence to “social areas/corridors”. The memorandum also made express reference to the anonymous email, observing that “it powerfully sets out why we are right to insist on the mixing of pupils in order for them to be fully prepared for their future lives in modern Britain”.

21. The author of this memorandum was Sean Harford, the Defendant’s National Director for Education and well senior to Mr McNeillie. It was addressed to Regional Directors and expressly required them to remind their teams, including Ofsted inspectors, of what it contained. The Claimant submits that the timing of the memorandum is telling, and that it was sent to Mr McNeillie in the context of his forthcoming inspection. Mr McNeillie denied that this was so, contending that the purpose of the memorandum could not have been that specific; but in my judgment this is merely splitting hairs. At paragraph 11 of his first witness statement Mr Harford accepts that he wrote the memorandum in the light of HMCI’s concern “at the apparently unjustified segregation” he had witnessed at this school; and, notwithstanding that inspectors on the ground would have to make individual judgments about “adequate educational justification for the segregation”, he also accepts (see paragraph 12) that he was concerned to ensure that the lead inspector had seen it. Accordingly, he had a brief telephone conversation with Mr McNeillie to satisfy himself that he was properly apprised of the correct policy documents.
22. On 10<sup>th</sup> June Mr McNeillie was sent by Ms Millward her report entitled “What happened at X School and why two HMI neglected to comment on the blatant segregation that was taking place across the curriculum and in social areas”. This report noted that the evidence base available to the December 2015 inspectors was clear (I would prefer using this more neutral epithet, or perhaps “patent” instead of “blatant”), and that it is equally obvious that it was not acted upon. The conclusion was as follows:

“The evidence base shows there were errors during the inspection and inspectors missed vital evidence when securing the judgments.”
23. I have already mentioned that Mr McNeillie gave oral evidence devoted to the issue of whether he was biased, or unduly pressurised to secure a particular outcome. This was something that he had “categorically” denied in his second witness statement. Overall he was a reasonable witness who was trying his best to assist the court. In

answer to my questions, he accepted that the December 2015 report was inadequate in failing to follow up the issue of segregation and make judgments upon it in the light of fundamental British values, leadership and management, and the equal treatment obligations located in the EqA 2010. He agreed that the fact of segregation could scarcely be disputed but maintained that it would not necessarily amount to a breach of the equal treatment obligation: his point was, and he sustained it in the face of some evident scepticism on my part, that the ultimate judgment would depend on the rationale behind the decision to segregate, its impact in promoting British values, equality of opportunity etc., and the nature and extent of any mitigation measures taken.

24. Mr Oldham put other documents to Mr McNeillie but in my view these did not add to the material I have already identified in terms of contributing to the strength of his case. The other documents relate to other individuals within the Defendant and do not bear directly on the lead inspector's decision-making.
25. The section 8 inspection started on Tuesday 14<sup>th</sup> June with Mr McNeillie leading a team of six other inspectors. The School had been given no precise forewarning of it but knew from HMCI's visit that it could expect an inspection from the Defendant in the near future.
26. On 14<sup>th</sup> June two female pupils in Year 10, apparently chosen at random by inspectors to express an opinion on the question, were critical of the policy of segregation. One said this:

“thinks [segregation] is ‘dumb’ because when girls go to college they will mix with boys, and at the moment she doesn't know how to have any relationship/friendship with boys. Finds that school isn't helping her get ready. Says some benefits as boys don't always behave well.”

A number of Year 10 boys expressed a similar view. One inspector noted, in respect of Year 7 pupils, that “students clearly felt very uncomfortable about being with opposite sex ... found it difficult to answer questions”. On the other hand, the point may fairly be made that this largely anecdotal evidence was not particularly quantitative, and whether it represented no more than a minority opinion (with the silent majority fully content with the existing regime) is unclear.

27. It is clear from Mr McNeillie's evidence that the School was given an opportunity to explain the reasons behind its segregation policy. According to paragraph 54 of his second witness statement:

“Leaders were very clear that segregation from Year 5 took place, and that the decision to segregate was based on a particular interpretation of Islam.”

It is not the Claimant's case that Mr McNeillie misunderstood the position here, or that any independent educational justification was either advanced or existed. However, it is clearly the Claimant's case that the School is entitled to reflect the wishes and preferences of the parents, and that the Defendant's secular assessment of



the educational disadvantages said to flow from segregation is subjective and judgmental, and fails to reflect an alternative viewpoint.

28. Owing to concerns about equality of opportunity at the School and how well leaders were preparing pupils for life in modern Britain, particularly in relation to their social development, at the end of the first day Mr McNeillie decided with the approval of Ms Fitzjohn to convert the inspection into one under section 5. It is clear from the evidence that another inspector had already been earmarked for this role, in the event that a decision was made on the ground to undertake a “full” inspection under the separate statutory provision. Mr McNeillie was cross-examined on an email he sent on 13<sup>th</sup> June which on its natural and ordinary meaning rather suggested that the conversion from section 8 to section 5 was in the runes:

“Please add Sally Noble to this inspection for Wednesday only – **but the school cannot know that she’s joining because the conversion won’t have taken place at notification on Tuesday.** It might be best to tell Sally and add her after the conversion? She is holding the day for me. [emphasis in original]”

Mr McNeillie said that it was clear from the final sentence that Ms Noble was being pencilled rather than inked in (my metaphor, not his), and that if placed on the list the computer record would show her as being an inspector from the outset. However, the passage emphasised in the original, coupled with the penultimate sentence, is more consistent with Mr McNeillie believing at that stage that the conversion was, at the very least, probable; and that care should be taken not to leave a documentary trail to that effect. Giving Mr McNeillie every reasonable latitude, his email is, at best, poorly expressed. Even so, I do not consider that this email supplements the Claimant’s case on bias, because it does not show that the lead inspector had pre-judged the merits to such an extent that he was intent on closing his eyes and ears to the School’s arguments.

29. At the end of the second day a briefing meeting took place at which the School was informed in general terms about the adverse judgments which the Defendant intended to make. Ms Fitzjohn’s email to HMCI timed at 18:05 on 15<sup>th</sup> June describes this as “a very unpleasant feedback meeting”. Clearly, she had been reliant on the impressions of others. The fact that she was emailing HMCI so soon after the inspection team had left the School shows how seriously this case was being taken at the highest level (the Defendant’s formulation) and/or that HMCI was driving the agenda (the Claimant’s). Mr McNeillie must have been well aware that the judgments he would make, and the terms of his report, would be carefully examined by those at the highest echelons of the Defendant.
30. Ms Fitzjohn’s email stated “the report will be written tomorrow”. In fact, Mr McNeillie had already embarked on the exercise of confining his ideas to writing because at 21:01 the previous evening he was emailing Mr Harford for assistance with the exact form of words to meet the Defendant’s grading criteria. Given that Mr Oldham was heavily critical of this aspect of the decision-making process, I set out the relevant parts of the exchange:

“**JM** (timed at 21:01 on 14<sup>th</sup> June)

At this stage we are not identifying any considerable weaknesses in the curriculum offer or concerns about boys and girls receiving the same levels of experience and opportunity. However, there is the considerable concern that they are segregated for lessons and for social times. The main reasons presented are around faith rather than education.

I am just looking at our criteria for inadequate leadership. The school's particular issues do not fit neatly into any of these and so, it's the highlighted part below that I will emphasise (although the criticism isn't of the range of subjects, rather than the organisation of the school).

Does this make sense?

...

**SH** (timed at 21:09 on 14<sup>th</sup> June)

I can see that this is tricky, but I wonder if the bullet I have highlighted in blue better matches the issue, i.e. that leaders undermine equalities. Saying to girls/boys you have to walk down a certain corridor because of gender seems discriminatory to me.

I'd be interested in Matthew's view here [he agreed]"

31. Mr McNeillie's draft formulation of the key point is set out below. I have italicised Mr Harford's suggested interpolations:

"The range of subjects is narrow and does not prepare pupils for the opportunities, responsibilities and *experiences* of life in modern Britain

*Leaders and governors, through their words, actions or influence, directly and/or indirectly, undermine or fail to promote equality of opportunity. They do not prevent discriminatory behaviour and prejudiced actions and views."*

32. Early on 15<sup>th</sup> June John Malynn, Principal Officer in the Schools Policy Team, entered the email debate. He endorsed Mr Harford's approach but added that "it needs to be picked up as an equalities matter" in the context of the public sector equality duty and section 149 of the EqA 2010. He also made the point in this particular context that it was incumbent on the Claimant to eliminate discrimination and other conduct prohibited by that Act.
33. On 29<sup>th</sup> June 2016 a complaint was made to the Defendant on behalf of the School. The exact terms of the complaint do not need to be examined because no issue directly arises. The complainant requested that publication of the report be delayed pending determination of the complaint.

34. On 4<sup>th</sup> July 2016 the Defendant sent the head teacher a draft of the June 2016 report and invited comment pursuant to section 13(2)(b) of the EA 2005. These comments were extremely detailed and made the point, amongst many others, that segregation had not previously been raised as an issue by the Defendant.
35. On 7<sup>th</sup> July 2016 the Defendant acknowledged receipt of the complaint. It was made clear that the publication of the report would not be delayed pending its determination.
36. On 15<sup>th</sup> July 2016 the final version of the June 2016 report was sent to the head teacher of the School. The covering letter stated that the report would be published within five working days of the date of the letter. The last available working day happened to be the last day of the summer term. In the event, as already explained, the intervention of this court prevented publication.
37. On 26<sup>th</sup> July 2016 the Defendant upheld one aspect of the School's complaint, determining that the judgments reached in the June 2016 report were inconsistent with those reached in December 2015, and apologising for the inaccurate and misleading judgments contained in the latter. The School then issued a second complaint.
38. On 10<sup>th</sup> August 2016 the Defendant sent the Claimant an amended version of the June 2016 report. This expressly acknowledged that segregation had not been commented on adversely in previous inspections, and made a number of further amendments that more squarely advanced the case that segregation was discriminatory under the EqA 2010.
39. Mr Oldham was heavily critical of the Defendant in failing to specify exactly how and why these changes were made, who made them, and whether HMCI himself had a role. In my judgment, some of his criticisms are made out. Nowhere in the Defendant's evidence is there a clear statement of who made the changes, and the passive voice is used. According to paragraph 14 of his third witness statement, Mr McNeillie did not make the changes and his advice was not sought, although he "supports" them (note the use of the present tense). HMCI was aware of the changes but does not identify their authorship. Lorna Fitzjohn states that she agreed to the changes and that Mr McNeillie had no objection.
40. I draw the inference that the changes were made on legal advice in order to lend greater clarity and weight to the Defendant's case, and to pinpoint more directly the key point that segregation of this sort in an educational context is, without a separate educational rationale, inherently discriminatory in that it deprives both girls and boys, in an equivalent way, of the opportunity to interact with the opposite sex.
41. I do not accept the submission that HMCI, who had a clear professional interest in the outcome, participated in the decision-making process, whether in relation to the June 2016 report or the amended version. On the other hand, I do accept the submission that the changes were not authored by Mr McNeillie.
42. On 24<sup>th</sup> August the Defendant informed the Claimant that the second complaint would not be taken forward as a formal complaint, and stated that if it remained dissatisfied with the outcome of the first complaint then a formal review could be requested. This

was sought the following day. To my mind, no separate judicial review point arises out of the Defendant's handling of the complaint and review processes.

### **THE DEFENDANT'S REPORTS**

43. The June 2016 report assessed the School as "inadequate" in three respects, namely (i) "effectiveness of leadership and management", (ii) "personal development, behaviour and welfare", and (iii) "early years' provision".
44. The inadequate judgment in relation to leadership and management has three aspects. First, reference was made to the discovery in the school library of a number of books which "included derogatory comments about, and the incitement of violence towards, women". Mr McNeillie covers this issue in some detail in his second witness statement. The books concerned were published between 1993 and 2009, and contain views which are completely inimical to fundamental British values, however precisely defined. For example, one of the books states that a wife is not allowed to refuse sex to her husband. Another opines that women are commanded to obey their husbands and fulfil their domestic duties. Two books made clear that a husband may in certain circumstances beat his wife, provided that this is not done "harshly".
45. One of the offensive books was prominently displayed in the library. It was apparent to Mr McNeillie that the head teacher was not aware that they were available, and to be fair to him said that their content was "abhorrent". Inspectors were told that, after an earlier inspection, unsuitable texts had been removed. In my judgment, it is obvious that leaders at the School conspicuously failed in allowing these books to enter, or re-enter, the library, and the report's assessment to that effect cannot be impugned. Indeed, Mr Oldham did not seek to justify his client's failings in this respect.
46. The second aspect of the critical leadership and management assessment related to the issue of segregation of pupils, which to a large extent I have already covered. The report said this:

"Leaders have ensured that both boys and girls have access to the same curriculum and facilities. However, the decision to organise the school in this way limits pupils' social development, and the extent to which they are prepared for interaction with the opposite sex when they leave school.

...

Leaders say that the decision to segregate is faith-based because their interpretation of Islam discourages mixing of genders for this age group. However, the school's policies and practice do not consider how to mitigate the potentially negative impact of this practice on pupils' chances to develop into socially confident individuals with peers from the opposite gender.

...

The board has also failed in its duty to have due regard to the need to achieve equality of opportunity as required by section 149 of the EqA 2010 and [various subordinate legislation], including preparing, publishing and reviewing both the school's equality objectives and the steps the school is taking to comply with its equality duties."

47. The third facet of the leadership and management failing related to ineffective arrangements for safeguarding: in particular, the inadequacy of opportunities to help pupils understand the risks associated with issues such as forced marriage and sexting, and weaknesses in record-keeping in relation to child protection case files.
48. The inadequate judgment in relation to personal development, behaviour and welfare covered the same concerns as the first two matters referred to under the first rubric.
49. Finally, the inadequate judgment in relation to early years' provision was based on weaknesses in the risk assessment arrangements. Other criticisms were made, but on my understanding of the June 2016 report these, whether taken individually or cumulatively, would not have justified this grading.
50. Mr Oldham's solicitors have helpfully prepared a marked up version of the revised June 2016 report with the August 2016 amendments clearly identified. These amendments comprised a number of additions as well as some subtractions. As I have already mentioned, the amended report expressly accepted that previous inspections had failed to address the issue of segregation and/or to comment adversely upon it. The point was specifically made in this context, in a way in which it had not been clearly set out in June, that segregation and its impacts do "not accord with fundamental British values and amounts to unlawful discrimination". Further:

"However, this experience [sc. 'the same opportunities and quality of experience'] is limited in relation to mixing with girls (in the case of boys) or boys (in the case of girls).

...

Although this has not been addressed by previous inspection teams, this does not give due regard to the need to foster good relations between the genders, and means that girls do not have equal opportunities to develop confident relationships with boys and vice versa. This is contrary to fundamental British values and the EqA 2010 and ought to have been picked up on the previous inspection."

As Mr Oldham was fully entitled to observe, this assessment reflects the legal case the Defendant was advancing (in its Summary Grounds and subsequently) on the issue of sex discrimination. The original version of the June 2016 report had not expressly made the point that the experiences of boys and girls were limited, but this seems to me to be an entirely obvious deduction from the uncontested facts.

51. The June 2016 report in its original iteration had contained a paragraph, reflecting section 44 of the EA 2005, that the school required special measures because it was failing to give its pupils an acceptable standard of education and the persons responsible for leading, managing or governing the school “are not demonstrating the capacity to secure the necessary improvement in the school”. This paragraph was preserved in the August 2016 version. However, in that version the following short sentence – “as a result [of leaders’ failures to keep children safe from intolerant views], leaders do not have the capacity to improve” – was removed. Mr Oldham did not submit that the excision of this sentence vitiated the Defendant’s overall section 44 judgment, and I therefore say no more about it.
52. In all other respects, the amendments were clearly in the nature of drafting and editorial changes intended to lend greater clarity and precision to the report. Whether the amendments identified in paragraph 50 above may be similarly categorised remains to be considered.
53. Both versions of the June 2016 report stated that the School failed to pay due regard to the need to achieve equality of opportunity, and that there was a breach of the relevant public sector equality duty in section 149 of the EqA 2010. In neither version of the June 2016 report do the inspectors opine that, on close analysis, girls (for example) receive a different and/or qualitatively poorer level of education than boys, or that the impact of segregation is, in reality or effect, to reinforce social and cultural stereotypes about the inferiority of the female sex.

### **THE DEFENDANT’S LEGAL AND POLICY FRAMEWORK**

54. Ms Mountfield took me through the relevant legal and policy framework in order to demonstrate that the Defendant was entitled, if not obliged, to take into account a school’s compliance with its obligations under the EqA 2010, including the duty not to discriminate, in forming assessments about that school. Mr Oldham did not dispute the accuracy of Ms Mountfield’s analysis, save in one respect relating to the issue of leadership and management. In those circumstances, I may be relatively brief.
55. Reference has already been made to Part 8 of the EIA 2006, in particular sections 112-119. Of key importance here is section 117(2)(a) which provides:

“(2) In performing its functions the Office is to have regard to –  
(a) the need to safeguard and promote the rights and welfare of children.”

I accept Ms Mountfield’s submission that the concept of “rights” must be broad enough to comprehend rights conferred by the EqA 2010. Under that legislation, children as much as adults have a right not to be discriminated against. Under section 117(2)(b) and (c), regard must also be had to views expressed by relevant persons, including parents, and their levels of satisfaction. The Defendant is required by section 119(3) to have regard to the section 117(2) matters when performing his functions.

56. The Defendant’s inspection of the School was converted to a section 5 inspection on 15<sup>th</sup> June 2016. Sub-sections (5A) and (5B) are relevant:

“(5A) The Chief Inspector’s report under subsection (5) must in particular cover –

...

(c) the quality of the leadership in and management of the school.

...

(5B) In reporting under subsection (5), the Chief Inspector must consider –

(a) the spiritual, moral, social and cultural development of pupils at the school.”

57. Ms Mountfield drew my attention to five sets of non-statutory guidance promulgated by the Defendant. Here, I will focus on crucial matters:

- (i) under the Common Inspection Framework (which applies *inter alia* to section 5 inspections):

“15. Inspectors will assess the extent to which the school or provider complies with relevant legal duties as set out in the EqA 2010 and the HRA 1998, promotes equality of opportunity and takes positive steps to prevent any form of discrimination, either direct or indirect, against those with protected characteristics in all aspects of its work.

...

24. Inspectors will also make graded judgments on the following areas using the four-point scale:

- effectiveness of leadership and management

...

- outcomes for children and learners.

...

28. Inspectors will make a judgement on the effectiveness of leadership and management by evaluating the extent to which leaders, managers and governors:

...

- actively promote equality and diversity, tackle bullying and discrimination ...
- actively promote British values.”

58. Under the School Inspection Handbook:

**“136. Grade Descriptors for overall effectiveness**

...

**Inadequate (4)**

The judgement on the overall effectiveness is likely to be inadequate where any one of the key judgements is inadequate and/or safeguarding is ineffective and/or there are serious weaknesses in the overall promotion of pupils’ spiritual, moral, social and cultural development.

...

**Effectiveness of leadership and management**

138. In making this judgement in schools, inspectors will consider:

...

- how well leaders and governors promote all forms of equality and foster greater understanding of and respect for people of all faiths (and those of no faith), races, genders, ages, disability and sexual orientations ...”

59. Under Objective 1 of Ofsted’s equality objectives 2016-2020:

**“In all its inspections, Ofsted will assess the extent to which providers demonstrate due regard to the equality duty.**

1.1 In education inspections, inspectors will assess the extent to which the provider inspected gives due regard to relevant legal duties as set out in the EqA 2010. Inspectors will assess how the relevant provider promotes equality of opportunity and takes positive steps to prevent any form of discrimination, either direct or indirect, against those with protected characteristics in all aspects of their work.”

60. Finally, reference should be made to the following additional provisions of the EA 2005:

“11. The Chief Inspector may arrange for any report of an inspection carried out by him under any provision of this



Chapter ... to be published in such manner as he considers appropriate.

...

### **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 ...

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,

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

(b) consider any comments 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 paragraph (a) or (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 in the report of the inspection.

...

### **14. Destination of reports: maintained schools**

(1) The Chief Inspector must ensure that a copy of the report of any section 5 inspection of a maintained school is sent without delay to the appropriate authority for the school.

(2) The Chief Inspector must ensure that copies of the report are sent –

(a) to the head teacher of the school,

(b) to whichever of the local authority and the governing body are not the appropriate authority.

...

#### **44 Categories of schools causing concern**

(1) For the purposes of this Part, 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.”

### **THE EQUALITY ACT 2010**

61. I will set out the key provisions and then summarise others.

62. Section 13 defines direct discrimination (one of the “key concepts” of the Act, dealing with “prohibited conduct”) as follows:

“(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

...

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.”

63. Section 23(1) provides:

“On a comparison of cases for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case.”

64. Section 85, which is located in Chapter 1 of Part 6 and deals specifically with schools, provides:

#### **“85 Pupils: admission and treatment, etc.**

(1) The responsible body of a school to which this section applies must not discriminate against a person—

- (a) in the arrangements it makes for deciding who is offered admission as a pupil;
  - (b) as to the terms on which it offers to admit the person as a pupil;
  - (c) by not admitting the person as a pupil.
- (2) The responsible body of such a school must not discriminate against a pupil—
- (a) in the way it provides education for the pupil;
  - (b) in the way it affords the pupil access to a benefit, facility or service;
  - (c) by not providing education for the pupil;
  - (d) by not affording the pupil access to a benefit, facility or service;
  - (e) by excluding the pupil from the school;
  - (f) by subjecting the pupil to any other detriment.”

65. Section 149 of the EqA 2010 defines the Public Sector Equality Duty as follows:

**“Public sector equality duty**

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
- (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.”

66. Section 158 permits the taking of positive action in relation to those who are reasonably thought to suffer a particular disadvantage. Section 195 also permits the taking of steps which would otherwise be discriminatory in the context of sporting activities, including those relating to children.
67. Section 212(4), one of the General Interpretation provisions, makes clear that any reference in the Act to “benefit, facility or service” (see, for example, section 85(2)(b)) includes a reference to facilitating access to these.
68. Schedule 11 of the EqA disapplies section 85(1) in relation to single-sex schools; it does not disapply sub-section (2).

### **THE CLAIMANT’S AMENDED GROUNDS OF CLAIM**

69. The Claimant now advances ten grounds of challenge. To my mind, there is considerable overlap between many of them. I do not propose to set out the grounds verbatim but will venture the following short summary.
70. Ground 1: the Defendant acted irrationally in that the June 2016 report was inconsistent with prior inspections where the relevant features and circumstances of the School had not changed.
71. Ground 2: actual, alternatively apparent, bias. In essence, the lead inspector could not have approached the exercise with an open mind and was pressurised to secure a particular outcome.
72. Ground 3: the powers of inspection were not used for statutory purposes. Mr Oldham accepts that this ground is parasitic on the second ground. It seems to me that it was pointless to raise it.
73. Ground 4: the June 2016 report was irrational and/or based on no evidence. By this ground it is alleged that the inspectors wrongly assumed that separation of pupils on the basis of sex meant or implied unequal treatment. Although characterised as an irrationality, no evidence and/or reasons challenge, the real point being made is that the inspector’s approach to the EqA 2010 was wrong in law because segregation, without more, is not discriminatory. In my view this point could have been made with greater precision.

74. Ground 5: the June 2016 report was based on the erroneous view that the Claimant had committed unlawful sex discrimination. It seems to me that ground 5 seeks to make exactly the same point as ground 4, and need not be considered separately. An additional line of argument, that a finding of unlawful sex discrimination was not in fact made by the inspectors, is more conveniently addressed within the scope of ground 10.
75. Ground 6: the Defendant's reasoning in relation to single sex schools is irrational and/or incorrect.
76. Ground 7: inadequate regard paid to parental preference, contrary to sections 9 and 14 of the EA 1996, and A2P1 of the Convention.
77. Ground 8: forbidding segregation without any policy backing or published guidance, and applying confused and inconsistent reasoning to the issue.
78. Ground 9: failure to abide by section 149 of the EqA 2010.
79. Ground 10: the Defendant is seeking to rely on a revised version of the June 2016 report which (i) postdates the challenge and introduces additional reasoning, and (ii) does not reflect the views and reasons of the inspectors at the time of the inspection.
80. In my view, this case largely pivots on grounds 4 and 5. I will, therefore, address these first, taking in (inevitably) grounds 6, 7 and 8 since those grounds impinge on the issue of discrimination. I will then consider the Claimant's procedural arguments (grounds 1, 2 and 10) before concluding with a succinct consideration of the remaining grounds (namely 3 and 9), which I consider are makeweights. In relation to what I have called the pivotal questions, the focus in argument has been on sex discrimination *simpliciter* and not on breach of the Claimant's public sector equality duty. To the extent that the latter arises as a separate issue, I address it below.

## **SEX DISCRIMINATION: GROUNDS 4 AND 5**

### The Rival Contentions

81. It is convenient to summarise Ms Mountfield's submissions before Mr Oldham's. Given that there has been a change of policy, it seems to me only fair that the Defendant should be required to make the running.
82. Ms Mountfield reminded me that the Defendant is an expert and experienced regulator, and that in terms of the educational judgments it makes the court should apply a "light-touch" standard of review (see, for example, Moses J in R (London and Continental Stations and Property Ltd) v Rail Regulator [2003] EWHC 2607 (Admin)). Naturally, I accept that submission, but ultimately the core judgment of whether segregation in an educational context amounts to unlawful sex discrimination is largely one of law, not expert opinion.
83. Ms Mountfield submitted that the structure of sections 13 and 23 of the EqA 2010 gave rise to two questions: first, is there less favourable treatment of person X in comparison with an actual or hypothetical other person (Y) in a situation with no

material differences; and if so, secondly, what is the reason for that less favourable treatment in comparison with Y?

84. In answering the second question, the court, submitted Ms Mountfield, should ignore the motive of person A (here she is using the lettering set out in section 13 of the Act) and, relatedly, the contention that the treatment under scrutiny was mandated by A's religious faith.
85. In answering the first question, the court should start from the proposition (being one clearly derived from the structure and language of the EqA 2010) that ordinarily segregation by sex in a mixed school will constitute direct discrimination unless a section 158 or section 195 reason applies.
86. Although girls and boys are ostensibly treated equally, less favourable treatment occurs in one or more of four ways (the Defendant's skeleton argument counted three, but in oral argument there appeared to be four):
  - (i) both boys and girls lose the opportunity to choose with whom to socialise: girls in the school are denied the opportunity to choose to socialise with boys (which boys in the same school enjoy); and *vice versa*. This loss of a choice of companions constitutes less favourable treatment for the purposes of section 13.
  - (ii) both boys and girls lose the opportunity to socialise confidently with the opposite sex and/or to learn to socialise confidently in preparation for interaction in personal, educational and work-related contexts on leaving school.
  - (iii) this loss (or these losses) of opportunity imposes a particular detriment on girls, because the female sex is the group with the minority of power in society.
  - (iv) the very fact of segregation constitutes less favourable treatment of girls because it cannot be separated from deep-seated cultural and historical perspectives as to the inferiority of the female sex and therefore serves to perpetuate a clear message of that status (see the US line of authority beginning with Brown v Board of Education [1954] 347 US 483).
87. In oral argument I pointed out that (i) and (ii) were paired, as were (iii) and (iv). The first pair assumes that girls and boys are treated equally, but contends that each suffer discrimination. The second pair of submissions propounds that segregation of girls and boys amounts to unequal and lesser treatment of the former. The only difference between (i) and (ii), it seems to me, is that the first may be described as flowing inexorably from the bare and indisputable facts, whereas the second entails a modicum of expert judgment as to the impact of disabling interaction between girls and boys at an impressionable age. It follows that I need to apply appropriate deference in relation to (ii). As for the second pair, (iii) it seems to me is a narrower and less far-reaching submission than (iv). It holds that, because women have minority power (no doubt in consequence of having been systematically discriminated against in the past, if not the present), any action or policy which differentiates between the sexes will confer on them a greater detriment. As for (iv), the US line of authority propounds that segregation in the field of race is inherently discriminatory, for the reasons mentioned under paragraph 86(iv) above. According to the Claimant's fourth formulation, the same reasoning applies to sex discrimination.

88. In oral argument, and then in a further written submission filed after the conclusion of the hearing, Ms Mountfield sought to analyse section 85 of the EqA 2010. Overall, her submission was that the present case falls within each of sub-paragraphs (a) to (f) of section 85(2), which are clearly overlapping; but the breadth of sub-paragraph (f) (“any other detriment”) means that the present inquiry need go no further.

89. I detected a slight shift of emphasis in Ms Mountfield’s further written submission. The key point was this:

“This [sc. the reason why segregation is discriminatory] is because it is treatment which can reasonably be regarded as detrimental which is imposed on a person, in an otherwise analogous situation to others, for no reason other than his or her protected characteristic ...”

Thus, if the court should be satisfied that the person in question has suffered treatment which is detrimental or disadvantageous (here, the restriction in social interaction etc. seen through the prism of the section 85(2) sub-categories), the real question then becomes the straightforward one of whether the reason for that difference in treatment was the protected characteristic or something else. Accordingly, so this submission runs, “the court should not get too hung up on the question of comparator”, and “the identity of the group from whom he is segregated is actually immaterial”. Alternatively, to the extent that a comparative analysis remains apposite (and other paragraphs of Ms Mountfield’s further submission suggests that it does), the comparison is with identically placed pupils of the opposite sex at the school.

90. I pressed Ms Mountfield to clarify the position of her clients in relation to other faith schools practising segregation of the sexes in the same or a similar manner. She confirmed that, subject to my Judgment in this case, the Defendant would now apply a consistent approach to all schools which fail to give an educational justification for the practice. I should reiterate that an educational justification means (on the Defendant’s approach, with which I concur) a rationale falling within section 158 or section 195 of the EqA 2010. It follows that, were I to uphold the Defendant’s submissions in this regard, the logic must be that other faith schools practising segregation of the sexes should expect to receive “inadequate” gradings and be placed on special measures. There is an obvious attraction, both logical and presentational, in bracketing together all faith schools in this manner, because it avoids any uncomfortable judgments having to be made about Muslim schools in particular.

91. Ms Mountfield advanced other submissions of a subsidiary nature which I will touch on below.

92. In his Skeleton Argument Mr Oldham was relatively brief on these matters, preferring (I apprehend) to await the final iteration of the Defendant’s case. I make no criticism of him in this regard because I accept his submission that the Defendant’s position has shifted over time (see ground 8). However, the Defendant’s vacillation can be no more than a forensic point, and ground 8 has no further legs. Either the Defendant is right as a matter of law on Ms Mountfield’s formulations of his case or he is not.

93. It was not until Mr Oldham’s reply that his case was fully articulated. His submissions may be summarised more shortly than Ms Mountfield’s.

94. Mr Oldham’s primary submission was that, absent any evidence or finding of differential treatment as between the sexes, the restriction of interaction with the opposite sex amounts to equal treatment of the sexes and (with a rhetorical flourish) “is the very definition of what discrimination is not”. On this approach, it is telling that section 13(5) of the EqA 2010 has catered expressly for segregation in the context of race alone.
95. Mr Oldham further submitted that the instant case cannot be accommodated within any of sub-paragraphs (a) to (f) of section 85(2). The denial of the opportunity to intermingle is too subjective and elusive a concept to be capable of falling within section 85(2). Given that many would say that single-sex streaming is advantageous in educational terms, and may reflect the religious preferences of parents, it would be wrong in principle to hold that either sex has been subjected to a relevant “detriment”: such a finding would only be appropriate if this were objectively and/or always the case. Additionally, Mr Oldham submitted that the denial of the relevant opportunity to interact could not be a “facility” for the purposes of section 85(2)(b) because it did not exist at this particular school.
96. Finally, Mr Oldham submitted that the American line of authority was of no relevance to the instant case because it could not be divorced from the particular circumstances of racial discrimination in the US in the 1950s, seen against the historical context.
97. Mr Oldham also advanced other arguments in support of his case but none of these, it seems to me, has any force. In particular, I cannot accept his point that the Defendant could not find discrimination in these circumstances in the absence of a particular claimant. On my reading of the overall regulatory framework (and, save in one respect, no contrary argument was advanced), the Defendant was entitled to consider the extent to which the School adhered to its obligations under the relevant anti-discrimination provisions of the EqA 2010. It was not incumbent on the Defendant to treat itself as some form of proxy for one of more discrimination claims brought in the appropriate tribunal by aggrieved pupils.
98. An issue arose regarding the potentially analogous case of segregation between Muslim and Hindu children on the ground of religion. There were also submissions from the parties as to whether, if I were to uphold the Defendant’s case, aggrieved pupils might be able to bring claims for damages in the appropriate tribunal or court. I cannot see how this last matter could affect the legal argument.

### Relevant Jurisprudence

99. The first basic question in any discrimination case is that succinctly identified by Lord Nicholls of Birkenhead in Shamoon v Chief Constable of the RUC [2003] ICR 337, namely:
  - “... where the act complained of consists of dismissal from employment, the statutory definition calls for a comparison between the way the employer treated the claimant woman (dismissal) and the way he treated or would have treated a man. It stands to reason that in making this comparison, with a view



to deciding whether a woman who was dismissed received less favourable treatment than a man, it is necessary to compare like with like. (paragraph 4)”

As I pointed out in argument, this is an application of a fundamental ethical principle which forms part of the substantive content of the rule of law. In a case of alleged direct discrimination, such as the present, the legislative purpose is to secure “formal equality of treatment”: see paragraph 56 of the judgment of Lady Hale in R (E) v Governing Body of JFS [2010] 2 AC 728. (I have not overlooked that this was a decision on the Race Relations Act 1976. However, the basic legislative concepts and terminology have been altered since 1968, and apply equally to the field of sex discrimination and the EqA 2010.)

100. The second question for the court is to identify the ground, or applicable factual criterion or criteria, for the less favourable treatment. In this regard there are two categories of case: in the first, the court considers in purely objective terms whether the ground for that treatment was a protected characteristic or something else; in the second, the court considers in subjective terms whether the ground for the decision or action constituting that treatment is an intention or motive to disfavour a person or a group possessing a protected characteristic. On Ms Mountfield’s submissions, the first category applies, not the second. In relation to this first category, the motives of the discriminator are irrelevant; and they may be benign. Further, once the fact of less favourable treatment on a prohibited ground is established, the decision or action at issue may then be described as inherently discriminatory: see the judgments of the majority of the Supreme Court in JFS, in particular Lord Mance (paragraph 78) and Lord Clarke (paragraph 132).
101. In certain contexts the inquiry mandated by this second question may give rise to difficulty, but in my view none arises here. It is plain beyond argument that pupils are segregated in this school on the ground of sex. The fact that the motive for this segregation is religious belief is irrelevant: see JFS. Nor is it relevant that the School is clearly taking into account the wishes and preferences of the parents, and that the Defendant is giving little or no weight to these matters: the short point here is that parental preference, and religious belief, must always cede to the higher normative imperatives of the EqA 2010 (see, for example, Denning LJ in Watt v Kesteven CC [1955] 1 QB 408, at 424; and (by analogy) R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246).
102. In Shamoon Lord Nicholls also observed that, depending on the nature of the issues and the circumstances of the case, it may be convenient to consider the less favourable treatment issue (the first question) before the “reason why” issue (the second question); but in other cases a consideration of the reasons should be the first line of inquiry. This is because the two issues are often linked in the sense that the answer to one may well provide the answer to the other. I read the first sentence of paragraph 11 of his Opinion (“employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator”), relied on by Ms Mountfield in her latest written submission, as being said in this context alone. Lord Nicholls should not be understood as holding that in a case where the reason why the act in question was carried out is clear, the court should “not be too hung up on the identity of the comparator”.

103. The issue of what amounts to “less favourable treatment” has been considered at the highest level. Three strands of reasoning emerge from the authorities.
104. First, “less favourable treatment” requires no more than the identification by the court of some denial of an advantage, benefit or choice which was or would have been afforded to the comparator. It is a concept separate from that of impact or damaging consequences. For example, the denial of a reference for the purposes of future employment would qualify, whether or not that reference would have been helpful. To my mind, the clearest analysis of these concepts is to be found in the Opinion of Lord Hoffmann in Chief Constable of West Yorkshire Police v Khan [2001] 1 WLR 1947, paragraphs 51-53 (but see also Shamoon at paragraphs 34-35).
105. Secondly, although there has been a tendency in some places to equate “less favourable treatment” with that of “detriment”, they are conceptually distinct (see Lord Hoffmann in Khan, paragraph 53). That said, as Lord Hoffmann continues:
- “But, bearing in mind that the employment tribunal has jurisdiction to award compensation for [there is a typographical error in the Law Report] injury to feelings, the courts have given “detriment” a wide meaning. In Ministry of Defence v Jeremiah [1980] QB 87, 104 Brightman LJ said that “a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment”.” [Brightman LJ’s dictum was also approved by the House of Lords in Shamoon]
106. Thirdly, and connectedly, the denial of a choice or opportunity which reasonable people would regard as being of value (cf. physical or economic value: a subjective perception of worth will suffice) can amount to discrimination. Thus, in the *locus classicus* of Gill v El Vino [1983] 1 QB 425, women were denied the opportunity drinking at the bar; and, thereby, a choice of companions. This amounted to the deprivation of a facility which was “greatly prized” by men and sought by the plaintiffs. Similarly, in Birmingham CC v EOC [1989] 1 AC 115, the fewer grammar school places for girls meant that they were deprived of a choice, valued by them or their parents, and on reasonable grounds by others. It was unnecessary to show that selective education was objectively to be preferred to non-selective.
107. In both these cases, the less favourable treatment related to the provision, or denial, of a facility. In the El Vino case, the *facility* could be described as the bar area, but the Court of Appeal preferred a less prosaic and tangible attribution. The facility was the opportunity to mingle with others in a particular location. In the Birmingham CC case, the scope of the inquiry was “facilities for education” as specified in section 25 of the Education Act 1980. Here, again, however, the *facility* was not envisaged by their Lordships as the grammar school place at a particular school, but the opportunity to apply to such a school, if so minded. Viewed statistically, the opportunities were fewer for girls than they were for boys.
108. I note that paragraph 58(iii) of the Defendant’s skeleton argument asserts, in the context of these cases, that “a denial of an equal choice may constitute less favourable treatment”. I would prefer to characterise the position thus: the less favourable treatment, and the unlawful discrimination, was the denial/circumscription of the

relevant opportunity as it related to the facility under consideration. Just as “detriment” and “less favourable treatment” are not synonyms, it is necessary to identify the particular respect in which the discrimination operates.

109. In Smyth v Croft Inns Ltd [1996] ICR 84, the issue was whether a pub in a loyalist area of Belfast, with Protestant customers, discriminated against a Roman Catholic barman by failing to take effective measures to safeguard him from threats, being measures which would have been taken had he been Protestant. The Court of Appeal in Northern Ireland held that the claim was made out. Ms Mountfield relied on the following passage in the judgment of Sir Brian Hutton CJ (paragraph 28):

“If an employer owned a bar in a Protestant neighbourhood, patronised by Protestants, in which he employed a Roman Catholic barman, and a second bar in a Roman Catholic neighbourhood, patronised by Roman Catholics, in which he employed a Protestant barman, and the employer dismissed both barmen on the grounds that the customers in the respective bars did not like being served by a barman of a religious belief which differed from their own, then on the appellant’s argument the employer could not be guilty of religious discrimination because he did not treat either barman less favourably than the other. I consider that this argument is fallacious. In my opinion the employer would be guilty of religious discrimination against both barmen.”

I see no similarities between Sir Brian Hutton’s example and the instant case. In his example we have two separate establishments and two discrete acts of discrimination. Each must be examined on its individual merits; and the fact that in one sense only (a very limited sense) the employer is being consistent is nothing to the point. In the instant case we have one establishment. Whether or not we have one or two acts of discrimination is a key issue, but no clue to its answer is to be found in Smyth.

110. Ms Mountfield also relied on a passage in the judgment of Underhill J sitting in the EAT in Hartlepool BC v Llewellyn [2009] ICR 1426:

“This is not therefore a situation where the act complained of is inherently gender-neutral and is only made discriminatory by the fact that a person of the opposite gender would have been treated more favourably. Here the act complained of is inherently discriminatory. It would have been no answer for the local authority in James v Eastleigh BC [1990] ICR 554 to say – no doubt rightly – that it would have acted in the same way if the pensionable age had been 65 for women and 60 for men.” (paragraph 53)

This was said in a context different from the present. The facts of Hartlepool were not altogether straightforward, but in broad outline the EAT concluded that the male Claimants had suffered a detriment, that there were no different circumstances between their cases and those of the female comparators, and that the treatment in question was on the grounds of sex. In such circumstances, the discrimination claim was fully made out because it necessarily followed that men were treated less

favourably than women. Underhill J was making the point that it would have been no answer to this claim for the council to demonstrate that it would have acted in the same way if (I would interpolate, by separate and different treatment) the relevant contingent had been women. In my view, that analysis, which is obviously correct and vouched by the highest authority, does not touch on the instant case, where the question at issue is whether separation on the ground of sex amounts to less favourable treatment of one group in comparison with the other. The treatment in the Hartlepool case clearly amounted to less favourable treatment of the male contingent and in that sense was inherently discriminatory. *Non constat*, in my view, that all treatment which is by reason of a protected characteristic is necessarily less favourable treatment of the possessors of that characteristic, and therefore discriminatory.

111. The parties referred me to other authority but in my view it did not assist. Neither party referred me to authority in this jurisdiction which directly addresses segregation whether in an educational context or otherwise. I have also looked at a number of standard textbooks on discrimination law but have found nothing which throws much light on this question. Indeed, Ms Mountfield's first and second submissions have their origin in no juristic or jurisprudential writings that I have been able to identify.
112. Although not authoritative, I should note the view of departmental officials, expressed at a meeting with the Defendant held coincidentally on 8<sup>th</sup> June 2016, that segregation of pupils on the ground of sex is:

“... [e]ssentially ... okay provided that two key points are met:

(a) that there is no detrimental treatment of one gender compared to the other in terms of the quality of teaching etc.

(b) that the subject choice available to each gender should be the same or at least of equivalent value.”

Ms Mountfield is entitled to submit that the DfE is simply wrong about this, and that I must determine the question on strict legal principles.

### Discussion

113. The present case clearly raises a point of general public importance as to the true construction and application of key provisions in the EqA 2010. It is a point which has not arisen before, and so must be answered on a first principles basis, applying standard interpretative tools to the language, policy and objects of the statute.
114. The fact that Ms Mountfield's first and second submissions are novel, and would (if correct) cause consternation in some quarters, is to my mind neither here nor there. It would be naïve of me to ignore the possibility that my rejection of her first and second submissions (or her case in general) might cause consternation in other quarters.
115. I have already made clear what cannot be of relevance to the present inquiry: namely, the Defendant's change of policy and vacillation; the views of others in government;

and religious belief and parental preference. I should also make clear that I must not be understood as expressing any opinion about the social and educational merits of sex segregation in schools, whether effectuated for religious reasons or otherwise, and about whether Islam treats women as inferior. The Defendant has proceeded on the basis that the School ostensibly treats boys and girls equally, from which it may be inferred that it has found no evidence to the contrary. It follows that the Defendant is not saying, for example, that the School is following a particular interpretation of the Qu'ran which denigrates or depreciates women, and/or that there is something specific about the teaching it furnishes which conveys that message. Nor should I be understood as opining that the Defendant would or should have found evidence of this sort had it only looked harder.

116. In putting the issue in these terms I am not overlooking the discovery of the offensive books in the School library which clearly do treat women as subordinate to men. At one point in her oral argument Ms Mountfield did appear to recruit the discovery of these books in support of her over-arching submission on less favourable treatment. However, the Defendant did not do so in any version of the June 2016 report, and in my view it is not open to Ms Mountfield to expand her client's reasoning in this manner. In my view, the books raise a separate issue.
117. I do not take issue with much of Ms Mountfield's analysis. First of all, assuming that segregation on the ground of sex amounts to less favourable treatment, I would agree that it would only *not* be unlawful discrimination if either section 158 or section 195 applied, and neither does. Secondly, I agree that no assistance may be gained from considering the statutory exclusion in relation to single sex schools. Although Schedule 11 disapplies section 85(1) (admissions) and not sub-section (2) (treatment), the latter sub-section has to be considered in relation to a school where no members of the opposite sex are present at all. Thus, any claimed discrimination has to be evaluated in that specific context, not the context of a mixed school. The instant case is not concerned with the extent to which those responsible for a single sex school might need to take positive steps to ensure some intermingling between the sexes to enhance their overall education. Mr Oldham advanced other arguments, in the context of his sixth ground, to the effect that the Defendant's reasoning in relation to single sex schools is faulty; and that, in addition, there has been unwarranted inconsistency. The short answer to these arguments is that Parliament, whether anomalously or otherwise, has fashioned an express exception for such schools.
118. Thirdly, I would hold that, at least in principle, the denial of the choice to seek the society of and interaction with the opposite sex, and of the educational benefits which might flow from the exercise of that choice, is capable of amounting to the denial of a "benefit" or "facility" for the purposes of section 85(2)(b), read in conjunction with section 212(4); and, as a possibly better fit, the subjection of the pupils to a "detriment" for the purposes of sub-paragraph (f). It is an opportunity which reasonable people would value, and there is some evidence that pupils at this school do regret its absence. The concepts of "detriment" and "facility" are, as we have seen, extremely broad, and are apt in my view to accommodate opportunities and choices which are intangible. (Imagine a situation where, in a mixed school, a small group of girls are segregated from the remainder of the pupils who are not segregated *inter se*: this small group will suffer a "detriment" and be treated less favourably than the majority contingent). Ms Mountfield's case could not succeed if the treatment

complained of fell outside section 85 of the Act; but, as Lord Hoffmann has pointed out, the identification of a “detriment” is not, without more, to be equated with proof of less favourable treatment.

119. Thus, the key question is whether the denial of this opportunity to both sexes amounts to “less favourable treatment” for the purposes of section 13(1) read in conjunction with section 23(1).
120. In her additional written submissions furnished after the close of the hearing (which in my view went further than they should have done in responding to Mr Oldham’s arguments in his reply), Ms Mountfield sought to persuade me that the question of the comparator is not something which I should be overly concerned about, and that it is sufficient to show detrimental treatment “in an otherwise analogous situation to others”. In my judgment, Ms Mountfield has misunderstood Lord Nicholls in Shamoon (see paragraph 102 above) and seeks impermissibly to elide the concepts of “less favourable treatment” and “detriment”. It is this elision which enables her to submit, wrongly in my opinion, that the question of segregation from whom is not strictly relevant. The matter is further obfuscated, if I may say so, by the introduction of the impenetrable phrase, “in an otherwise analogous situation to others”. This notion is advanced slightly more clearly at a later point in her written argument (paragraph 19), and leads to the submission that the real question here, if detriment were made out, is the reason why the treatment is imposed. In my view, that is not the real question in this case. The “reason why” is obvious; whether it amounts to less favourable treatment is not.
121. To be clear: I agree with Ms Mountfield that the segregation is on the basis of a protected characteristic. I also agree that segregation is treatment which is capable of falling within section 85(2)(b) and/or (f). However, I cannot agree that the investigation may conclude at that point; the section 13/23 question remains to be answered.
122. I am therefore obliged to pose and answer this question: is one sex being treated less favourably than the other?
123. On analysis, it seems to me that the Defendant’s case is founded on the proposition that two groups are being discriminated against: the boys (when compared with the girls, and the opportunities enjoyed by the latter for mingling *inter se*); and the girls, *vice versa*. Thus, there is equal or mirrored discrimination, and the two treatments cannot, as it were, cancel out the other (or, possibly on this formulation, one treatment resulting in two discriminatory consequences).
124. In my judgment, a broad and sensible evaluation of what is happening here is required by the statutory language. The treatment in question is segregation of the pupils on grounds of sex. It is not helpful to say that the treatment occurs twice (in relation to each contingent) or maybe over several hundred times (for each and every boy and girl at the school). This is because each sex must be viewed as a group - there is no material difference (*inter se*) between any of the boys and any of the girls – and the comparison must be made between the two groups. Further, it is not helpful in my judgment to say: let’s start with the girls and then we will look at the boys. They can be considered simultaneously, because that is the effect of segregating them down the middle.

125. On this simultaneous approach (or an approach which regards the two sexes as interchangeable at all stages of the analysis), both sexes are being denied the opportunity to interact/socialise/learn with or from the opposite sex. Given that no material distinction is to be found between the two sexes for these purposes (without prejudice to Ms Mountfield's third and fourth submissions), this is the fairest and most legally accurate way of describing what is occurring. It is also non-discriminatory. In my judgment, it is artificial to say that the denial to the boys of the opportunity to mix with the girls (which the latter enjoy as between themselves) is somehow different from the opportunity being denied to the girls. It would only be different if there were some qualitative distinction for these purposes between male and female interaction (each looked at *inter se*), but in my judgment there is not. What we have here is the denial of interaction or concourse with the opposite sex which has equal value and impact, and is of the equivalent nature and character, in relation to both sexes.
126. In my view, it is preferable to envisage the issues in this way rather than to proceed along the "different but not less favourable" pathway pressed in argument by Mr Oldham, reliant as he was on the case of Smith v Safeway [1996] ICR 868 decided on very different facts. However, to the extent that female interaction *inter se* might be said to be different to comparable male interaction, I would hold that the denial of the one is not less favourable than the denial of the other.
127. On this analysis – one act/treatment of equivalent nature and character, and with equivalent consequences for both sexes – it cannot be said, in my judgment, that one sex is being treated less favourably than the other. Substantially adapting Lady Hale's phrase in JFS (paragraph 69), there is symmetry between both contingents on either side of the line. The circumstances of the case (per section 23(1)) are the same, or at the very least do not materially differ, as between the sexes. To suggest otherwise is strained and artificial.
128. Thus far, reference has not been made to section 13(5) of the EqA 2010. I agree with Ms Mountfield that it provides only weak support for the Claimant's case. An equivalent provision was to be found in section 1(2) of the Race Relations Act 1968, and there has never been such a provision in any other anti-discrimination legislation. In declaring that segregation on the ground of race is inherently discriminatory, Parliament in 1968 had well in mind the sort of considerations which have underpinned liberal thinking on the subject in the USA: although not on my understanding a feature of educational practice in the UK in the 1950s and 1960s (the 1968 Act being enacted for other reasons), segregation on the ground of race has a specific resonance. In 2010 Parliament must be deemed to have decided that there was no basis for removing a stipulation of some considerable pedigree. It cannot be deemed to have thought through all the ramifications, including the implications for segregation on the basis of other protected characteristics. In this way, it is open to Ms Mountfield to submit that section 13(5) is a piece of legislative archaeology; an avoidance of doubt provision which throws no light elsewhere.
129. Even so, the inclusion of section 13(5) provides some modest support for the Claimant's case, at least by this stage of the analysis, inasmuch as Parliament, at one stage over the last forty years or so, must be deemed to have considered that segregation on other grounds is not inherently (i.e. by definition) discriminatory, and that some additional factor had to exist. Yet on analysis the Defendant's case, at its

highest, sees no need for such an additional factor: to contend that girls are denied the social interaction that is enjoyed by boys, and *vice versa*, comes close to saying that separation on the grounds of sex is discriminatory – by definition and without more. Such an argument, if correct, could almost always be made (and in my opinion could *always* be made in an educational context).

130. Some time was spent considering the hypothetical case of segregating between Muslims and Hindus, but otherwise apparently treating them equally. Reference might have been made by Counsel to Lord Rodger's example of segregation between Roman Catholic and Jewish children (see paragraph 223 of his judgment in JFS) – "religious discrimination of the worst kind". I entirely agree that the enforced separation of Muslim and Hindu children would be an egregious case of religious discrimination. The inference must be in any given case that the more powerful group was imposing its will on the weaker, with correlative express or implied disadvantages. Thus, discrimination would ensue not because the Defendant's first and second submissions are right, but a variant of the third. The instant case is not of course about compulsory discrimination at all, and with respect to the parties I simply cannot envisage a situation in the United Kingdom where Muslim and Hindu parents would freely endorse arrangements of this sort, and/or where the governing body of any hypothetical school would accept them. In any event, if this example is being deployed by the Defendant in support of its first and second submissions, then a factual scenario would need to be hypothesised where approximately half of the pupils in the school were Muslim, and the other half were all Hindu – a fanciful state of affairs. As soon as other children are factored into this hypothetical case, bringing it slightly closer to the real world, it either becomes unworkable in practice or obviously discriminatory.
131. Given that I am rejecting Ms Mountfield's first and second submissions on what may be described as fundamental grounds of principle, it is unnecessary for me to address Mr Oldham's subsidiary arguments, not all of which I have listed. For the avoidance of doubt, I wholly repudiate any suggestion that, other things being in the Defendant's favour, the pupils have not been denied an *existing* facility (see Clymo v Wandsworth LBC [1989] ICR 250). In that case, job-sharing arrangements did not exist in a particular employment context, so there was no detriment which could be said to have been sustained. In the present case, if (but only if) the proper comparison is, in the case of girls, the opportunities afforded to boys to mingle *inter se*, it is immediately apparent that such opportunities do exist. Accordingly, there is an existing facility. To say that the same opportunities do not exist in relation to the girls (to mingle with boys) proves – from Mr Oldham's perspective - too much.
132. I now turn to address Ms Mountfield's third and fourth submissions. In my view, these are both based on the unspoken premise that what is occurring here is that the girls are being segregated from the boys because they are regarded as inferior (or that the impact of doing so is to reinforce notions of their inferiority), and/or that the boys are being segregated from the girls because they are superior.
133. The third submission did not feature heavily in oral argument. Mr Oldham chose to ignore it, taking the view that the third and fourth submissions are synonymous. I would tend to agree that there may not be much difference between them, and for present purposes it makes sense to construe the third submission narrowly and the fourth submission broadly. As regards the former, Ms Mountfield may have drawn



comfort from my relatively early indication that I was content to take judicial notice of the fact that women have been, and still are, the group with minority power in society (I should make clear, as I hope I did at the time, that I would accept the generality but not necessarily the universality of that proposition). Notwithstanding this, I cannot accept that the third submission is well-founded. The difficulty I have with it is that there is no evidence in this case that segregation in a mixed school, still less segregation in an Islamic school, has a greater impact on female pupils. The June 2016 report does not provide the evidential springboard for Ms Mountfield's third submission, and these are judicial review proceedings. The August 2016 amendments supply the evidential groundwork for the first and second submissions, but the Defendant has not sought to explain how and why segregation particularly disadvantages girls. I have little doubt that educational experts would have much to say on this topic, but I have not heard it within the four corners of this litigation. I will return to this issue at paragraph 143 below, but I reject Ms Mountfield's third submission.

134. In my view, Ms Mountfield's fourth submission is more sophisticated and compelling than her third. The essence of her case is that "making separate but equal provisions for boys and girls (or blacks and whites, or heterosexuals and lesbians and gay men etc.) cannot be divorced from the historic and current societal treatment of the less powerful group." Put another way, but to the same effect, segregation has the tendency to promote social and cultural stereotypes about the role of women in society.
135. Insofar as her fourth submission is buttressed by authority rather than first principle, Ms Mountfield relied on the unanimous decision of the Supreme Court of the United States in Brown v Board of Education (*loc.cit.*) where it was held, Chief Justice Warren giving the sole judgment, that treatment of this sort is inherently unequal in relation to African-Americans because it "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"; and was therefore a violation of the 14<sup>th</sup> Amendment, in particular the equal protection provision appearing at the end of section 1. Similar reasoning is to be found in subsequent decisions of the US Supreme Court, and the decision of the Constitutional Court of South Africa in Minister of Home Affairs v Fourie and others (Case CCT/60/04).
136. In order to place this jurisprudence in its proper context, a brief historical note is required. The 14<sup>th</sup> Amendment to the US Constitution was one of three amendments introduced in the post-Civil war period of Reconstruction in an endeavour to entrench and safeguard the position of the recently-freed African-American and accord guarantees as to equality of treatment. As is well known, the Southern States, where the vast majority of African Americans lived until well into the last century, proved able to sidestep, circumvent or ignore the 14<sup>th</sup> Amendment, and one of the starkest and most emblematic form of this enforced inequality was segregation in schools on the ground of race. Looking at the facts of the various cases considered by the Supreme Court in Brown, it was not practised in mixed schools: African-American children were "bused" to separate institutions. Although the argument was made (and successfully upheld in Plessy v Ferguson [1896] 163 US 537<sup>2</sup>) that black children

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<sup>2</sup> In Plessy, the Supreme Court held, by 7 votes to 1, that the argument against segregation was false because of the "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.

were on one level being treated in the same way as white, because the education provided did not differ materially, it was or ought to have been apparent that the whole point of putting these children in separate institutions was to emphasise their inferiority: this was precisely why the Southern States<sup>3</sup> were doing it. It followed that the African-American, profoundly aware of these reasons, would inevitably experience the “feeling of inferiority” mentioned by Chief Justice Warren<sup>4</sup>. In this sort of situation, it makes no difference whether the focus of inquiry is the grounds or factual criteria of the discriminator, or the reaction of the group being discriminated against.

137. For the purposes of the EqA 2010, seen through the prism of the JFS case, it may be argued that Brown places undue weight on the question of motive (see paragraphs 100-101 above). I am not sure that this matters. In principle at least, the “feeling of inferiority” (if proven) could properly be envisaged as both the less favourable treatment and the relevant “detriment”. In any event, I would not hold Ms Mountfield to her analysis that the instant case falls into the first category (an objective assessment alone) rather than the second category (a subjective assessment).
138. Mr Oldham did not make the point that Brown turned on the language of the relevant section to the 14<sup>th</sup> Amendment which is worded differently to sections 13 and 23 of the EqA 2010. In my view, he might have done; the language of the domestic statute is narrower. Further, submissions could have been advanced as to the differences between the approach of a foreign constitutional court to the provisions under scrutiny, and the domestic court to a Parliamentary statute. One may debate whether the EqA 2010 should be regarded as a constitutional statute, but in my view the common law has not yet reached the stage whereby different canons of statutory interpretation should be applied to such instruments. Although the US Supreme Court applies common law principles, I cannot assume that these are the same as ours, and am well aware of the differences of view within that court as to how the US Constitution should be interpreted. Overall, I remain to be persuaded that Brown and its jurisprudential progeny are directly applicable to the present context.
139. Even so, I can see that these are technical arguments, and the objection should not be taken too far. Putting to one side the terms of the 14<sup>th</sup> Amendment, Ms Mountfield is entitled to point to the *factor* identified by the US Supreme Court as constituting a breach of that provision – perpetuating notions about the inferiority of women – as being in effect the same factor which constitutes less favourable treatment and “detriment” for the purposes of the EqA 2010. Thus, the fourth submission best proceeds by referencing Brown as a general signpost, not as directly in play, but applying by loose analogy.
140. In my view this is a powerful submission which cannot be lightly dismissed. Having thought carefully through its ramifications, I have concluded that it is incorrect. My reasons fall under three headings.

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If this be so, it is ... solely because the colored race chooses to put that construction upon it.” Plessy was expressly overruled in Brown.

<sup>3</sup> Following significant migrations of African Americans after the First World War, enforced segregation in schools on the grounds of race was also practised by a number of Northern States.

<sup>4</sup> There was also expert evidence before the US Supreme Court about this.

141. First, there are obvious differences between compulsory segregation on the ground of race in the USA and South Africa, and voluntary segregation on the ground of sex in mixed schools in the United Kingdom. Both in the USA and South Africa there was a plain and obvious link between (a) the mores and attitudes of those exercising majority power in society, (b) government policy (in relation to the USA, I am not referring to Federal Government, but to the individual States), and (c) the means which were customarily deployed in the field of education to impose a racist ideology. Before anti-discrimination legislation was introduced in 1965, the UK government, whether central or local, might in theory lawfully have segregated children on the ground of race, but I am unaware that they made a practice of it. More importantly, the UK government does not routinely, still less compulsorily, segregate on the ground of sex in public education, and I do not understand it to have a policy on this issue. If asked about it, on the basis that all schools are within her remit, the Secretary of State would presumably say that she would defer to the court's interpretation of the EqA 2010. Insofar as segregation on the ground of sex is practised in mixed schools in the UK, it is a practice carried out by a minority of schools with a Jewish, Christian and Islamic ethos, with the full participation of parents.
142. In short, segregation in mixed schools in this country is not the practice of government; it cannot be envisaged as any reflection of the mores and attitudes of wider society; it is only capable of being seen as a reflection of the mores, attitudes, cultures and practices of the faith groups who have been permitted to do it.
143. Secondly, I would be very slow to conclude that segregation in this Islamic school "generates a feeling of inferiority as to [the] status of [the female gender] in the community" (adapting the ratio of Brown to cover the present case). Some might say that this is axiomatic, but to my mind that would be too broad and sweeping a judgment to make in a multi-cultural society, particularly in circumstances where the separation is not enforced but elected by the parents. I consider that some supporting evidence is required, and none is available. As I have noted, a number of the children at the School complained to the Defendant's inspectors about this practice, but none suggested that it made girls feel or appear to be inferior.
144. Thirdly, and flowing on from my first reason, the Defendant's argument would only be well-founded if it could be established that faith schools in general, and Islamic schools in particular, segregate the sexes because they regard the female gender as inferior, and/or that girls should be separately prepared for a lesser role in society. If that were the case, it would follow that (i) girls are subjected to a greater or particular detriment (Ms Mountfield's third submission) and (ii) it would not be possible to divorce the making of separate but equal provision for girls and boys from the historic and present treatment of the less powerful group within this culture (adapting the way in which the fourth submission was advanced: see paragraph 134 above).
145. Neither the Defendant in its June 2016 report (including the August 2016 amendments) nor Ms Mountfield has made that argument. Instead, the fourth submission was sedulously tethered to "society" (I would add, as a whole), and not to any particular section of it. I understand the Defendant's unwillingness to go further, but the consequence must be that I am not required to address this point: it is a non-issue in this case. Lest I should be misunderstood, I should make clear that had the Defendant laid the groundwork for such an argument in its report, and stated in terms that Islamic schools segregate because their religion (or their interpretation of it)

views girls and women as second-class citizens, I would have been duty-bound to address the issue. However, I would only have done so on the basis of evidence; this is not a topic which lends itself to the taking of judicial notice. The matter is not axiomatic<sup>5</sup>; it has not been asserted by the Defendant; and I am therefore required to express no view upon it.

146. The submission was squarely made by Ms Mountfield that “religious conviction is not a solvent of legal obligation” (per Mason ACJ and Brennan J in Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria) [1983] 154 CLR 120), but that is not the same as saying that segregation for religious reasons is always discriminatory. If segregation is discriminatory for other reasons (or, more precisely, following JFS, on other grounds, on account of the factual criteria deployed), it would follow that it could not be excused by recourse to faith-based rationales. But, if that is not established, segregation for religious reasons is not, without more, discriminatory. Put another way, the School’s rationale for this practice should be seen as neither a virtue nor a vice; it is entirely neutral.
147. In the particular circumstances of this case, it is unhelpful to say that segregation on the ground of sex is inherently discriminatory and therefore inimical to the policies and objects of the EqA 2010; or that the treatment here is not “gender-neutral”. As we have seen from JFS and other cases, less favourable treatment on the ground of a protected characteristic is inherently discriminatory. But the issue here is not the identification of the ground but proof of less favourable treatment. In the absence of proof of such treatment, there is no discrimination at all; and the adverb “inherently” cannot advance the debate. In this respect section 13(5) of the EqA 2010 is different, inasmuch as it *deems* segregation to be discriminatory in the field of race; and no further inquiry is required.
148. In my judgment, the Defendant has not established that the School (i) discriminates against its male and female pupils by denying them opportunities to interact with or learn from the opposite sex, and (ii) discriminates against its female pupils by treating them as inferior. The criticisms in the June 2016 report which are based on the proposition that the School does cannot stand.
149. I did not receive argument as to whether the Claimant was in breach of its public sector equality duty under section 149 of the EqA 2010 by failing to promote equality of opportunity. This may be a broader concept than discrimination. However, invoking this concept does not improve the Defendant’s case, for this reason. The June 2016 report does not rely on any additional or separate matters as constituting the section 149 breach. In other words, and subject to paragraph 173 below, the case on sex discrimination and the case on breach of the public sector equality duty is advanced in exactly the same way, and both stand or fall together. There is no evidence that the School has circumscribed opportunities for its female pupils.

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<sup>5</sup> For an interesting recent analysis of the complexity of this issue, in particular that religious practice is an amalgam of scriptural hermeneutics, culture and custom, see the first in the series of this year’s Reith Lectures delivered by Professor Kwame Anthony Appiah, Mistaken Identities: Creed.

**GROUND 1: INCONSISTENT TREATMENT AND/OR IRRATIONALITY: NO CHANGE SINCE DECEMBER 2015**

150. Mr Oldham made a number of submissions under this rubric. First, he submitted that nothing had changed since December 2015 (when no point was taken by the Defendant as regards segregation), and that the Defendant therefore acted irrationally by making such a fundamental criticism of the School's practice in the June 2016 report. Secondly, he submitted that a public body cannot change its mind irrationally so as to abuse its powers. Thirdly, he submitted that, in the particular circumstances of this case, a breach of the EqA 2010 did not reflect on the leadership and management of the School; and, in any event, that the Defendant was not presented with a binary choice in June 2016: in the circumstances of the present case, it could and should have afforded the Claimant a reasonable opportunity to consult its stakeholders and decide what action could and should be taken to address the Defendant's concerns.
151. I must consider this ground on the premise that I am wrong about the sex discrimination point.
152. In my judgment, Mr Oldham's first and second submissions are not well-founded and may readily be rejected. In Old Co-Operative Nursery v Ofsted [2016] EWHC 1126 (Admin) Coulson J held that the Defendant's inspections are not one-off events and that "a system of inspection which ignores previous inspections runs the risk of turning the whole process into a lottery". But this was in the context of making value-judgments about the quality of the educational provision the school was offering. Segregation on the ground of sex, although obvious to all the previous inspectors, does not entail this sort of value judgment. Essentially, it is a legal judgment or conclusion based on evidence which cannot be in dispute. If, on an earlier occasion, the legal judgment was incorrect, then it seems to me that the Defendant – subject to the Claimant's third submission under this rubric – is bound to correct it.
153. On my understanding of his submissions, Mr Oldham did not raise a similar objection as regards the discovery of the offensive literature in the school library. He was right not to do so. The evidence was so clear, and the Claimant's explanation for this state of affairs so unsatisfactory, that the Defendant was surely entitled to consider that the proper inference to be drawn was that there had been a significant failing of leadership and management at this school. Similar points arise in relation to the inadequate risk assessments.
154. Mr Oldham's second submission was that a public body cannot change its mind irrationally so as to abuse its powers. I was taken to the decisions of the Court of Appeal in R v IRC, ex parte Unilever [1996] STC 681 and R (oao Tate & Lyle Sugars Ltd) v Secretary of State for Energy and Climate Change [2011] EWCA Civ 664. There are of course situations where the public law duty to act fairly and consistently means that a change of mind, in the absence of an overriding public interest, may amount to an abuse of power; but in my judgment the instant case is far from these. I do not consider that the Claimant could properly draw any legal comfort from the earlier decision being (*ex hypothesi*) plainly incorrect in law; and that the Defendant should somehow be precluded from departing from it. Unilever and Tate & Lyle are not examples of cases where the facts were identical at all material times and the decision-makers' view of the law changed – with that change of mind being correct.

155. Mr Oldham's third submission has greater force than the first two under this ground. During the course of the hearing, I expressed concern about the apparent unfairness of viewing the discriminatory practice of segregation as a leadership and management failing in circumstances where the School may have been forgiven for thinking that the Defendant had no problem with it for a number of years. At the very least, the School should have been given a broader opportunity to respond to the Defendant's change of mind, to reflect, to consult and to take appropriate reactive measures.
156. Ms Mountfield's riposte to this limb of the Claimant's case was that the Defendant's published guidance makes clear that a breach of the EqA 2010, and a finding that discriminatory treatment has occurred and is still occurring, will ordinarily result in an assessment that the leadership and management at the school is inadequate. Given that segregation on the ground of sex is one of the defining characteristics of this school, it is impossible to say that, if discriminatory, it does not reflect on leadership and management at the school. Further, the EA 2005 lays down an exhaustive and comprehensive framework for giving the school the opportunity to comment etc., in line with the requirements of basic fairness, and there is no room for any additional or broader opportunity to reflect and respond. Although the imposing of special measures has immediate and serious consequences, the wider public interest and the need to safeguard the rights and interests of children amount to overriding considerations.
157. I confess that I have not found Mr Oldham's third submission easy to resolve, and the merits of each side's cases are finely balanced. I reiterate that this submission must be addressed on the basis that I am wrong on the main points of principle raised by this case, and that the Defendant was therefore entitled to conclude that segregation on the ground of sex was and is discriminatory.
158. I doubt whether the conferring of any additional time or opportunities to reflect and consult would have made any difference in this case; the School would have stood its ground, and there would still have been litigation. I also accept Ms Mountfield's submission that a finding of discrimination ordinarily impacts on leadership and management at a school: not merely is this a serious matter, the Defendant's published guidance makes that clear. Even so, I remain troubled by the fact that the leaders and managers at this particular School have acted in a consistent manner for several years, without complaint by the regulator, and could also look to other schools up and down the land where similar practices have been condoned. On reflection, I consider that in the circumstances of the instant case, it is not a question of leaders and managers being forgiven for thinking that everything was in order; I would go further, and hold that they were entitled to think that, until informed otherwise and given a proper opportunity to reflect, respond, take legal advice, and if appropriate implement remedial measures to address the issue. Furthermore, I do not consider that the EA 2005 serves to exhaust the rights stemming from the general principle of fairness: see R v Home Secretary, ex parte Doody [1994] AC 531 at 562D. The situation was not so urgent that it required immediate remedial action to safeguard the rights and interests of children. On the contrary, the status quo had subsisted for a considerable period of time without there being any evidence of harm to the children or major disgruntlement within the School. In the rather unusual circumstances of the present case, I would hold that the Claimant should have been given a longer period in which to sort itself out.

159. Nonetheless, I am unable to grant the Claimant any relief on this ground, for this reason. The Defendant's judgment that leadership and management at the School was inadequate was also based on the discovery of the offensive books in the library and the failings in relation to safeguarding and record-keeping. Having regard to the Defendant's published guidance, and to Mr McNeillie's evidence that he would still have graded leadership and management as inadequate if the segregation issue were removed from account, it seems to me that the public interest required no more, and no less, than compliance with the fairness obligations set forth in the EA 2005. It follows that my concerns about the segregation issue (assuming, contrary to my analysis, that the Defendant's case on the law is correct) cannot make any difference to the outcome of this case.
160. Accordingly, I reject the Claimant's case under this ground.

## **GROUND 2: BIAS**

161. Mr Oldham advanced a number of submissions under this rubric. First, he submitted that the School was unfairly singled out, and that the inspection of 14<sup>th</sup>/15<sup>th</sup> June 2016 was effectively a "show trial". Secondly, he submitted that Mr McNeillie's decision-making was infected by actual bias inasmuch as he was unduly pressurised to reach adverse conclusions about the School and "perhaps without knowing it, he succumbed to that pressure". Thirdly, he submitted that at the very least, there is an appearance of bias in that "the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal [here, the lead inspector] was biased": see Porter v Magill [2002] 2 AC 357.
162. Again, I must examine this ground on the footing that I am wrong on the sex discrimination point.
163. In my judgment, it is necessary to be clear about the issues Mr McNeillie had to determine. If Ms Mountfield's submissions of law were correct, it would follow that a finding of sex discrimination would have to be made in the instant case because it is common ground that section 158 and section 195 of the EqA 2010 do not apply. The evidence was, I repeat, patent and everywhere to behold. It also follows, in my view, that no amount of bias on the part of Mr McNeillie could affect the matter. He would be bound to reach a certain conclusion as a matter of legal judgment, and his predisposition to arrive at that conclusion, by virtue of bias, should be regarded as interesting but irrelevant. Further, I do not understand Mr Oldham to be submitting that Mr McNeillie's adverse conclusions on other matters (e.g. the books found in the library) could have been, or were, affected by the same bias; and I find that they could not have been. Nothing set out in any of the Defendant's documents to which I have made reference (see paragraphs 20 to 22 above) had any logical or practical connection with these matters.
164. As it happens, the position is slightly more complex than I have just outlined because Mr McNeillie did not in fact share Ms Mountfield's binary view of the relevant provisions of the EqA 2010. On my reading of his evidence, he believed that the School might be able to exonerate its actions by advancing some "educational justification" for its policy (in his estimation, this is not a synonym for a justification

which falls within section 158 or section 195), and/or by setting out the measures it was taking to ameliorate the impact of its policy. In my judgment, he was wrong to embark on these lines of inquiry, but the fact that he did is scarcely evidence of bias; it points the other way. No separate educational justification was advanced by the School for him to consider. Furthermore, nothing contained in the various documents sent to Mr McNeillie over the relevant period could have had any impact on his decision-making in these respects.

165. To be fair to Mr McNeillie, I must not duck the issue and should either find the case of actual bias established, or acquit him of the charge. In categorically denying that he was put under any pressure to reach certain conclusions, it seems to me that he was protesting too much. However, he was a solid, fair-minded witness with the right instincts and temperament for making often difficult judgments in sensitive areas, and overall I am not satisfied that he approached his duties with a closed mind.
166. In my judgment, the fair-minded and informed observer would undoubtedly conclude, having regard to all the circumstances of the instant case, that those senior to Mr McNeillie were making quite sure that previous errors would not be replicated. The hypothetical observer would no doubt baulk at some of the tendentious language deployed (e.g. “blatant”; “tolerated”) as well as the overall tone of a number of the documents. The same observer would also think that Mr McNeillie must have been aware that his decision-making was being scrutinised at the highest level. But I do not accept that this individual would conclude, having seen and heard Mr McNeillie give evidence, that there was a real possibility that his judgment – insofar as there were value-judgments to be made about this School – might be distorted, undermined or subverted.
167. There is nothing in the point that this School was “singled out”. The Defendant’s policy was clearly in a state of flux after the training days in January 2016 and, in particular, after HMCI’s letter to the Secretary of State dated 27<sup>th</sup> April 2016. It is clear to me that the Defendant was moving towards the view that segregation in mixed schools on the ground of sex is unacceptable under the EqA 2010. The Claimant just happened to be the first school which fell within HMCI’s line of sight.
168. Accordingly, I reject the Claimant’s case under this ground.

#### **GROUND 10: THE REVISED REPORT**

169. Relying on the well-known decision of the Court of Appeal in R v Westminster CC, ex parte Ermakov [1996] 2 AER 302, Mr Oldham submitted that the Defendant cannot rely on the “new and contrived wording” in the August 2016 version of the June 2016 report because it changes Mr McNeillie’s original reasons. As before, I must approach this ground on the premise that my conclusion on the sex discrimination issue is incorrect.
170. In my judgment, there is nothing in this ground. Although Mr McNeillie was not the author of the August amendments, I do not consider that they significantly altered the meaning and intendment of the report. Reference had already been made to the EqA 2010, admittedly in the specific context of the public sector equality duty. The overall



point being made, not as well as it might have been, was that segregation on the ground of sex was inimical to equality of opportunity and raised issues under the Act. In August the point was more clearly made that segregation on the ground of sex amounted to unlawful sexual discrimination under the same Act. At least as regards Ms Mountfield's first and second submissions (see paragraph 86 above), this is an inference of law which flows from facts which are not in dispute; and, in any event, all the relevant factual matters were set out in the original iteration of the June 2016 report. I see no reason why the Defendant is somehow precluded from running with this issue, and no useful purpose would be served by artificially constraining the Defendant in this regard. Even were the June 2016 report as originally formulated were to be quashed, the Defendant would merely send out another version which more clearly relied on the anti-discrimination provisions of the Act. The point might as well be addressed now.

171. I should add that, had the August 2016 amendments purported to include what I have called the evidential springboard for Ms Mountfield's third and fourth submissions on the sex discrimination issue (grounds 4 and 5), I would have taken a different view.

### **GROUND 3 AND 9**

172. On Mr Oldham's analysis, ground 3 is wholly dependent on ground 2. I have found against him on that ground, so ground 3 fails.
173. As for ground 9, Mr Oldham invites me to examine the public sector equality duty on the footing not that he is right about grounds 4 and 5, but that he is wrong. There would be no utility in approaching the question on the alternative premise. His submission is that the Defendant failed to take into account that its decision had implications for pupils and their parents having protected characteristics. However, I entirely agree with Ms Mountfield that this is a hopeless contention. If the Defendant's analysis of sex discrimination law is correct, then it seems to me that it fully complied with its section 149 duties: it could have done no more, and no less. Any different course of action would have placed the Defendant in breach of its duties under the EIA 2006, its section 149 duty, and its own policies.

### **OTHER MATTERS**

174. Mr Oldham also criticised one aspect of the Defendant's reasoning: that failing to treat the sexes equally amounted to a breach of fundamental British values. According to this submission, the concept of fundamental British values does not include equality of opportunity and/or sex discrimination. I can see, just about, that there may be room for a difference of opinion about this, but the point is an entirely arid one. If the Defendant were right on the law on the main ground, it had ample basis for giving the inadequate grading even without recourse to fundamental British values.

### **DISCRETION: SECTION 31(3C) AND SECTION 31(3D) OF THE SCA 1981**

175. In my judgment, this too raises a short point which may readily be dismissed. I accept Mr McNeillie's written evidence, as to which he was not cross-examined, that he would have reached the same overall conclusion, and placed this School on special measures, even had he reached a different conclusion on the sex discrimination point. However, this does not mean that the outcome for the Claimant would not have been substantially different even if the relevant error of law not occurred. The Defendant cannot now publish the June 2016 report in its present form; it requires significant amendment and excision in the light of my rulings; and the Claimant is entitled to a further opportunity to comment.

## **CONCLUSION**

176. I have granted permission to apply for judicial review on Amended Grounds 1, 2, 4 and 5 but refused permission elsewhere.
177. I have upheld the Claimant's case on grounds 4 and 5, but dismissed it on grounds 1 and 2. In short, I have held that segregation in this School on the ground of sex does not constitute discrimination under sections 13, 23 and 85 of the EqA 2010. It follows that the June 2016 report cannot be promulgated in its current form.
178. I will now receive submissions from Counsel as to the form of relief.